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Legal Time

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Introduction

Throughout the centuries, written laws have been conceptualized in the common law world as rules, principles, policies, doctrines and other intelligible standards. I wish to expose to light an important feature of this tradition of taking law as a structure of conceptual objects. What I have in mind is time. Whereas everything occurs in time, even the untimely, this essay examines the importance of time, separated from space, in understanding the identity and binding character of a discrete law and of the Law (*le droit*) as a whole. I shall state that a special sense of time as conceptually structured has been adopted in Anglo-American Analytical (sometimes called Conceptual) Jurisprudence. This sense of time has presupposed, and so requires, a starting point after which rules, principles and other intelligible standards become the law. Once legal time has thus begun, say by enactment, events of legally relevance have been organized by jurists into distinct phases or periods of time. Each such a distinct piece is parsed through reference to the named, or labelled, starting point and it, in turn and ultimately, with reference to the beginning of the very constitutional order itself. So, for example, the American and Canadian constitutional orders have been taken as beginning with basic documents dated in 1789 and 1867. Legal justification and the conceptual structures of justification are presumed to follow suit.

This focus upon conceptual objects in Anglo-American Jurisprudence can be traced to Jeremy Bentham; he described the deployment of concepts as a "method new in itself", "original" and what "most assuredly has never been taken hitherto". Bentham's preoccupation with concepts was picked up by John Austin and H.L.A. Hart. Hart, after all, entitled his classic, The Concept of Law—law as concept. Joseph Raz has followed with a ruthless analysis of legal concepts. Ronald Dworkin similarly left us with his final effort, Justice for Hedgehogs, as an endeavour to associate legal legitimacy with the justification of concepts. And any number of other contributors to Jurisprudence and Legal Philosophy have followed suit as the basis of law's legitimacy. Let's develop this further. In the tradition of conceptual law, legal time requires a moment of enactment or enforcement—writing the first chapter, as it were. Even the structure of the Law as a whole, as opposed to discretely identifiable laws, has been assumed to possess a beginning date. The significant times have been highlighted with reference to the calendar—a year, month, day and sometimes even the minute when it takes effect and also sometimes reference to a date of termination. So, for example, a FISA judgement, the warrant lasts for 90 days and a Declaration of a state of emergency ends when the de facto emergency is over. A new statute, statutory

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amendment, judicial decision or the amendment to the text of 'the Constitution' begins another phase of structured time, and voids or renders inoperative the earlier phase. However, when a norm lacks a structuring beginning, it does not 'exist' as valid law nor does a legal structure as a whole 'exist'. In short, legal time here, as it is understood since constitutionalism took hold with the French and American Revolutions, always has a beginning.

I wish to examine norms which lack this kind of birthday. So, I shall contrast conceptually structured time with another sense of time, not structured. (It is yet also submerged inside the structured time in ways to be explained.) Time in this latter sense exists—is experienced—prior to any phase of temporal or conceptual structure and therefore is ignored in the other sense of time as that which starts. When non-conceptual norms have been addressed in the English common law, they have often not been identified as 'laws' unless re-presented as concepts in structured time. Even when local customs have been considered law in the early common law, this was so only after centralized institutions recognized the customs as made up of concepts. Non-conceptual social phenomena (such as customs, practices, rituals, dances, feasts, orally communicated stories and other social phenomena) were exemplified in pre-settler Indigenous communities of North America just as such phenomena are manifested today in the social practices of Nomadic peoples.[1] In that fashion they would be considered rationally coherent, that is, tied in with the other concepts in the structured time of a constitutional order.

The issue is not about space. Of course, the common law has often considered space as territory to be important. So, for example, territorial space has figured in land claims disputes. A territorial space has also been presumed to possess a physical border that outlines its range. The state has been defined by criteria which highlight legal space as a matter of territorial control and of a legal claim about its ownership. The beginning of structured time reinforces and extends the identity of a discrete legal unit as well as the binding character of a discrete law and even of the constitutional order as a whole. However, by stressing time, I aim to push jurisprudential enquiry further by opening questions about the identity of a discrete law, how a discrete law is binding, and how a constitution itself is obligatory.

1. Structuring Legal Time

Jurists in the field of constitutionalism have adopted two approaches to the birthing moment of structured time. One locates the date of the origin of laws on the historic calendar. Structure can be shown by named periods of significant events. An important common law date is the Privy Council judgement of Campbell v Hall which, in 1774, described the birth of a legal order as the "Critical Date".[2] One version of the Critical Date is the signing or ratification of a basic text

1. For the latter, see generally William E Conklin, *Statelessness: The Enigma of an International Community* (Hart, 2015, 2014) at 121-25, 205-09.
2. *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 (KB).

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usually signified by a special name such as 'The Constitution'. A treaty, state Executive proclamation or a judicial precedent may also exemplify such a basic text. The Critical Date has also been said to be represented by a social phenomenon such as settler contact, sovereignty or the state's effective control of a territory. As a consequence**,** Section 35 of Canada's Constitution Act, 1982, for example, "guarantees" the existence of existing Aboriginal Rights. Such an existing Aboriginal right to fish, for example, has been held by the Supreme Court of Canada to exist if it existed as a right historically prior to settler contact and if that right remained more or less continuous to the present-day. An Aboriginal right to own land has been held to exist if the right existed in a time prior to sovereignty, a date fixed from the standpoint of the existing structured time. The Critical Date for a Métis claim to own land, for example, crystallizes if the Métis possessed the land historically prior to the state's control of the land.

The second approach to the origin of the laws of a constitution has been the claim that certain Fundamental Values represent or found the origin. In a series of judgements during the 1950s, Justice Rand in Canada held that freedoms of expression, religious practices and political participation, breathed life into the constitutional structure even though each one was analytically prior to the institutional structure of the state. Charter and federalism disputes have been resolved in terms of the balancing of values. The Privy Council introduced this birthing date when it described the constitution as a "living tree".[3] The "living tree" birthing date is increasingly adopted in contemporary constitutional adjudication. By 1998, the Supreme Court of Canada held that certain values, such as federalism, democracy, constitutionalism, the rule of law and respect for minority rights, were "unwritten" binding values, better known as conventions.[4] More recently, the Supreme Court of Canada has added other values to the beginning of constitutional reasoning. Examples are the concepts of the independence of the courts and of the separation of powers. Such unwritten Fundamental Values, the Court has stated, infuse and breathe life into the Constitution. Though framed with reference to the historically observable origin—the Critical Date or the values (often said to be buried in the texts)—legal time has been recognized from the standpoint of the judiciary's present time or the 'now'. This sense of legal time, I suggest, is structured and therefore is presumed to have had a beginning as time is understood in contemporary constitutionalism.

'Legal time', as I shall use this term, means the same as 'time as it is to be understood in this determinative or law-creating system'. The birth of legal time as structured time in this sense has taken hold of theories of legal reasoning as well as of judicial decision-making. One such contemporary theory about constitutional interpretation is stated as Originalism.[5] The issue for Jurisprudence is

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3. *Edwards v AG Canada* ['The Persons Case'] [1930] AC 123; [1930] 1 DLR 98 (PC) per Lord Sankey LC.

4. See *Reference re Secession of Quebec*, [1998] 2 SCR 217; 161 DLR (4th) 385 (unanimous) at paras 49-54.

5. Grant Huscroft & Bradley W Miller, eds, *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2013); Grant Huscroft, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2011);

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that the structure of concepts as concepts (that is, as rule, principles, policies and other intelligible standards) presupposes the birth of structured legal time—that is, the use of temporal limits for norms—without a questioning of the legitimacy or social consequences of the historical time itself. This is especially pertinent today in the light of the possibility, now well-established, that structured time excludes by failing to presuppose a radically different sense of 'legal time' as experienced by Indigenous and Nomadic peoples. I shall describe this different sense of time as experiential and not conceptual. This experiential sense of time has especially been manifested in Indigenous laws historically prior to settler contact, sovereignty, and the state's effective control of territory; these latter are the judicially constructed cut-off (and cut-in) dates for the birth of legal time intended by the present identifiable law, for example, represented by Section 35(1) of the basic text, as amended in 1982, of Canada.

For the conceptualist a norm to be law, it must be launched and measurable from a starting point in time. The paradigm is legislative enactment. Dating is a logically necessary condition for all law properly so-called, on this view. Indigenous norms which themselves lack this condition are 'pre-law' for the conceptualist—being non-conceptual habits, gestures, rituals and, more generally, events or collective memories of events. They are not enactments. But if one rejects the necessity of this timing condition, room is made for the title of 'law' for others, viz., the Indigenous and Nomadic norms of conduct-control. Expressed in terminology suited to Hart, there are norms being law without the power-rule of enactment, without giving law a before and after date of validity. In a pre-legal society, a rule of recognition is unnecessary. Unnecessary. Therefore, when, in considering an uninitiated experiential sense of time, the positivistic approach is rejected, then the question becomes what now is necessary for law (as non-enacted and non-conceptual). What condition is that for 'law' properly so-called in the concept-free, experiential world unbound by the calendar and clock?

One thing is clear, one cannot start using the word 'law' for Indigenous and Nomadic norms merely because they presuppose an 'experiential sense of time'—that is insufficient for the item. One is then tempted to say generously, hey, in theory there are two kinds of law in the world each properly so-called; while sharing some commonalities, each of the two—conceptual and experiential—is suited to its own kind of social and political order possessing its own unique way of timing. Liberals like Hart are describing concepts used in the law of a state-centric liberal constitutionalism. There is 'law' appropriate to liberal constitutionalism law as concepts, rules, powers of creation, immunities, a written basic text, higher-ordered constitutional rights, etc. One need not automatically deny that. However, I hold a much more radical view, namely, that the temporally structured conceptual sense of law itself depends upon the experiential sense. Indeed, this other sense of time is one without which 'conceptual law' cannot exist. In my view, Jurisprudents have, as an essential condition for the possibility of law as structured time, excluded or ignored non-conceptual experienced time. Of course,

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Lawrence Solum & Robert W Bennett, eds, *Constitutional Originalism* (Cornell University Press, 2011).

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the past is necessary for there to be a present and the future, but I mean something more. My thesis is that the legitimacy of structured time depends upon 'the immanent constitution of meaning in a singular past event' and it is my aim in this paper is to explain what this language signifies.

2. Experienced Time

To represent such a different sense of time today is a formidable challenge to our understanding of law. What really matters in this regard are two forms of a beginning of structured time. The one is a Critical Date such as the text of a 'Constitution' or a social event such as 'the fact' of a legal right alleged to have been experienced by a pre-contact, pre-sovereign or pre-state control before structured time began. The second is 'the fact' of a fundamental value. One must figure out how one can be nested within the other in a community aspiring to be legally bonded into a whole. Exactly, what is the problem? It is that the past event, as experienced and not conceptualized, is the object of remembrance, observation, recording and signification by jurists today. The event was never granted in an act of recognition (through a secondary rule). The Indigenous claimant today, for example, must 'recollect' how the right was experienced decades and sometimes even centuries ago. The experienced event in the past is accepted as legally appropriate today as if independent of the experiences of the claimant, expert witness, lawyer, law instructor and judge today. Examples can be given from Canada.

The Critical Date, say, of European contact may be represented in documents authored by the Lieutenant Governor or some military official. There may also be a treaty signed by Indigenous leaders and an official of the Colonial Government, for example. The practice and dependency of fishing for the livelihood of members in the claimant's group must be established. Such a practice and dependency are treated as if an observable fact 'out there' in a past and as if the observer is situated in the present. The constitutionally required events read as if they have transpired temporally prior to the observing claimant, the law and the judge. To achieve this, the claimant's act (of fishing) must be typified not as an isolated event but as a category, such as 'fishing out of season' or an 'Aboriginal right'. We proceed as if the singular event of fishing falls inside the boundary of such the typification and as if the typification or conceptualization itself actually causes the production of a legal right properly so-called. All this reinforces the legal structures of both institutions and of legal positions, e.g., discrete rights holding. Of course, rules, principles, standards, rights, duties and the like are such concepts. A government official may typify and charge an Aboriginal person for fishing 'out of season' and the lawyers will examine and cross-examine the fisher aiming to situate the month, day, and time of the incident of the legal harm or contravention with reference to the pre-contact practice of fishing. Yet there is something missing in such an endeavour.

What is missing in such an analysis of legal time is how a discrete event has been experienced by indigenous ancestors and ancestral groups in the past when

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today's claimant, expert witness, lawyer, judge and pedagogue transcribes such an event into the familiar contemporary signs representing concepts such as rights, property, the state's claim of radical title to land and the state itself. Because space and time are limited here, let us take one example of a claimant: the approach of the Majority's judgment has been repeated again and again by the Supreme Court of Canada. Dorothy Van der Peet was charged in 1970 with the offence of selling fish (10 salmon caught by Steven and Charles Jimmy to be exact) pursuant to s. 61(1) of the Fisheries Act, RSC 1970, c. F-14, s. 27(5) of British Columbia Regulations in 1970. The offence of selling fish pertained to a situation where the fish was caught under the authority of an Indian food fish licence, contrary to s. 25(5) of the British Columbia Fishery (General) Regulations, SOR/84-248, s. 27(5). Such Regulations, in turn, provided that "[n]o person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence." Van der Peet had such a licence. Despite the wording in the Regulation, she claimed that she had the right to fish and sell the fish pursuant to Section 35(1) of the Constitution Act, 1982. Again, s. 35(1) of the Canadian constitution guaranteed that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The Supreme Court proceeded to address Van der Peet's claim by initially emphasizing that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake", quoting from the earlier precedent-setting Sparrow case.[6] This perspective required the Court to appreciate the "distinctive culture" of the aboriginal group of which Van der Peet was a member. And this cultural requirement, in turn, involved "a practice, custom or tradition" of fishing by the typified Indigenous group. Such a "practice, custom or tradition" "truly made the society what it was," one is advised.[7] The group was said to have a "specific history".[8]

This culturally sensitive concern of the pre-contact life of any Indigenous claimant, according to Justice Heureux-Dubé (dissenting), suggested that the Court should understand the pre-settler time as something other than some 'fact' in legal objectivity.[9] This very different sense of time, she said, manifested what I am calling in this essay an 'experiential time'. The latter, she described as a "dynamic approach" to time. What is crucial, she writes, is that one must understand time as a duration or, in her words, the "evolution over time", again quoting from Sparrow.[10] The evolution of time, she seems to assume, is a string-like continuity where an event is not recollected or remembered as if an ossified 'fact' 'out there' in legal history but as having emerged through the duration of time. Such a duration or "substantial continuous period of time,"[11] she says, "maintain[s] contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they

6. *R v Van der Peet*, [1996] 2 SCR 507; 137 DLR (4th) 289 at para 49 quoting from *R v Sparrow*, [1990] 1 SCR 1075; 70 DLR (4th) 385.
7. *R v Van der Peet*, [1996] 2 SCR 507; 137 DLR (4th) 289 at paras 51, 55 [emphasis the Court's].
8. *Ibid* at para 69.
9. *Ibid* at paras 164-75.
10. *Ibid* at para 172.
11. *Ibid* at para 175.

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live."[12] The aboriginal rights "would ensure continued vitality" from the standpoint of their present perspective.

The important point for my purposes is that such a sense of time as a duration through the experience of time is displaced by the Majority's preoccupation with the beginning of legal time. Such a beginning emerged, according to the Court's majority, with the calendar date when the settlers arrived on a territory inhabited by the Aboriginal peoples. As the Court put it, the Aboriginal 'right' needed to be protected legally, though such a protection was to be analytically prior to the beginning of legal time. Such a date was considered important because of "the fact that they [the Aboriginal peoples] existed prior to the arrival of Europeans in North America."[13] Such an historical fact is said to begin the Court's justification of its decision. The main issue, deduced from this fact according to the Court, was that the perspective of Van der Peet as a member of her Indigenous group existed temporally before the settlers arrived in North America. Settler contact was the moment when the "Canadian legal and constitutional structure" took form.[14]

Such a beginning to legal time was reinforced in Canada by basic texts introduced thereafter by the legislature, the executive and the judiciary. The role of the lawyer or of the judge also followed suit. The "purpose" of the words in Section 35(1) of 'the Constitution' as amended in 1982 had to be read in the light of a concept of fishing experienced temporally prior to European contact. The Law ('le droit') was considered complete if discrete laws could be justified with reference to the dated beginning. Any one justified rule represented a structure or system as a whole. Structured time now existed after the beginning of the legal-structured time. Interestingly, as the factum of Van der Peet put it, what was crucial was not the pre-contact cultural and social relationships of her traditional community but her "legal rights" in the present. Such present rights were said to have existed before the social contact with the Europeans. The cut-in date for the beginning of legal time was the moment of European contact, being the cut-off date for the past. From the standpoint of the jurist in structured time. Once that starting date of settler contact (or sovereignty or territorial control by the state or 'the Constitution' or a treaty) was identified—a date which the Court magically assumes was the same date throughout the territory now claimed by the state, Canada—the legal order as a whole came to exist. Now any discrete rule could have a rightful place in such a world where law has been founded. The consequence, though, is ironic.

3. The Transcription of Experience

Legal history, as the history of structured time, has become a-historical in that it has been presumed to have a beginning in historical time. Such a beginning interrupts and temporally displaces and conceals the experiential sense of a continuity or duration of time. The sense of legal time, having a beginning after which

12. *Ibid* at para 172.
13. *Ibid* at para 61 [emphasis the Court's]. See also para 30.
14. *Ibid* at para 49.

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time can be structured as legal, is reinforced by the establishment of institutions such as courts, legislatures, agencies and the executive. My point is that the concept of legal time's beginning is presumed to represent a core or essence to the concept of the beginning. The structure of concepts becomes performative or law-creating historically and analytically after the core of the beginning is juridically recognized or assumed. This core is reinforced by the establishment and undertakings of institutions.

Even pre-contact, context-specific, social relationships are said to have a core or essence as if one core concept could represent the complexity and nuanced life in any singular event, such as fishing, in any context-specific, pre-contact traditional community.[15] With this in mind, the judicial function was to observe the core to the concept of pre-contact fishing as if it were a 'thing' 'out there' independent of the experienced event of fishing. The Court could now represent the state's claim as a matter of a state's legal claim of "radical title" to all territory formerly inhabited by the traditional community.[16] As a consequence, Van der Peet was now located in a structured time where any individual could, at best, possess special 'rights' as opposed to universal rights, after the beginning.[17]

My point is to observe that the Majority has attempted to read an official language back into the pre-contact social life of the Indigenous peoples. Though inherited from Roman law, both the lawyer for Van der Peet and the Majority accepted that rights, property and legal claims existed prior (in calendar time) to European contact in North America amongst the Indigenous and Nomadic inhabitants.[18] This was presented that way despite the Court's taking for granted that singularly experienced events prior to contact could be remembered, observed, recorded and represented in the present without an official European legal language. The event of fishing centuries ago was not the ossified observable or conceptualizable fact the Majority had initially presumed. With the perspective of the present now determinative of the law, the "legal cultures" of any pre-contact community had now to be observed as if a concept were found for it, found inside structured time. Once represented within structured time, the "perspective of Aboriginal peoples" now had to be "reconciled" or "bridged" with other concepts in the structured time.

The most dominant such a bridging concept was state sovereignty. The continuity of experiential time, whether of the claimant, the lawyers or the judges, was displaced and forgotten. A network of historical remnants represented in a foreign language—the official or legal language—was considered by the Court as the present perspective within structured time. That said, it may be that there are jurists who aspire to break from the constraints of structured time without appreciating what is antecedent to the beginning and boundary of structured time. Justice Heureux-Dubé's judgement in Van der Peet manifested revealed such

15. *Ibid* at paras 56, 70-71.
16. *Ibid* at para 39.
17. *Ibid* at paras 19, 20, 26. See HLA Hart, "Are There Any Natural Rights?" in AI Melden, ed, *Human Rights* (Wadsworth, 1970) 61.
18. *R v Van der Peet*, *supra* note 7 at para 39.

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an effort. And it may be that some lawyers and judges succeed in dissolving the rupture between structured time and the other sense of time. Indeed, such is apparent in the legal discourse about statelessness.[19] The paper must now expand on the nature of legal time as structured and contrast it with the radically different sense of time: namely, experienced time concealed in acts of signification. One must identify a series of problems with structured legal time. The argument of the essay concludes that, in the context of Indigenous and Nomadic peoples, the act of displacement means that structured time neglects the sociality in past experienced events and fails to appreciate the social consequences of the exclusionary character of constitutional discourse in structured time.

4. To Be or To Become

I will aim now to flesh out the distinction between the two very different senses of time, i.e., ways in which time is to be understood as legally relevant. Legal time is structured today, much as declared in the Majority van der Peet judgement. Justice Heureux-Dubé, offering a Minority judgment, briefly highlighted how this very different sense of time has a duration or continuity. I shall identify and develop that different sense of legal time that lacks a structural beginning. Beginning with this, a singularly experienced event is unrepeatable. Such an event exists independently of the posited beginning of structured time. It is not organized by jurists into Periods, which are signs representing (that is, signifying) conceptual objects. This experiential time emerges from a continuity of 'now's, whether in the present or in a past experienced event in the duration of such experiential time. The reality of experiential time raises a question about the dominance or propriety of structured time in all legal matters. A special picture of legal timing is observable once one accepts that there is a beginning to legal time. Two sources have been accepted by jurists for this, a Critical Date and a Fundamental Value. Both presuppose something's becoming a law at a certain time. Let us first identify and clarify a series of elements of time presented as structured.

a) In the Beginning There Was a Posit

The first moment of structured time is posited as an objective fact, whether that beginning step is a Critical Date in the past or founding a Fundamental Value to be realized. There is an important commonality to the two views of the beginning of constitutional time. Being a fact, the Critical Date or the Fundamental Value cannot be changed at will by human agents. A question arises. Why does the mere 'fact' of the Critical Date or of the ascribed Value create the imperative that those addressed ought or are empowered to act in a certain way? In other words, how is it that these facts may seem by themselves to possess a performative or action-demanding character and hence generate legal obligations and

19. See the documentation in Conklin, *Statelessness, supra* note 1 at 177-301.

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powers? The date itself is but a necessary condition for legal existence but not a sufficient condition. A birthday itself, without more, cannot entail a legal obligation. Thus, it is not merely that the temporal date of the basic text, such as 'The Constitutional Act, and, say, of an event, such as European contact, are treated as observable social facts. It is, rather, that the event is in addition to a place in time said to possess a performative or act-demanding character. Hart described this function as an ascription.[20] With experiential time excluded from legal time, the question becomes 'why is the birthday of a structured time, for example, a distinct historical period, thought of as law-creative?' Why is a birthday even necessary to the ascriptive power of laws?

An obligation-creating or performative character is ascribed to the birthing fact. The beginning of legal time is more than constative (that is, empirically observable). It functions as a performative or law-creative event. If one puts experiential time to the side, why is the 'fact' of a Critical Date or a Fundamental Value performative?

The Supreme Court of Canada appreciated the need to understand why an expression, such as a birthing fact in our case, possesses an 'ought' or ascriptive character in the well-known Secession Reference:

> [u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the Patriation Reference [1981]) […], which constitute substantive limitations upon government action. These [unposited] principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force and are binding upon both courts and governments.[21]

The Court and other jurists usually maintain that what creates the performative character of a principle is its justification with reference to higher-ordered concepts. Once so observed and justified using this lens, the Critical Dates or Fundamental Values—usually buried in texts—can be said to possess a core signification for norms of legal action. It is as if each discrete measurable phase in structured time can be represented by the general conceptual unity to be found in justified higher-ordered concepts directed towards the beginning of legal time as the referent for justifying the concept.

Taken to be observable social 'facts', the honoured Critical Date or Fundamental Value legally exists beyond the control of the jurists. In that way, the performative function of the Critical Date and the force of the Value are frozen as facts in historical time in place for all preceding and subsequent legal justifications. This result will rule out consideration of any legal reasoning which could include meaning drawn from experienced events. To prove useful, discrete experienced events will have to be transcribed into an official language re-located or re-situated somewhere analytically within a measurable and observable

20. HLA Hart, "The Ascription of Responsibility and Rights" (1948-49) 49 Proceedings of the Aristotelian Society, New Series 171.

21. *Reference re Secession of Quebec*, *supra* note 4 at para 54.

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stretch of time. Unless and until they are re-presented as social facts observed in the structured time, all events experienced temporally prior to both the Critical Date and the recognition of Values are analytically immaterial to the legal argumentation. Such experienced events are thereby assumed to be remembered, observable, recorded, and then re-presented through and into the structured time and its language. In a sense, therefore, the beginning of a structured time and of the legal units inside each subsidiary historical phase are a-temporal, are fixed. In addition, the facticity of the scope of the concept of the 'historical' fact submerges or excludes what had transpired prior to its beginning.

b) The Passing from one Structured Phase into Another

The beginning of structured legal time, understood as organized into historical Periods, may be a gesture rather than a basic text. The Russian state after the Soviet one, for example, might be identified by Boris Yeltsin's symbolic climb onto a war tank. The beginning of structured time for the United States might be the date of the Declaration of Independence. Here I have highlighted where the structured time of the legal order as a whole began. However, this notion of legal time with a birthday also applies to discrete temporal periods inside the structured time as a whole. Such periods inside the whole are signified by a name. One historical phase—christened perhaps by legal historians or, more likely, law professors who aspire to be historians—is marked off from other structures temporally before and after temporally before and after it in calendar time. To take an example, the jurist might speak of the Warren or Berger Courts or of the Court of Chief Justice Marshall. Any such juridical period may be signified by a well-known judgement, such as the Miranda decision in the temporal era of 'the Warren Court'.[22] The sign—Warren, Berger or Marshall—signifies a mini-structure with its own beginning inside the structured time as a whole with its Critical Date or Fundamental Value.

Similarly, in Canadian constitutional discourse, 'legislative supremacy' marks off one historical phase as distinguished from the later 'living tree' period where 'the Charter' required that 'the Constitution' be "capable of growth and development over time to meet new social, political and historical realities often unimagined by the framers."[23] Each period suggested a different role for the courts. In the 'legislative supremacy' period, for example, the Canadian courts were expected to play a passive role in changing law. Such a period was interrupted by two different structured periods. The one, the implied Bill of Rights period, entertained that the judiciary would offer a deep and well-documented appreciation

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22. For the Warren period see, e.g., *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954); *Miranda v Arizona*, 384 U.S. 436 (1966). For the Dickson Court see, e.g., *R v Oakes*, [1986] 1 SCR 103; 26 DLR (4th) 200; *R v Big M Drug Mart*, [1985], 1 SCR 295; 18 DLR (4th) 321.

23. *Hunter v Southam*, [1984] 2 SCR 145 at para 16; 11 DLR (4th) 641 at para 155. The best examples of the 'legislative supremacy' historical phase concerned the Court's interpretation of the Canadian Bill of Rights. See, e.g., *R v Burnshine*, [1975] 1 SCR 693; 44 DLR (3d) 584; *AG v Lavell*, [1974] SCR 1349; 38 DLR (3d) 481. For the 'living tree' period see, e.g., *R v Big M Drug Mart*, *ibid*.

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of free expression as a whole. The other, the Charter period, held out an active role of the judiciary in questioning the social-political assumptions of the values embodied in the past. Although the Charter was ironically justified as a textual new beginning, the very wording of the text of a previously enacted federal statute applicable to federal jurisdiction, the Canadian Bill of Rights, 1960, could well have justified a new beginning for the structured time of an active court.

In like vein, the structured time of the Canadian constitutional bill of rights and freedoms has manifested several distinct categorial periods, each with its own name. The Dickson period represented an approach to interpretation which aimed to incorporate the "place" the Charter "in its proper linguistic, philosophic and historical contexts", including the language and historical origins of the concepts enshrined…."[24] Though the signs (that is, case-names) representing the Dickson period continued to be used, the Dickson structure was interrupted with the 'social objective' structure with its own beginning, the Oakes period.[25] The same name was used again to begin a new period, the "means-oriented" period. And on it goes into the future. Each passing of legal time is held out as if a legal 'fact' legitimized by the signs representing the passing period.

Each span of structured time in the overall structure of legal time has been presumed to possess a core or essence to each passing. Such a core distinguishes an historical period, yet such a passing subsequently and abruptly passes into another separate structured phase. One recognizes the passing, moreover, only after the passing has been experienced. At that moment in the overall structure's time, a name has represented the 'perceived' historical period. Of course, there may not in fact be a precise chronological date, empirically speaking, indicating when the particular legal period began. Even a Fundamental Value can begin the legal time as a series of periods—even for the structured time as a whole. The value, like the assigned Critical Date, is presumed to possess a core or essence to the concept of the structured passing, for example. Such has been so pertaining to the association of the core of freedom of expression to the implied Bill of Rights period noted above.

The same has been said of the Charter period even though such a period has had several different passings, each with its own core concept. To generalize about and categorize a past event as a named historical period, being of a kind variable demographically from one geographical region to the next, may itself miss a highly complex and non-descriptive of political and judicially interpreted actuality. This is so because of the continued use of signs (case-names) even though the actuality has shifted into a different structured period.

For that matter, the name for the period (such as Oakes) necessarily represent the same differentiating core for several passing historical phases that are represented by that name. The problem is that the structured time of a distinct period reduces a context-specific, singularly experienced event leading to adjudication

24. See *R v Big M Drug Mart*, [1985], 1 SCR 295; 18 DLR (4th) 321 at para 117.
25. See, e.g., *R v Oakes*, [1986] 1 SCR 103; 26 DLR (4th) 200; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; 120 DLR (4th) 12; *Irwin Toy v Quebec (AG)*, [1989] 1 SCR 927; 58 DLR (4th) 577.

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into a general concept. Consequently, given the beginning for a structured time, it is unnecessary for jurists to examine the experienced events, represented by a label, such as 'implied Bill of Rights" or Oakes as the referent for the justification. The presumed legitimacy of any individual judicial decision is therefore brought into question. It is as if one looks backward to the experiential event in the pre-birthing moment of structured time and that one does so objectively from a point of view external to the birthing moment. However, the jurist, who accepts that there just must be a beginning to legal time, occupies a standpoint internal to structured time.

Consequently, the jurist retrospectively looks backward believing that the birth of structured time plays a role in legal reasoning. As I wrote above, constitutional analysis proceeds as if each discrete measurable phase in structured time can be represented by the general conceptual unity to be found, first, in intermediate rules-concepts and tests or, second, in the higher-ordered concepts temporally after the name of the period. As Dworkin points out in Justice for Hedgehogs, a cluster of higher-ordered concepts may well become a belief or conviction in the future. Once concepts become beliefs or convictions, Dworkin then adds, the beliefs and convictions must again be justified with reference to still more general and higher-ordered concepts in a ladder of concepts. Singular, formerly experienced events in the past are thereby reduced and unified into a general category, such as contact, sovereignty, state territorial control or a Fundamental Value. With a beginning to legal time, such a general category then becomes the ultimate referent of justification for higher-ordered general concepts or categories accepted in the present. Any contemporary constitutional claim is thereby allocated to this or that structured period or epoch inside the overall structured time as a whole.

Indeed, what signifies (and gives a name to) a phase in structured time is its differentiation from the picture of the earlier phase or phases. A later structure of calendar time is self-characterized as "legal development". Legal time is said to "develop" from a "pre-legal", "rudimentary" or "primitive" stage of time into a "modern" stage of state-centric institutional sources. Both the League's Covenant and the UN Charter, for example, have 'mandated' that earlier and lower-staged entities must 'develop' into a well-organized legal order until they are recognized as capable of "standing by themselves" and "self-governing" in the international community.[26] The latter point in structured time then possesses a new beginning in legal time. Its legal institutions may be said to "develop" on their own as "mature" legal orders. The latter legal "maturity" marks the point in time when a social entity may be considered as possessing the state-centric right to self-determination. More generally, the origin of structured time represents the moment when a modern domestic legal order has begun to determine its own legal identity. When so begun, the juridical recognition of the beginning represents 'written law'.

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26. *League of Nations*, *Covenant*, 28 April 1919, Art 22; *United Nations*, *Charter*, 24 October 1945, 1 UNTS, Arts 73-85.

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c) Written and unwritten laws

Structured time—as understood here—clarifies Hart's meaning when he wrote that we begin to possess law when we reduce "unwritten rules" or "unofficial rules" into "written" rules. The "step" from unwritten to written laws, Hart writes, is "[n]o doubt as a matter of history" "crucial" to "understanding the nature of law."[27] Hart describes the reductive history as a "step" from pre-legality into a modern concept of law. Hegel similarly describes the same reductive history as a "leap" from pre-history to history, from pre-legality to legality. Interestingly, some jurists presuppose the need for such an analytic leap from the unwritten to the written.[28] The analytic leap from the context-specific experiential time (free of 'periods' and 'concepts' with our beginning) into structured time ruptures experiential time, as I shall highlight in a moment. This rupture leaves an experiential event in an inaccessible past. This is so despite the fact that this very different sense of time is analytically and experientially prior to the posit of the Critical Date and the posit of the Fundamental Values. After the posit of the beginning to structured time, constitutional analysis proceeds as if it possesses legitimacy as long as a discrete rule, principle, doctrine or other intelligible standard is invoked and justified with reference to the birthdate (a Critical Date or Value). This legitimacy rests in a power-conferring rule as well as any discrete rule enacted, adjudicated or enforced pursuant to the authority of the power-conferring rule. First, a singularly experienced event, whether temporally before the birthing event or after the birthing moment (as I shall note in a moment), is re-presented as a legal category analytically prior to that birthing moment. Time as experienced is interrupted by the birthing moment. In constitutional reasoning, the context-specific birthing event functions best analytically after a concept-rule, e.g., pre-contact or sovereignty or pre-control, is employed as the ultimate referent of justification. This is so for the more obvious Critical Date and for the Fundamental Value articulated as a branch of the Constitution**.**

The interruption of experiential time is rather more apparent when jurists have described the beginning as a 'fact'. We are going from the unwritten to the fact of the written. Both Hart and Dworkin elaborate theories of law that assume such a facticity to the birth of a constitutionalism. When we appreciate that constitutionalism emerged with the English, French and American Revolutions, all previously experienced time is displaced by the structured time. Once so displaced, the experienced time rests 'out there' to be observed as a fact. Hart and Dworkin also describe the fact as a "belief" or a "conviction".[29] Once so signified, much

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27. Hart, *The Concept of Law*, 3rd ed, with an introduction and notes by Leslie Green, with a postscript by Penelope A Bullock & Joseph Raz, eds (Clarendon Press, 2013 [1961]) at 94-95.

28. See, e.g., John Gardner, *Law as a Leap of Faith* (Oxford University Press, 2014); Matthew H Kramer, *Objectivity and the Rule of Law* (Cambridge University Press, 2007); Nigel Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007).

29. Hart, *The Concept of Law*, *supra* note 27 at 83; Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011); Dworkin, *Taking Rights Seriously* (Harvard University

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like the law of gravity, as a 'fact', legal reasoning proceeds to the justifying concepts. So, societies can be categorized as "primitive" or "pre-legal" if they are believed to exist once the leap has been made from the pre-legal time into the birth of structured time. The same may be said of the day-to-day legal reasoning about the justification of beliefs and convictions with reference to the ultimate birthdate or the historical period of structured time. After the leap, consciously intended conceptual objects take over the experienced world. As I wrote above, throughout the centuries, written laws emerged in the common law world once local customs and other experienced events were recognized as conceptual objects. Matthew Kramer may have such in mind when he writes that the "presentation of laws in authoritative written formulations" is "of greatest importance, in any legal system beyond the tiniest and most primitive."[30] My point is that once an experienced time is interrupted by the birth of structured time, consciously written formulations are structured inside a phase or epoch. Jurists reflect, deliberate and decide 'in time'—in structured legal time, that is. They take the internal standpoint inside the bounded structure of time. One's justification of a judicial decision thereby transpires 'over time' (over the structure of time, that is), not through the experience of time. So too, the rule of law is possible only in structural time.

Legal time now is ordered or structured. For its part, structured time orders a Past, Present and Future, each demarcated from the other. In this vein, the Past, Present and Future manifest what Gerald Postema in "Melody and Law's Mindfulness of Time", describes as a "pattern" or "structure".[31] I am emphasizing, however, that such a "pattern" analytically and experientially begins only after the cut-off date or value is presumed to begin legal time. At that point, legal reasoning proceeds. Indeed, law's time, as Postema puts it in a more recent essay, "anchors official decisions, especially judicial decisions, to trajectories from the past projected into the future."[32] It proceeds by virtue of "self-directed agents" who consciously reflect, deliberate and render decisions about intended conceptual objects. Any such agent makes a "rational choice".[33] Such acts of intellectualization of self-directed agents are, as Postema explains, the "mindfulness of time" possessed by the Law. In "Melody", Postema frames legal time as structured time: legal time is said to be "a kind of mindfulness involved in grasping a melody". This act of mindedness relates the past to the present and the present to the future "over time"—that is, over the structured time. Such a "pattern", Postema says, represents "intention-plans" or "coherent sub-plans" of deliberate

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Press, 1978) at 240-59; Dworkin, *Law's Empire* (Harvard University Press, 1986) at 45-86, 114-50. See also Green, "Introduction", *supra* note 27 at xvii. See also Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007) at 55, 149-50.

30. Matthew Kramer, *Objectivity and the Rule of Law*, *supra* note 28 at 116.

31. J Postema, "Melody and Law's Mindfulness of Time" (2004) 17 Ratio Juris 203; Postema, "Jurisprudence, the Sociable Science" in Pawel Banaś, Adam Dyrda & Tomasz Gizbert-Studnicki, eds, *Metaphysics of Law* (Hart, 2016) 9 at 21-23.

32. See "Jurisprudence", *ibid* at 22.

33. *Ibid* at 21-22.

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mindful intentions. The self-directed agent deliberately "fit[s]" "the parts into a meaningful whole."[34] And that renders the structured time complete.

d) The Past in Structured Time

Because time is measurable (or so we believe) in a structured time of the Constitution or a structured historical phase inside the Constitution's structured time, only the past and the present can be considered "in time" or happen "over time". The Past's starting place is observed, recorded and represented as a fact in objectivity 'out there' beyond the control of the jurist. The measurement of legal time cannot be identified in a future. The measure of time cannot be taken in the future. Time only passes into the future once an event has been experienced. Each passing is the consequence of the perspective of the 'now'. But at that moment of passing from one historical phase inside the structured time of the constitution as a whole, the experience of time is reduced into a homogenous entity—a category or concept—such as, in Canada, the 'implied Bill of Rights period', the 'legislative supremacy period', the 'Dickson' or the 'Lamer' periods. Each passing of a structured time is interrupted by a new structured time. The jurist's standpoint of the 'now', nested in each passing into the next period, enters legal reasoning experientially after the instant of the experienced event of the jurist's standpoint of the 'now'. This is the case whether the jurist represents the past (from the standpoint of the 'now', say) or the future (again from the standpoint of the 'now'). This 'now' is situated inside the structured time and is also represented as within the structure of a particular historical phase. The 'time before' from the internal standpoint of structured time is synonymous with a sense of 'before' as pre-structural (that is as pre-legal, pre-political or pre-historical).[35]

Such a 'before-ness' to a whole legal system, Hart claims, must be represented by something radically different from the structure or order of legal time—for example, it will lack periods provided by jurists. Hart recognizes such a context as "only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment."[36] The one historical phase "progresses" into a seamless line to the present structured time of an historical period inside the structured time as a whole. The Present, we have been led to believe by many, represents the origin of the rule of law and civilization. With a "civilized" system of centralized institutional sources, we have represented laws as concepts about which we reflect, deliberate and render decisions. Inside the structured time of the Constitution as a whole, such consecutive historical periods are

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34. Postema, "Melody", *supra* note 31 at 209-11, quoting affirmatively from Michael Bratman, *Faces of Intention* (Cambridge University Press, 1999); Friedrich Wilhelm Nietzsche, *On the Advantages and Disadvantages of History for Life*, translated by P Preuss (Hackett, 1980) 89; Neil MacCormick, "Time, Narrative and Law" in Jes Bjarup & Mogens Blegval, eds, *Time, Law, and Society* (Steiner, 1995) 111.

35. As jurists have often incorporated 'pre-legality' into structured time by considering it as a mere binary to clarify legality, it is better to describe 'pre-legality' as 'proto-legality' as I have represented it. I have benefited from Richard Bronaugh for this term.

36. Hart, *The Concept of Law*, *supra* note 27 at 92.

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represented by a series of 'nows'. Each passing is recognized after the period has been interrupted by a new structured time. As Hegel ends the Preface to his Philosophy of Right,

> [w]hen philosophy paints its grey in grey, a shape of life has grown old, and it cannot be rejuvenated, but only recognized, by the grey in grey of philosophy; the owl of Minerva begins its flight only with the onset of dusk.[37]

The juridical practice of incorporating past precedents into an argument manifests the standpoint of the 'now'. What is after (that is, in the past) or beyond (that is, in the future), both are a 'now' and yet, they remain inaccessible until re-presented in the structure of time begun by a new Critical Date or Fundamental Value.

e) The Two Versions of Legal Reasoning within Structured Time

I now wish to connect the significance of structured time's use of a beginning to two different forms of legal reasoning. Justification, I have highlighted, proceeds from such a Critical Date or Fundamental Value. The justificatory act raises two versions of legal reasoning. The one is regressive in that the jurist turns backward 'in time' to the presuppositions of prior justifications in an effort to access the Critical Date or the Value. Such a regressive argument eventually presumes one unifying a priori concept that founds the justificatory acts and therefore the legitimacy of structured time and its identifiable laws. The Critical Date or the Value is presupposed as existing into the present. Much of common law analysis is characterized by such a regressive argument.

Hans Kelsen, for example, attributed this regressive form of argument to the nature of a binding law.[38] The ultimate presupposition in tracing arguments backward to their presupposed origin is the Grundnorm, according to Kelsen. But because the trace is a justification of concepts, the originary birth of the regression cannot be a non-concept such as a habit, custom, belief, conviction or other experienced event. Instead, the Grundnorm is a pure thought. In like vein, Kenneth Westphal recently suggests that the finality to a regressive argument, following Immanuel Kant, is an a priori concept of equal rational will.[39]

To take another example, Dworkin argues in Law's Empire that the materials of legal justification are nested in an imperfect narrative in the backward quest in an attempt to access a narrative that has worked itself pure. Such a quest here is not a matter of a conventional morality but of a constructive morality. The presupposed pure narrative is presumed to have begun the structured time even though it

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37. GWF Hegel, *Elements of the Philosophy of Right*, edited by Allen Wood & translated by HB Nisbet (Cambridge University Press, 1991 [1821]) at para 23.

38. Hans Kelsen, *General Theory of Norms*, translated by Michael Hartney (Clarendon Press, 1991 [1979]) at 222; Kelsen, *Pure Theory of Law*, translated by Anders Wedberg (Russell & Russell, 1961); Kelsen, "On the Basic Norm" (1959) 47 Cal L Rev 107; Conklin, *The Invisible Origins of Legal Positivism: a Re-reading of a Tradition* (Kluwer, 2001) at 182-83.

39. Kenneth R Westphal, "Hegel, Natural Law & Moral Constructivism" (2017) 48:1 Owl of Minerva 1. See also Karl Ameriks, "Kant's Transcendental Deduction as a Regressive Argument" (1978) 69:3 Kant-Studien 273.

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is apparent that we can never access such a narrative. Hercules, the critical character from Law's Empire, is abstracted from all inclination and all institutional responsibility: "justice, on the contrary, is a matter of what the community personified, abstracting from institutional responsibilities, ought itself to achieve."[40] Like Kant's moral commentator, Dworkin's Hercules resides in the intelligible realm without rational contradiction. Hercules' voice and gaze always remain "beyond" the voices of ordinary judges and beyond their justificatory arguments. Hercules' rank is not granted to the human agents of a genre's structure.[41] Judges are only "princes" who have been anointed to act upon the arguments of the idealised judges of the imagined legal structure that has worked itself pure. Hercules is a "seer" or "prophet" presumably because he feels immediate with the law beyond law despite his radical departure from the experiential world of the body. In the spirit of integrity, we dream about the coherent principles "latent" within our participation in the construction of the narrative structure.[42]

What one needs to appreciate is that this radical absence of the foundation in legal time from a contingent narrative structure is, by Dworkin's own admission, sacred.[43] Dworkin defines the sacred as "inviolable" or "intrinsic". The sacred exists only once. The law beyond law, we need to remember, precedes the interpretative project itself. The law beyond law is the final cause, the unmoved mover of the narrative structure and, therefore, of legality and the possibility of justice. Because the law beyond law dwells beyond language, it also lacks morality in the sense of the historically contingent narrative integrity. Only a star marks its situs, Dworkin asserts in the final chapter of Law's Empire. So, an experienced time temporally before the Critical Date or the value is posited, exists analytically before the imperfect narrative. The 'before the law' exists from the standpoint of the 'now' inside the structured time. The 'before' temporally before the beginning of structured time lacks any sign to represent the language of the imperfect narrative, a language of rights, property, sovereignty, physical possession and the like. Similarly, regarding legal reasoning inside a structured phase, the experiential time is not recognized as a legal unit in that, at best, it is conceptualized as a belief, conviction or feeling—that is, as a 'fact'.

Of course, the intellectualist pursuit towards the one purified narrative contrasts with the conventional morality of the ethos or community that Dworkin distinguishes and excludes from a regressive argument. Instead, as highlighted earlier, a regressive reasoning is directed towards a Critical Date where the presupposed origin marches through time to the present judicial decision. Here, through the representations in the officially written language of structured time, the court will seek to retrieve the intent of the framers or ratifiers of a basic text such as 'The Constitutional Act' or a treaty or a founding value. The Law (le droit] is presumed to begin with such a cut-off date. If a past event, such as the

40. Dworkin, *Law's Empire*, *supra* note 29 at 406.
41. *Ibid* at 407.
42. *Ibid* at 409.
43. Dworkin, *Life's Dominion*: *An Argument about Abortion, Euthanasia, and Individual Freedom* (Vintage Books, 1994). See especially "What is Sacred?" at ch 3.

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spiritual practice of a Nomadic group, has transpired before the beginning of the Critical Date time, such an event is considered pre-legal or pre-historical. It is considered a fact that can be 'found', observed and re-presented into the concepts juridically accepted in the structured time after the cut-off date. The consequence is that such a regressive reasoning cannot access the context-specific events singularly experienced before the cut-off date. For that matter, the singularly experienced events by the jurists after that cut-off date cannot be recognized inside the structured time except through the language of the structured time.

There is a second form of legal reasoning that also presupposes the beginning of time's structuring. Here, the reasoning is forward-looking or progressive. The reasoning begins with the posit of a Fundamental Value which is itself justified with reference to higher-ordered and more general concepts. Such a value is a non-concept in that it is said to be a belief, conviction or commonly felt expression. Such a non-concept is legitimate, as Dworkin argues in Justice for Hedgehogs, if an argument is directed towards some ultimate telos at the end of the justificatory acts about the Fundamental Value. That is, this progressive form of reasoning cannot access the fulfilment of the value despite its performative (or law-creative) character. Why not? Because the jurist is stuck in the structure of time which has a beginning and a transcendental external concept at the end of the justificatory acts. The presupposed future fulfilment of the value exists only once there is a 'now', the present. In this regard, the structure of time is linearly constructed from a re-presented present value into the future higher-ordered general concepts as if the present value and the transcendental end are discontinuous the one from the other.

Like the foundation in structured time of a regressive argument, Dworkin claims that the telos of a progressive argument is an a priori concept or what he signifies as a "primitive" concept. Dignity, he consistently says in his works, exemplifies such a primitive concept. Hart's preoccupation with legal obligation as the justificatory argument about the recognition of a habit and Dworkin's claim that any belief or conviction are legal. Why? The justification of the habit or belief with reference to a higher-ordered concept exemplifies a progressive form of reasoning. Here, values begin reasoning about the legal validity of a concept-rule. But because the values (as well as beliefs and convictions) are considered facts, the justification fulfils the need for legitimacy.

In sum, the justificatory reasoning of both a regressive and prospective character renders a performative character to any argument. Any one rule, principle or other concept is now identifiable as legally valid if it can be justified—whether regressively or progressively—with reference to the beginning of structured legal time. Once we have a beginning to structured time, one ought to obey the justified concept. A legal reality—or what we take as a legal reality—is represented by the subsequently reasoned temporal structure. Such a legal reality, though, excludes what Dworkin describes as "anthropological morality' or is, as I will argue further, better understood as experiential time.

The social consequence is that the singular events experienced in the past remain unaccessed by the representations inside structural time. The events are left

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incubating as the reductive and abstract re-presentations of the events take over in regressive and progressive arguments. The sociality embodying a singular event—after all, one event relates to another event—is left behind as a remnant to structured time once the justifying act begins. Any effort to address such a past remnant through the perceptions of those who experience the singular context-specific past event is excluded from law as a 'pre-legal' belief or conviction.[44] It is inaccessible inside the structured time. To be sure, the originalism represented by a Critical Date or a living Value is a 'now'. But it is a 'now' as if it has existed in a frozen past. Jurists have for too long conceived legal legitimacy as bound within a time constraint.[45]

f) The Boundary of Time's Structuring

The conscious recognition of a Critical Date or a Fundamental Value on the part of a jurist posits the beginning of structured time. Once thereby recognized as if familiar signs of the beginning in historical time, conscious reflection, deliberation and judicial decisionism proceed. Such signs, though, are not any signs. They are familiar signs for the jurist immersed in the language of the structured time. They are not the signs necessarily shared, say, amongst contemporary Nomadic peoples or in the Indigenous legal traditions before contact, sovereignty, or the state's effective control of land. The same may be said of the identifiable laws and their binding character in the cultures of contemporary Nomadic communities.

Once the past said to begin legal time is identified, then, mutually unconnected experienced past events are conceptualized and generalized with reference to the language of the structured time. From such a conceptualized 'given' beginning in legal time, legal arguments can be organized justifiably into a rationally coherent unity. One might take Hart as assuming in his Postscript that his concept of law is situated in such an a-temporal starting point to structured time.

Law can be "general", Hart says, "in the sense that it is not tied to any particular legal system or legal culture." It can also be "descriptive" "in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law."[46] Once the origin of structured time—a social convention about primary rules only—is regularized as a concept, time proceeds within an a-temporal structured time. Similarly, the rational coherence that Ronald Dworkin highlighted as

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44. Although the emphasis upon the 'now' certainly highlights the importance of perception, Edmund Husserl especially emphasizes that what I have called structured time fails to appreciate how individuals themselves actually perceive their singular event in the past. See Husserl, *On the Phenomenology of the Consciousness of Internal Time (1893-1917)*, translated by John Barnett Brough (Springer, 1991 vol 4 of *Works*) at 38-39, 166. See also Brough, "Translator's Introduction", *ibid* XI-LVII at XXXVIII, LII.

45. Although they may well would have disagreed with my analysis in this sub-section, it is influenced by Husserl's theory of time-consciousness especially as cited *ibid*; Martin Heidegger, *History of the Concept of Time*, translated by Theodore Kisiel (Indiana University Press, 1992 [1985]) 55; Michael Oakeshott, "Present, Future and Past" and "Historical Events" in *On History and other Essays* (Liberty Fund, 1999 [1983]) 1-48, 49-104.

46. Hart, *The Concept of Law*, *supra* note 27 at 239-40.

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the critical character in a legal narrative in Law's Empire is also nested in just such a structured time. So too, Lon Fuller's sense of the Law possessed an "inner morality" all the while that Fuller also claimed that a boundary separated legality from non-legality. He described non-legality as an interregnum in structured time such as that of the Weimar Republic. An intellectualized order, immersed inside structured time, was thereby autonomous and intentionally unconnected with sociality as experienced in time. Such sociality exists because any one experienced event exists by virtue of its relation to another experienced event.

Aside from the structured time's autonomy vis-à-vis the sociality of experienced events, there is something more one needs to recognize as the social consequence of the beginning of structured time. The Critical Date or the present Values function as the sign-posts of another referent: namely, an ultimate boundary for the range of legal knowledge. In a way, previously experienced time is assimilated into structured time. Institutional sources and doctrines, for example, now become important features of legally binding concepts. They are considered the 'sources' of the law because, from the standpoint of the jurist immersed in structured time (not in experiential time), non-time (that is, experiential time) happens to dwell outside the boundary of the structured time and therefore of legal knowledge. The boundary itself is thereby unspoken and unwritten. And yet, the boundary to structured time begins the possibility of legal time. The boundary is neither inside nor outside the structure. Being outside the boundary of structured time, the boundary cannot be posited as a unity of valid legal concepts-rules and institutional sources. Being inside the boundary, the boundary of legal time can be the referent of regressive or progressive justification.

As such, more often than not, the boundary is taken for granted in the very undertakings of reflection, deliberation and decisionism. And yet, whatever happened in the past before the birth of the boundary must be excluded from binding laws as outside the boundary of legal knowledge. The extra-legal or pre-legality is 'outside time'—outside structured time, that is. The extra-legal exists in constitutional reasoning, to be sure. It is included in structured time by virtue of being signified as 'extra-legal' or some other discourse than the Law. As such, the unaccessed and inaccessible past event as a proto-legality exists before the law. What is outside structured time has been characterized in European legal thought as lawless, disordered, chaos, savage, barbaric, primitive.

Without structured time, a territorial space is similarly projected as if a lawless condition. Communities may well lack a structured time if they lack a centralized institutional structure modelled on a state. Such an institutional structure needs authority inside structured time to supervise, "develop", or function as a legal claimant to own the territory. Until structured time begins, a centralized state cannot claim to own the territory. Officials may authorize the settlement of a territorial parcel of land and may assimilate the first settlement as the beginning of structured time. Until the beginning of such a structured time, the Europeans cannot claim radical title to the land. So, the beginning of legal time appears as if legal time created itself or, alternatively, once created, as if the law inside the structured time constrained the beginning.

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At least, that is what we have heretofore claimed and must claim as jurists, it seems. With the beginning of legal time, what has been experienced by the jurist, witness or party to litigation may make sense to the jurist. This is reinforced once we take on the baggage of the beginning of structured time as if it were a posited fact. Such a facticity about the beginning of legal time renders legal time uncontrollable and uncontrolled by the jurist. Its beginning just is. An experienced event falls either inside or outside the boundary of this or that structure of legal time. The structured time is presumed to be analytically available prior to any experience of time even though the condition of the structured time is experiential time in what has been considered by others as non-legality.

Being neither inside nor outside structured time, though the boundary of structured time is coloured by ambiguity. The boundary is more a horizon at dusk than a seem-less, string-like line. This boundary characterizes both the structured time as a whole as it does each passing of structured time inside the time as a whole. Rarely does one find a jurist explaining why the edge excludes this or that argument. The boundary is just a 'given' as if it is considered a linear boundary between the Law and the non-law. This is so even with all the recent movements about legal discourse—the 'law and society', 'critical legal studies', 'law and literature', 'law, culture and the humanities', and on its goes. Each new movement presupposes that there is a line between the Law and the extra-law. The same point extends to the interruption of one phase, such as 'legislative supremacy' and that of 'the Charter'. But the presupposed line that differentiates the passing from one to another is only recognized after the phase has passed through experiential time. Instead of being a referent for the direction of this or that argument, the boundary emerges after the network of arguments and then only as some vague, opaque boundary which conceals the extra-legal side or the other passing.

5. A Return to Experienced Time

Structured time has been better known perhaps as 'written law'. It is not that laws are 'written' in the sense of being inscribed on paper or in the internet. After all, we have only had the printing press for a few centuries. Writing for that matter has been found on cave walls in the form of art from millennia ago. My point here is that 'written' laws are 'written' in the sense of being the product of the jurist's intentional consciousness about a conceptual object. One pleads a rule-concept as applicable to an experienced event—perhaps one might call the latter an 'authentic' event—as if the event were 'out there' in a past to be observed, recollected, and recorded, an immunized thing of the past.[47] What I mean by 'authentic' is one's singular unrepeatable event as experienced in the past. One cannot signify (that is, represent) some object unless one is conscious of the object, actual or mythic. Again, Postema indicates this sense of law as a conscious act

47. I do not mean by an 'authentic' event that one's experience is unmediated (that is immediate between the individual and the object intended). Nor is the event 'authentic' because of the jurist's perceptions from the present standpoint as if the perceptions hover over the event as experienced in the past.

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of willing when he writes that the nature of law is said to manifest "the actions of self-directing, intelligent agents" who publicly justify their actions "in time" or "over time".[48] The written event is self-directed. As Hart also puts it, a legal system involves units that are "deliberate datable" or "conscious law-creating acts involving facts and justifications".[49] One's conscious object is a concept-rule represented by a sign.

There is, however, a very different sense of time as I have continually declared. This sense of time is immanent in the pre-justificatory and pre-intellectual experiential world. This sense (or meaning) of time is pre-intellectual in the sense of being temporally prior to any intentional or conscious act in structured time. That is, from the standpoint of structured time, the experienced time exists before the structured time's initiation. With structured time, again, the singularly experienced event already falls into the past once it is represented by a sign. More particularly, a socially experienced event is re-presented as a legal event from the standpoint of the 'now' inside the structured time of the Constitution as a whole or of a discrete historical phase inside such a whole constitutional structure. Such re-presentations refer to concepts inside the boundary of structured time.

Those perceptions are not those of the authentically experienced event but of the jurist situated in a 'now'. Such a jurist observes a past event in the jurist's 'now' even if that 'now' transpired years ago. A conscious intellectualization involves reflection, deliberation and a decision about a signified rule-concept. With structured time, the authentic experienced event is a 'left-over' to one's knowledge about law. What one does know about the law is a fragment of the perceived experienced past event. The jurist perceives the event from the standpoint of the 'now' in structured time, not in terms of other perceptions of other events in the past. The experienced event is reduced to the concepts of the structured time. This is so, first, with reference to the identity of a law and, second, with regard to the binding character of such an identifiable law. Such legal knowledge is believed to be enriched once the object is regressively or progressively justified with reference to the Critical Date or the foundational Value(s). The experienced event only comes on the legal scene, if it does, when the concept-rule is applied to the re-presentation of the experienced event. But even at that moment the experienced event is reduced to a concept, such as the 'facts of the case'. A discrete 'law' is thereby retrospectively retrieved from the past.

My point is that by virtue of this retrospective character to structured time, experienced time is forgotten as an element of law in the legal reasoning inside what is erroneously assumed to be the inner boundary of the structured time. Because 'law' in structured time is so entangled with such conscious and voluntary actions, the absence of such intentional actions is 'unwritten'. The 'unwritten' phenomena are experienced. Sophocles does not have Antigone consciously reflecting, deliberating or rendering a conscious decision when she goes out to the desert and throws dust and then rocks on the body of her deceased brother's body. She just does it. She finds herself immersed in instants of experiential time

48. Postema, "Melody", *supra* note 31 at 206-07, 209, 223.
49. Hart, *The Concept of Law*, *supra* note 27 at 44, 48.

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that Sophocles so powerfully describes. She feels bound by her personal and collective memories of experienced events in her clan. Here, she feels as if she has no choice but to follow the ritual, as the eldest surviving member of her immediate family, of burying the body of her deceased brother. She cannot explain nor understand the beginning of events through her experiential time. She is just stuck in the experiential time of her clan.

Let us return to the full passage where Sophocles indicated this absence of intentionality:

> It wasn't Zeus, not in the least,
> Who made this proclamation—not to me.
> Nor did that Justice, dwelling with the gods
> Beneath the earth, ordain such laws for men.
> Nor did I think your verdict had such force
> That you, a mere mortal, could override the gods,
> The great unwritten, unshakable traditions.
> They are alive, not just today or yesterday:
> They live forever, from the first of time,
> And no one knows when they saw the light.[50]

If Antigone did reflect, deliberate or decide about the ritual (or custom) of burying the body of her deceased brother's body, then she would have leapt from experienced time into the structured time of "written law". She would have been able to assume that structured time had had a beginning. Antigone, however, understood her unwritten obligation as a meant object, not as some rule posited from an institutional source claiming authority over the event of burial.[51] The meant norm now had a performative or action-creating character. She acted by her gesture—her throwing dust and later laying stones over the deceased body of her brother. Her gesture manifested that she ought to act. The gesture thereby ascribed that she ought to act as an addressee of the clan's law. This ascriptive ritual was pre-legal in the sense of being pre-conceptual if the 'legal' of extra-legality were understood as having had a beginning in structured time. The ritual was excluded from the written laws by virtue of being analytically and experientially prior to the beginning of the structured time and of the reasoning inside the structured time as a whole. The latter reasoning was represented by the king, Tiresias, Harmon, and the chorus.

What is critical to appreciate here is that the instant of an experienced event takes on a very different sense than that with which structured time encounters

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50. Sophocles, *Antigone* in *The Three Theban Plays*, translated by Robert Fagles with an introduction and notes by Bernard Knox (Penguin, 1984) at lines 499-508. Paul Woodruff translates the laws as "the gods' unfailing, unwritten laws" in *Antigone* with Introduction and Notes by Woodruff (Hackett, 2001) at lines 456-57. Elizabeth Wyckoff translates them as "the gods' unwritten and unfailing laws" in *Sophocles I* (University of Chicago Press, 1954) at line 455.

51. This sense of an object as meant is developed in more detail in Conklin, "Human Rights and the Forgotten Acts of Meaning in the Social Conventions of Conceptual Jurisprudence" (2014) 2 Metodo: Int'l Studies in Phenomenology & Philosophy 169 at 184.

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an objectivity as a reduction of the instant into a conceptual typification. The sense of meaning that I am addressing is constituted from the singularity of an experienced event. One's objects are meant from one's personal experiences and from one's sharing of collective memories with others in the group. The latter exist before one ever becomes a member of the legal profession. In a sense, one's embodying of the collective memories of the profession mark an important requisite, if not the most important requisite, for entrance into a legal profession.[52] Because of the assumed originalism of a Critical Date in legal history or of a Value in the living present, the constitution of meaning is extra-ordinary—that is, non-legal or pre-legal—because it is analytically and experientially prior to the beginning of structured time.[53] Meaning so constituted is pre-intellectual of the concepts represented in structured time.

It lacks the conscious reflection, deliberation and decisionism accompanying an act of justification in structured time. Time in this sense is experienced immanently from the consciousness of the jurist, victim, claimant, expert witness or judge-mediator. Meaning is the product of experienced time buried in singular context-specific events which relate to other events, not to the rationality inside structured time. The objects of experienced time are constituted rather than posited. They are meant, not posited, objects.

The unwritten social events submerged in structured legal time remain unaccessed in structured time except through the familiar significations of structured time. Rarely, as yet, have jurists enquired as to how such phenomena are fulfilled by the constitution of meaning. So long as structured time counts for legal time, the experiential embodiment of meaning is excluded from legal time. To be sure, the jurist may well claim, as has the Canadian Supreme Court, that rights and property were experienced historically and analytically prior to European contact, sovereignty and the state's effective control of territory. But, aside from the possibility that rights and property are concepts imported by European military and governmental officials and inherited from Roman law, Indigenous experienced events constitute meant objects experientially and analytically prior to such conceptual constructions. Aboriginal law, 'entrenched' in section 35(1) of the Constitution Act, 1982 has been situated inside structured time. Experienced time is a remnant of such a structured time. And yet, taking the sense of time as structured, experiential time is temporally prior to structured time and, therefore, of Aboriginal law as lawyers know it today.

The consequence is that one experiences time very differently from the justification of a decision with reference to the Critical Date or Fundamental Value posited as the beginning of structured time. So, as noted a moment ago, in structured time, the Supreme Court of Canada has claimed that an 'Aboriginal right' exists if it can be traced backward to a past temporally before Indigenous

52. If territorial space and calendar time permitted, I would argue that much about a legal training in a professional law school manifests the inculcation of collective memories, not of rules-concepts, despite appearances and claims to the contrary.

53. I draw from Edmund Husserl for my sense of a constitution of meaning. See Husserl, *Logical Investigations*, vol 2, Part II translated by JN Findlay (Humanities Press, 1970 [1900/01]), Investigation I, V, VI. See generally, Conklin, *supra* note 51 at 1.

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inhabitants ever made contact with the European military, religious and civil authorities. Such a past, though, has been re-presented into the vocabulary and grammar of the judiciary's 'now'—a vocabulary of rights, state authority, title to land, territorial space and self-determination (of both the agent and of the group) in structured time. This transcription into the judicial language of the present, though, takes for granted that the beginning of legal time is either the Critical Date of "European contact", "sovereignty" or "effective territorial control" or the "living tree" of Fundamental Values usually buried in texts in structured time. Indeed, one might well find that such a sense of experiential time lacked the vocabulary of individual rights, property, title and the like prior to the birth of structured time. Instead, the transcription re-categorizes the world in a past that cannot be recognized through structured time except as a familiar signifying relation in structured time. This re-presentation transpires inside the structure of the continuance of past-present-future time. This re-presentation of an experienced event, though, is retroactively imposed, as a concept, analytically after the experienced event. The memory of the experienced event is at best a mere fragment retrospectively re-presented in the 'now'.

One may add that 'the rule of law', as a concept, is internal to such a structured time. It is erroneously assumed to exist temporally and analytically independently of the experienced events of Indigenous and Nomadic inhabitants, say. Indeed, the rule of law is believed to pre-exist the experienced events by jurists, clients, and witnesses. That is, the bounded concepts-rules are presumed to exist temporally before the experienced events which can only really be differentiated with other experienced events, not with the concepts. The effect, though, is that legal reasoning proceeds as if in the air. This is so because we forget the time immanent in the experienced meant objects despite that their pre-intellectual acts exist before the concepts-rules and before any analytical condition of the beginning of legal time. Analytically prior to the birth of structured time, there are singular events and a past for which we only have remnants today. Such a displacement of experienced time by structured legal time has for too long been left unexamined as a critical element to Jurisprudence and Legal Philosophy.

6. The Displacement of Experiential Time

So, in light of the two senses of time, a singular experienced event falls 'outside time'—outside structured legal time, that is—though it may simultaneously be unrepresented inside the structured time. Put differently, legal history is presumed to have a beginning. The birth of structured time becomes an assumption as to when legal history begins institutionally in a centralized governmentality. And that legal history excludes a past as experienced time before the beginning of structured time and then only as a remnant of experienced events in the past. At best, an experienced event in the past is transcribed into the language of structured time. Such a transcribed experienced past is consciously intended. The flash of an immanently experienced event is re-presented in structured time once a Critical Date or a Fundamental Value is recognized and signified by the

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officials of the centralized institutions. The flash or instant of time of an experienced event thereby becomes non-legal.

Once the structured legal time begins, then, the signified concepts-rules of the structured time are separated from the events of experienced time. Experienced events may well have constituted meaning into the Critical Date or Value. However, once transcribed into structured time, the experienced events are severed and/or concealed from structured time. An irony thereby overtakes experienced time: although the experienced events experientially exist before the moments of the structured time's self-creation and self-determination in the sense of structured time, such events do not exist, legally speaking, except as later re-presented in structured time. As a consequence of this, laws in structured time become a-temporal: the beginning of structured time is reduced and lifted into a heaven of concepts-rules from experienced events and then analytically constructed as if nothing transpired before the beginning except as signified inside the boundary of structured time. The Law becomes and must become 'written' so long as structured time conditions how one understands the binding character of a law.

a) The Final Referent of Structured Time

The justifications of rules-concepts with reference to higher-ordered concepts from the beginning of structured time proceed temporally after the 'beforeness' of experienced time in two ways. In the interruptions of the phases of structured time, the beginning of legal time is believed to be a universal 'out there' in an objectivity. For Hans Kelsen, again, such a universal is the Grundnorm or pure thought independent of any social contingency. For Kant, the ultimate referent is a pure will, purged of all social contingency, and therefore coloured with divinity. For John Austin, the ultimate referent—habits of obedience by the People—is external to structured time and therefore inaccessible inside the structure of laws. For Hart, the ultimate referent—habits—are exterior to the system of primary and secondary rules and yet, rules-concepts are represented as a general concept (the rule-concept of recognition) inside the already existing system of primary rules in structured time. In each standpoint, the final referent of justifications inside structured time is inaccessible.[54] This is so of the regressive argument and the progressive argument.

As such, the beginning and therefore the referent of justifications in structured time is self-standing. It is independent of or external to structured time and yet structured time is dependent upon it. We reflect, deliberate and render decisions about concepts. Any enquiry as to how the concepts are constituted from experiential meaning is excluded from inside legal time as structured time. The identity of a law ends up being immersed in a time-consciousness about conceptual objects.[55]

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54. For documentation as to how Kelsen associates the *Grundnorm* with the divine, see Conklin, *Invisible Origins*, *supra* note 15 at 196-200.

55. I draw this point from Husserl, *Logical Investigations*, *supra* note 53 at Investigation VI, ss 60, 307.

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b) Hart's Re-presentation of Experiential Time into Structured Time

Let us re-read Hart's analysis in The Concept of Law about the beginning of legal time. Hart initially characterizes a pre-legal community as having "habits".[56] He subtly shifts, however, from an examination of such habits into an analysis of "customary rules". A moment later in his argument, he describes the "customary rules" as "primary rules". This shift from the experience of habits to customary rules and from customary rules to primary rules subtly transpires in just a few sentences. After imagining a "primitive" community as lacking centralized institutions ("it is, of course, possible to imagine a society without a legislature, courts, or officials of any kind"),[57] Hart advises that one should not consider the pre-legal community (representing their laws as primary rules) as guided by habits or customs. Why not? Because (customary) rules, not habits, raise the prospect of law as a system of concepts. And customary rules, being old according to Hart, need to be replaced by 'primary rules'. Customary rules exist, Hart says, due to a social pressure that is absent from a traditional community.

My point is that even before Hart describes a community of habits as "primitive" or "pre-legal", he has categorized, characterized, and excluded such a community from the rule (that is, the concept) of recognition by jurists. Again, the "habits" of the pre-legal community have subtly, but suddenly, become customary rules (that is, concepts) and these, in turn, to primary rules of obligation". To be sure, Hart understands the rule of recognition as emerging because the rule recognizes the habit (or what he calls "the regularity") of officials as officials elaborate the system of primary rules. But the regularity conceptually generalizes about singular habits. And the regularity concerns habits about concepts—the primary rules-concepts. In this way, an historical and analytic interruption of time, experienced as a habit, is complete. Hart's subsequent analysis of the pre-legal community is complete without him having to closely examine the laws in such a community. "Legal development" thereby crystallizes from an absence of centralized institutional authors into a "system" of institutional authors such as courts and legislatures. The laws have become "primary" rules-concepts of obligation characterized by the writing in acts of reflection, deliberation and decisionism of a centralized institutional system. Structured time now needs a beginning in time. The Critical Date and posited Values fulfil that need. Such an originalism can mark the beginning of a reflective and deliberative world of conscious decisions.

This point needs emphasis. In his effort to understand the importance to the identity of a law as "written", Hart shifts his focus from authentically unwritten or unexpressed habits to consciously intended "primary rules"—consciously intended, that is, by central institutions of the state. The justification of a primary rule, in contrast with a ritual, gesture, belief, conviction, assumption, expectation or other singular, unwritten, socially experienced event, is now represented as a legal "obligation". Events are socially experienced because they only relate

56. Hart, *The Concept of Law*, *supra* note 27 at 91.
57. *Ibid*.

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to other singular events. But such an obligation emerges from a justification about the provisions of a Critical Date or of an unwritten contemporary Value. As Hart quite rightly points out, such starting-points and the subsequent justifications contrast with the excluded feelings of being "obliged". A law has also been questionably represented as a habit and yet, Hart typifies the habit as a concept (a "regularity") about concepts ("customary rules") that, in turn, are said to be "primary rules" (that is, concepts again), the latter being distinguished from "secondary" rules-concepts about primary rules (not about "customary rules", let alone "habits").

The primary rules, one needs to recall, are consciously and voluntarily enacted or adjudicated or applied as concepts; this is in contrast with events experienced through time analytically and temporally before the birth of structured time. Pre-intellectual habits, which constitute meant objects, are now represented in structured time. Such objects are meant without one being conscious that one is actually participating in the representation or construction of the habit's meant objects. From the standpoint of structured time, the importance of immanent meaning, experientially and analytically prior to structured time we now appreciate, is forgotten as an element about an identifiably binding law. The rules-concepts possess a rational beginning which has displaced experiential time. A residue of social meaning is thereby concealed both temporally (in the sense of structured time) before and inside the language of the structured time. Perhaps I might use Hart's own words to describe my point here: "the light is so bright that it blinds us to the remainder and so leaves us still without a clear view of the whole."[58]

c) An Act of Meaning

There is another social consequence that may well be apparent from my argument above. This concerns the displacement of a radically different sense of meaning than that taken for granted in structured time.[59] Structured time takes for granted, that is, that meaning rests 'out there' in the core of a concept, the core of the intent of the founding fathers, the core of the Fundamental Values, or the core of the historical phase that functions as the object of the overall structured time. So, for example, a 'fee simple' is considered an object separate from the jurist's experiential meaning and separate from the ethos in which the concept of the 'fee simple' took form. The jurist can analyse the concept of 'fee simple' oblivious to the social context of the constitution of meaning embodying the sign, 'fee simple'. That said, the jurist can analyse the meaning embodying the concept in the feudal social context or, for that matter, in its social context today. The latter contexts embody or confer one's experiential body into experiential time from the fragments represented in the present. Experiential time, however, is immanent from the personally experienced of the social ethos when the sign,

58. *Ibid* at 1.
59. Again, I draw from Husserl for this sense of an act of meaning. See Husserl, *Logical Investigations*, *supra* note 53.

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'fee simple', took form. This immanent sense of a standpoint is not what Hart described as an "internal point of view". Nor does it jibe with what Joseph Raz described as an "internal standpoint". Hart and Raz take the "internal" position as already immersed in the justificatory acts inside structured time. The referents of such justificatory acts are considered synonymous with legal objectivity. Experiential meaning, however, radically differs from this acceptance of meaning as situated in an objectivity autonomous of an individual.

Experiential meaning is immanent in what Georg Hans Gadamer described as a praejūdicāre (or 'prejudgement').[60] Such a sense of meaning lacks the intentionality and voluntariness associated with a written law. Experiential meaning addresses the question, 'if meaning is assumed to exist in an objectivity separate from the jurist or the addressee of a jurist's statement, why would time experienced before that birth of a structured time be relevant to the identification of a law?' Experiential meaning, I am emphasizing, concerns the subjectivity of the jurist or of the addressee's subjectivity before the law. The issue is pressed: 'why would members of a social group experience an obligation to obey the laws identified in the structured time that has lopped off the experiential time of the addressees?'

Such an issue is especially material when one addresses the standpoint of contemporary Indigenous and Nomadic traditional communities. In brief, the birth of the legal time is not a basic text but a series of singularly experienced social events, themselves reduced and abstracted as categories and whose content varies from one geographic area to another of the country. Time as 'pre-legal' is experienced despite being forgotten in structured time. It must be so forgotten so long as the birth of structured time is taken as a 'given' or 'fact' in legal reasoning. Experiential time radically differs from the structures of time measured from a beginning. This is especially true because "written law" is considered the manifestation of a modern and developed legal structure as opposed to "unwritten law" as representing a pre-legal community. The interruption between the pre-legal and the modern time and between immanently experienced and structured time has represented two historical and analytic interruptions in legal time as experienced. On occasion, jurists have feared that a certain condition, suggested by an absence of written laws, might well return a society to an imagined pre-legal period of lawlessness.

d) A Paradox

The subtle analytic leap from the time experienced in a singular event and the significatory network into such an event to the structured time using the analysis and justification of concepts leads to an unstated and unwritten boundary of legal knowledge. This boundary separates experiential time from the "written" structured time. A paradox emerges. On the one hand, jurists implicitly claim to know what is excluded or submerged in structured time. Why? Because the

60. Georg Hans Gadamer, *Truth and Method* (Crossroad, 1985 [1975]) at 238-40.

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experiential time—heretofore excluded by the birth of rationally structured time in a discrete phase or a full epoch—conditions the possibility of structured time. Experiential time exists logically and experientially before the law if the 'before' is taken in the kind of the temporality created by structured time. For one to say that a linear, horizontal boundary separates structured time from experiential time, law from non law, or legality from pre-legality, one must implicitly claim to know what exists before and outside the boundary of legal knowledge. How else can one differentiate law from non-law unless one impliedly claims to know what is non-law?

On the other hand, because experiential time is excluded from structured time by the latter's supposed beginning, legal knowledge exists analytically after the posit of the birth of structured time exists. As a consequence of this, jurists just cannot know what they implicitly claim to know: namely, the social phenomena exceeding the boundary of structured time. Such social phenomena remain immanent in a forgotten experienced time. This inability to know what is analytically outside and temporally prior to structured time is reaffirmed by the admission that the pre-legal community is imagined, a fable or a myth.[61] This paradox characterizes Hart's nuanced shift in The Concept of Law from the pre-intellectual "habits" to consciously enacted "primary" concepts of obligation.[62]

As a result of the paradox, structured time has left the jurist necessarily to imagine the experienced social life temporally and logically before the beginning of structured time. It is as if the pre-legality were a proto-law 'before the law' is immunized from the present.[63] So, even alleged pre-legal communities are categorized outside structured time. If so excluded from structured time, communities are excluded from the legal order and therefore not recognized as legal persons.[64] Treaties between the recognized legal persons (states) and the unrecognized legal persons (non-state actors) have been rendered non-existent in international Law until relatively recently. To the extent that Indigenous or Nomadic groups, say, experience immanent time, the analytic leap from such unwritten experienced time into the 'written' laws of centralized institutional authors leaves the immanent time excluded and forgotten. A rationally structured time thereby displaces experiential time. To be sure, the structured time may re-present the experiential time into the familiar written language about rights, jurisdiction, property, contracts, federalism, and other concepts. Despite such

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61. For this mythic element, see Hart, *The Concept of Law*, *supra* note 27 at 91; Gardner, "Why Law Might Emerge" in Luis Duarte d'Almeida, James Edwards & Andrea Dolcetti, eds, *Reading HLA Hart's The Concept of Law* (Hart, 2013) 81; Gardner, *Law as a Leap of Faith*, *supra* note 28 at 1-18, 67-74; John Finnis, "On Hart's Ways: Law as Reason and as Fact" in Matthew Kramer, Claire Grant, Ben Colburn & Antony Hatzistavrou, eds, *The Legacy of H.L.A. Hart* (Oxford University Press, 2008) 3.

62. The same may be said of others. See, e.g., Gardner, *Law as an Act of Faith*, *supra* note 28; Simmonds, *Law as a Moral Idea*, *supra* note 28.

63. Since such terms as 'primitive' or 'pre-legal' have often been used in the language of structured time or even incorporated into such language in order to merely clarify the concept of law, the remnant so used or incorporated, I am suggesting, is better described as a 'proto-legality'.

64. I document the statistics in Conklin, *Statelessness*, *supra* note 1 at 96-134.

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possibilities, the extra-ordinary or immeasurable experienced time is interrupted by the 'ordinary' structured time.[65] But the immanently experienced time of such groups is forgotten as material to the identity of a modern law.

The consequence is a residue of social life vis-à-vis observable structured time. Indeed, the whole social life, experienced as immanent in meaning, is reduced and abstracted into the legal rationality—that is, reflection, deliberation and decisionism of structured time. Consequently, the immanent time is unwritten and unspoken. It lacks the product of state-centric institutions, namely, reflection, deliberation and decisionism. And yet, the so-called 'modern' legal order is dependent upon just such forgotten 'unwritten' immanent laws heretofore excluded from the concept of law. Why is the 'modern' legal order dependent upon the proto-legality? Because the proto-legality constitutes the condition of the possibility of law as structured time.

e) Written and Unwritten Laws

The difference I have been describing between structured and experiential time offers insight about the legacy of "written law" and the "unwritten law"? A law is "written" in the sense of being consciously intended by officials representing a centralized institutional structure. After all, Hart's displacement of a habit by a customary rule and that, in turn, by a primary rule suggests that a habit does not exist for law except as re-presented in the official language signifying rules-concepts of the centralized institutional structure. If so, is sociality (built into experientiality) a remainder or 'left-over' from the written laws as consciously intended in structured time? The clue, I believe, rests in the self-image of the jurist as a 'thinking subject'. Do the units of law—that is the concepts and other intelligible standards—become units through being identified by a thinking agent in structured time?

By negative inference, unwritten laws must involve an absence of the relevant conscious reflection, deliberation and decisionism about alleged facts and concepts. What we have assumed to be facts are considered observable and quantifiable in an objectivity beyond conscious law-creating and law-applying acts. They are constative rather than performative, to use J.L. Austin's distinction. Examples are feelings of being obliged, beliefs, convictions (Hart, Dworkin and Leiter, for example). Collective memories, personally experienced memories and experienced anticipations towards the future exemplify what are taken as 'facts' by the jurist. The 'facts' begin regressive reasoning into the past or progressive reasoning into the future. The regressive reasoning, for example, may turn to the

65. It is interesting how this interruption has permeated the state of nature jurists as well as Kant, Hegel and jurists of the late Roman Republic and the Augustan era. See generally, Conklin, "Human Rights and the Forgotten Acts of Meaning", *supra* note 51; Conklin, "The Legal Culture of European Civilization: Hegel and the Indigenous Americans" in David B MacDonald & Mary-Michelle De Coste, eds, *Europe in its own Eyes, Europe in the Eyes of the Other* (University of Waterloo Press, 2014). Conklin, "The Exclusionary Character of the Early Modern International Community" (2012) 81 Nordic J Int'l L 133; Conklin, "The Myth of Primordialism in Cicero's Theory of *Jus Gentium*" (2010) 23: 3 Leiden J Int'l L 479.

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'fact' of the intent of the Founding Fathers or the progressive reasoning may turn to some one final Value such as 'dignity'. What is left of the experienced events are unwritten and unspoken fragments.

Even here, these left-over fragments are re-presented. Such a constitution of meaning is immanent rather than imposed from a presupposed objectivity outside the jurist as presupposed as a subject. What is critical to appreciate is the constitution of meaning, that is, the meaning-constituted acts, through immanent time. Instead, immanent time is represented as a 'fact'. All justification—whether about a juridical practice or an intuition or a state institutional source—may be immanently changing*;* and yet*,* it is taken for granted that legal legitimacy rests in the act of justification.[66] The act of constituting meaning that way leaves much social life an unwritten and unspoken remainder or, at best, a remnant from the past. Being so excluded from the conscious reflection, deliberation and decisionism, it can be called "primitive" or "pre-legal" or, better, 'proto-legal'.

Accordingly, as an act of justification legal reasoning stands as if frozen in time and territorial space and as if immunized or unchanged except for fragments thereafter. A precedent makes sense as representing such a frozen time in the past. Once the ultimate referent of justification—the Critical Date or the Fundamental Value—triggers legal time, all justifications are assumed to have a beginning either in the past or in the telos of the living present represented by the Fundamental Values. Legal reasoning thereby proceeds as if it is situated in an objectivity grounded in a 'fact'. The true jurist aspires to access such an intellectually transcendent objectivity as if it represents the only legal reality. Structured legal time seems rational and natural; a sense of logical necessity is aided by having been presented with a beginning to the project of justification.

To be sure, there are 'original' interpretations about the Critical Date or Values as the years pass. But the key in legal reasoning, as Tzvetan Todorov explains more generally about rationality, is to "make the ordinary strange".[67] The "ordinary"—the singular experienced event—is now imagined "strange" from the standpoint of the jurist analytically situated in structured time. The structured time also delineates the originating boundary of what counts as the "ordinary". After all, without the boundary, how could there be a structured time? But the legal order after the radical interruption—after the Critical Date or the knower's Values—differs in nature from the alleged pre-legal social phenomena temporally and analytically before the interruption from the standpoint

66. John Rawls, *Political Liberalism* (Columbia University Press, 1993); Hart, *The Concept of Law*, *supra* note 27; Simmonds, *Law as a Moral Idea*, *supra* note 28 at 10-11, 130-43; Jules L Coleman, "Methodology" in *The Oxford Handbook of Jurisprudence and Legal Philosophy* (Oxford University Press, 2002, 2004) 311. Stephen R Perry, "Hart's Methodological Positivism" in *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press, 2001) at 311; Finnis, "On Hart's Ways", *supra* note 61; Richard A Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford University Press, 1961). See also A John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2001) at 122-57.

67. Todorov, *The Poetics of Prose*, translated by Richard Howard (Cornell University Press, 1977) as quoted and discussed in Jerome Bruner, "The Narrative Construction of Reality" (1991) 18 Critical Inquiry 1 at 13 n 30.

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of the structured time. Hobbes and Hart are right: the pre-legal communities are the constructs of the juristic imagination.[68]

7. On the Problems Initiated by Structured Time

Serious social consequences have flowed from the structuring of legal time. These are problems about what will be understood to be the law at any time.

a) Hierarchy

The first social consequence is that 'progress' is represented in a hierarchy of communities. At the bottom of the hierarchy, there is what Hart and others have described as "pre-legal" or "primitive" communities. At the pinnacle of the hierarchy, there are "modern" or "developed" communities. The displacement of experienced time by the structured legal time provides the background to this hierarchy. This is so because once the beginning in structured time is identified as a Critical Date or a founding Value, such a beginning excludes the possibility that a pre-beginning, qua pre-beginning or proto-legality, is included in the elements constituting an identifiable binding law. Accordingly, a 'progress' from a 'pre-legal' to a 'modern' legal order represents an analytical move. That analytic move presumes a sense of time as structured.

This sense of time as structured has had negative social consequences for communities characterized as "primitive" or "pre-legal" throughout the common law area. The constitutional discourses of Canada, Australia and New Zealand and perhaps from all alleged "modern" societies have manifested and advocated such an analytic leap from the pre-legal Indigenous and Nomadic communities into the modern legal time in order for law to possess a performative, action-guiding, character. Leading Anglo-American legal philosophers have asserted or implied that a modern legal order anthropologically develops from a "primitive" or "pre-legal" one.[69] Some have claimed that the embryonic beginning of law is a mere "myth or "fable,[70] others that pre-legality functions heuristically,[71] as an "intuition",[72] as "policy" and "morality",[73] as "anthropological" morality,[74] as

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68. For Hobbes' view of the "generally" hypothetical identity of the state of nature, see *Leviathan*, ed with Notes by Edwin Curley (Hackett, 1994 [1668]) 13.11. For Hart, see *The Concept of Law*, *supra* note 27 at 91.

69. Hart takes this view in the "step" from the pre-legal to the legal reality in *The Concept of Law*, *supra* note 27 at 94. See also, Simmonds, *Law as a Moral Idea*, *supra* note 28; Gardner, *Law as a Leap of Faith*, *supra* note 28; Kramer, *Objectivity and the Rule of Law*, *supra* note 28.

70. Gardner, "Why Law Might Emerge", *supra* note 61 at 67-74; Finnis, "On Hart's Ways", *supra* note 61.

71. Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001); and Tamanaha, *Realist Socio-Legal Theory* (Oxford University Press, 2001).

72. Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence" (2003) 48 American J Jurisprudence 17 at 40-43.

73. Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence" (1997) 76 Texas LJ 267 at 299-300.

74. Dworkin, "Lord Devlin and the Enforcement of Morals" (1966) 75 Yale LJ 986; reprinted in "Liberty and Moralism" in *Taking Rights Seriously* (Harvard University Press, 1977) 240.

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a mere passing phenomenon,[75] as a "static" character of "highly homogenous societies not much larger than a handful of families", as "general and uncontroversial" empirical assumption,[76] a mere observed social fact,[77] and the absence of a need to have law.[78] Not surprisingly, various encyclopaedias about legal philosophy remain silent about the nature of a pre-legal society or of pre-legality in legal reasoning.

An allegedly lawless pre-legal alien world is not peculiar to the contemporary imagination of Anglo-American Conceptual Jurisprudence, however. As noted a moment ago, Hobbes described the state of nature is a mere "hypothetical" postulate. Hegel elaborated a similar climb up the ladder of civilization.[79] Such a climb manifested a living present in legal consciousness.[80] He distinguished between a natural consciousness and a reflective consciousness. Natural consciousness was manifested by Antigone who felt at one with the customs of her clan. The modern state, according to Hegel, emerged from such a family or clan.[81] Hegel demarcated historical stages of society from alleged "savages" in the natural consciousness to an agricultural community, then into a trading class, and eventually into a universal class of public servants.[82] More generally, as Hegel records (and remarkably similar to Lucretius), "[t]he ensuing stage of history is always higher, and this is the perfectability of spirit …. In sublating its phenomenal form, the spirit of the age [Zeitgeist] attains in the transition a higher stage."[83] After the analytic and temporal leap from the 'pre-legal' (Hegel's term as well as Hart's), Hegel considers legal reasoning as nested in a reflective consciousness.

Although I have just highlighted Hart's and Hegel's own hierarchy of societies as a consequence of their analytic "step" or "leap" from experienced time in a pre-legal condition into the reflection, deliberation and decisionism of a modern legal order, this hierarchy has characterized the history of legal thought at least since the jurists of the late Roman Republic and the Augustan era.[84] Though the leap from the one to the other is an analytic claim, it has had an enormous impact upon the anthropological and historical assumptions of common law judges as well as upon the legacy of European legal thought more generally. As Hobbes writes, there is

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Also see Dworkin, "Does Law Have a Function? A Comment on the two-level Theory of Decision" (1965) 74 Yale LJ 640.

75. Leslie Green, "The Concept of Law Revisited" (1996) 94 Mich L Rev 1687 at 1698-99.

76. Matthew Kramer, "How Moral Principles can Enter into the Law" (2000) 6 Legal Theory 83 at 97; Kramer, *Objectivity and the Rule of Law*, *supra* note 28 at 116.

77. Leiter, *Naturalization Jurisprudence*, *supra* note 29 at 126; Jules Coleman, *Practice of Principle: in Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press, 2001).

78. Green, "Introduction", *supra* note 27 at l.

79. Hegel, *World History*, *supra* note 8 at 162-71; *Philosophy of Right*, *supra* note 37 at paras 32R, 349, 351.

80. See generally, Conklin, *Hegel's Laws: The Legitimacy of a Modern Legal Order* (Stanford University Press, 2008) at 108-10. See also Howard P Kainz, *Hegel's Philosophy of Right with Marx's Commentary: A Handbook for Students* (Martinus Nijhoff, 1974) at 42.

81. GWF Hegel, *Lectures on Natural Right and Political Science*, translated by J Michael Stewart & Peter C Hodgson (University of California Press, 1995 [1817/18]) at para 122R.

82. Conklin, *Hegel's Laws*, *supra* note 80 at 196-202, 215-21, 248-53.

83. Hegel, *Natural Right*, *supra* note 81 at para 126R.

84. See Conklin, "Myth of Primordialism", *supra* note 65.

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no justice nor injustice, no law nor society, no culture or economy, no account of time, no letters nor even a society that could possibly exist outside the boundary of the civil laws of the "common Power" over a territory.[85] Kant writes that justice is absent in a pre-legal community, this absence requiring that a civilized society may violently "bring […] culture to primitive peoples".[86] Hegel describes inhabitants in a stateless community as "passive", "inferior", "little capacity for education", "submissive", "unenlightened" and on it goes.[87] Anglo-American jurists of the 19th century especially characterizes the objectivity of general laws with "savage" pre-legal communities without such general laws.[88]

In sum, the analytic leap constructed in the legacy of structured time requires that one ask and respond to questions concerning the identity of law and the binding character of an identifiable law. Does structured time leave social phenomena forgotten in constitutional analysis, for example? If so, is that forgotten element a condition precedent for the very existence of the succession of temporal phases constructed in the backward-looking past of the Critical Date or the forward-looking Fundamental Value? Does the structured time open the door for the displacement of the sense of time as experienced? Does structured time leave one with the possibility of something forgotten even when jurists, immersed in structured time, recognize the socially experienced events of immanent time by transcribing the experienced events into the familiar signs after the birth of legal time?

b) How is the Critical Date or the Fundamental Value Performative?

This raises a second problem. It pertains to both the regressive and the progressive argument about the beginning of structured legal time. If one takes the Critical Date as the origin of structured time or if one takes a Fundamental Value as such for the moment, the date or the value functions as if the constitution were authored by an institutional source such as the 'Founding Fathers' or the Legislature. What is material here is that several or even a multiplicity of authors are presumed to have created or authored the date or the value.[89] If so, how would one go about identifying the intent of the Original authors of the beginning of structured time? In addition, there may be a multiplicity of intended addressees. The multiplicity of authors and addressees raises a further problem if the Critical Date or the Values changes from one geographic space to another under the control of the state. It may also subtly or expressly change over a long period of calendar time. The consequence is that there is not one intention of one author but a multiplicity of intentions and often conflicting intentions of alleged authors.

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85. Hobbes, *Leviathan*, *supra* note 68 at 13.9.
86. Kant, *Metaphysical Elements of Justice*, 2nd ed, translated with Introduction by John Ladd (Hackett, 1999 [1798]) 117 (line 353).
87. See generally, Conklin, "The Legal Culture of European Civilization", *supra* note 65.
88. See, e.g., Philip P Curtin, ed, *Imperialism: Selected Documents* (Macmillan, 1972); John Austin, *The Province of Jurisprudence Determined*, with an introduction by HLA Hart (Hackett,1954 [1832]) at 208-10.
89. Solum, "We are all Originalists Now" in Solum & W Bennett, eds, *Constitutional Originalism*, *supra* note 5 at 14.

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If there are many participants in the creation of the Critical Date or the Founding Values, can one claim that structured time even has a beginning in measurable time? If it does not, how can there be a structured time?

This question is especially pressing when one appreciates that fragmentary texts, say, vague statutes, might represent the beginning of structured time. Of course, the text or values of the first authors of the English Constitution have been retrieved in the Selden Society volumes. But many countries lack the wealth or institutional capacity to record or provide the institutional materials for the Critical Date or Fundamental Values. This being so, how can one claim Originalism to be a general theory for all societies? This is all the more problematic in that the Critical Date, such as a treaty or the Articles of Capitulation or a Proclamation of Annexation, may well introduce an alien founding language into the existing intermediate constitutional principles of the conquered or annexed territory. This ambiguity is certainly apparent if the birth of legal time is said to be the moment when Europeans made contact, when sovereignty was recognized internally in the formality of texts, when the officials of other legal regimes externally recognized a state's sovereignty, or when the state effectively controlled the territory of which an Indigenous or Nomadic group were habitually resident. The consequence of all this is that the intent of the framers of the beginning of legal time is unified into a rational intent, and an intent constructed after the event of legal time's birth. The authorial intent, as a representation of the Critical Date, becomes an intellectual abstraction. The regress to the beginning of legal time dissolves into the interpretive role from the standpoint of the present. Put differently, the calendar date of the birth of structured legal time is displaced by the standpoint of the living present. And the experiential time empirically (according to the calendar) before the birth of structured time is forgotten as a past.

Originalism takes for granted that the constitution is 'written'. It is 'written' in the sense that authors consciously and intentionally reflect, deliberate, and render decisions about the content of the Critical Date. Both the literal and the genre character of the originalism are infused into a consciousness about the origin of structured time. The same holds for the Values of the living present. What the first authors constitute as meaning to objects before the Critical Date or before the posit of the Values of the present is left unwritten in the sense of lacking reflection, deliberation and decisionism. We take the Critical Date and the Values for granted. We take for granted that they represent 'facts' in the beginning of legal reality. The legal point of view is thereby external to the singular events experienced in the past.

c) The Arbitrary Beginning of Structured Time

There is a common feature of both the Critical Date and the Value approaches concerning the beginning of structured time. This relates to the arbitrary character of the beginning of structured time. The arbitrariness is imbued from the posit of the Critical Date and of the Fundamental Value(s). Such a positivity arbitrarily interrupts the continuity of experienced time.

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Of course, jurists have used the term 'legal positivism' in different ways during recent years. Indeed, much intellectual energy has been expended trying to understand why a discrete law or law in general is positivist. Such an issue has been addressed in a binary opposition of law versus morality. Insufficient attention, however, has been paid to what is represented by 'morality' or, more generally, by extra-law.[90] For Hart, law is posited in the sense that it exists independent of morality and morality involves 'oughts' as opposed to the 'is' of rules. For Fuller, 'morality' concerns the presupposed sense of 'law' internal to the procedural conditions of a metaphysical structure of rules. For Dworkin, in Law's Empire, 'morality' pertains to the content of the justification of any principle (like a rule, a concept) with reference to the narrative that has worked itself pure. In Dworkin's Justice for Hedgehogs, 'morality' involves the justification of the 'fact' of a conviction or belief. For Jules Coleman, 'morality' concerns the content of a rule. What we have yet to appreciate is that positivism epitomizes the very act of structuring legal time. The beginning of structured time—the Critical Date and the Values buried in texts—is arbitrarily posited. It is a 'given' believed to be beyond the control of the jurist subsequent to the posited start-up.

Because of this arbitrariness, jurists have failed to address why both the Critical Date and the Values possess legitimacy.[91] Why is the jurist obligated to obey, accept, and believe in the fact of a Declaration of Independence, 'the Constitution', European contact, the state's effective control of territory, the sovereignty recognized of the state, and on it goes? One response to such an issue rhetorically asks "[w]hat other point could there be to having a written constitution that declares itself the 'supreme law of the land?'"[92] Well, my response is that there are inhabitants whose sense of experienced time is excluded from the birth of just such a sense of time as structured. The posit of the "supreme law" renders the structured time arbitrary. The beginning, as a beginning, is likely to be violent or, even at that, a matter of an identifiable law-concept.

Consequently, a silence clouds the nexus of legality to legitimacy. Neither the Critical Date nor the living Values necessarily explains why inhabitants are obligated to obey the Critical Date or the Originary Values through the time experienced by jurists or non-jurists. If the genre of a Critical Date does explain why the Critical Date is obligatory, why does the genre possess such an obligatory character? Why the judge's genre rather than the genre of the experts in some other discourse such as Social Theory, Literary Criticism or Philosophy? Why the founding fathers of the basic text or values, say, rather than the intent of the ratifiers of the text or the value? What explains the performative character of words in a basic text as opposed to the mere observation of the use of the words? Is the mere declaration of a date or value an adequate explanation? The same

90. For an effort to retrieve a sense of law that is neither posited nor morality (as natural law) see Conklin, "Hegel and a Third Theory of Law" (2016-17) 48:1-2 Owl of Minerva 57.

91. Since writing this essay I have been reminded of this issue in Derrida, "Declarations of Independence" in Jacques Derrida, *Negotiations: Interventions and Interviews 1971-2001*, edited, translated and with an introduction by Elizabeth Rottenberg (Stanford University Press, 2002) at 46.

92. Solum, "We are all Originalists Now", *supra* note 89 at 18.

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question could be asked of the values posited in the "living" present of constitutional analysis. As Hegel once lectured, "[t]here is nothing easier than to formulate the general principles of a constitution, for in our day these concepts have become conventional abstractions."[93] Indeed, because the Critical Date and the Founding Values are arbitrarily posited, the beginning of structured time is violently imposed—culturally violent, that is—upon experiential time. No founding fathers nor contemporary jurists, however brilliant, stand as god-like authors outside their own culture. No Critical Date, posited by such founding fathers, and no Value posited by contemporary senior judges, can change the inward structure of their own legal consciousness overnight.

d) Structured Time as Reductive

Next, the Critical Date and Values are reductive. We just cannot reduce an historically earlier legal order or a multiplicity of legal orders with a later one by some general concept about a posited Critical Date or a Value. Nor can we reduce a singular experienced event by abstracting it as a typification. This is so because once a beginning is posited as a fact, the experiential factors constituting the alleged fact are barred from analysis. But this foreclosure of interrogation leaves unaddressed the possibility that a very different sense of law. The constituting of the beginning raises the possibility that a very different sense of law is immanent in the experiential time. Without understanding a text or a value as an event through experiential time, the text or value is meaningless in the sense of meaning as the constitution of a meant, as opposed to a posited, object. This is so although it may well possess a sense of the beginning of structured time as if definitive of the founding moment of binding laws. Scholars of comparative law should heed Hegel's caution in one 1819-20 lecture that "[n]othing is more foolish" than to compare and evaluate different peoples by comparing the words in texts.[94] The final referent of the justification of ordinary laws, whether regressive or progressive, is used to compare and evaluate the ethoi of different languages and cultures by comparing words or the uses of words in the Critical Date or by comparing one Value with another.

e) The Legal Objectivity of Structured Time

There is a further problem particularly obvious in the light of my comments above. Legal time, as structured, reinforces the belief in the objectivity of law. The jurist acts and must act by virtue of the assumed beginning of time. That beginning excludes experienced time as if it does not and has not existed as law. One might mistakenly proceed as if the 'before' and 'after' of the structured time can be reconciled by an appeal to intermediate principles representing universal rights. It cannot be. This is so because such universal rights and their intermediate

93. GWF Hegel, *Lectures on Natural Right and Political Science*, *supra* note 81, 134R, line 190.
94. Lectures delivered by Hegel in 1818/19 at Berlin University and translated in *Lectures on Natural Right and Political Science*, *supra* note 81, Appendix.

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principles are identified and binding inside the bounded structured time. What is considered outside or temporally and analytically prior to the boundary does not count as legal knowledge within structured time. A social left-over remains concealed within structured time in any effort to reconcile experienced time with structured time. More generally, when all is said and done, the exclusion of pre-legal communities is perpetuated.

Indeed, structured legal time and its manifestation in a Critical Date of the past or in a Value of the living present proceeds as if it lacks any social presuppositions analytically and temporally (in the sense of structured time) prior to the originating 'facts' attributed to the birth of structured time. But is structured time so presupposition-less? Is it so presupposition-less if there is invariably only a remnant of experienced time in structured time? Such an issue now comes to the fore in judicial and political efforts of Canadians and Canadian state officials to reconcile with Indigenous inhabitants for the past harms, including the assimilation of Indigenous cultures, into structured time. For, in the light of my argument, the legitimacy of structured time depends upon the immanent constitution of meaning. Such a juridical meaning embodies what others have called the lived laws.

From the standpoint of structured time, the conceptual inaccessibility to experienced time raises several further issues. First, is the beginning an uncontrolled and uncontrollable fact? Second, does the posited character of the Critical Date and the Founding Values drag legal time into an arbitrary beginning? Third, if the ultimate legitimacy were left to the desires of the founding fathers in a regressive argument or of the values of the contemporary legal profession (reinforced by the legal culture of the professional law schools) in a progressive argument, would the arbitrary beginning represent legitimacy? We have been led to believe in Anglo-American Conceptual Jurisprudence that the posit of the Critical Date or the founding Values can be legitimated by the acts of justification. And so, we regressively proceed backward through our previous arguments to some final pure thought or Grundnorm. Or, we justify the 'fact' of our beliefs and convictions in the quest for the core of concepts, a narrative that has worked itself pure, or some final notion such as the concept of dignity. We do so, though, at what price? How can the jurist act legitimately if the inhabitants' and aliens' experienced time is excluded from constitutional analysis ab initio?

How can the rules-concepts inside structured time be the source of legitimate punishment, property claim, treaty or customary international law if the performative character of words and other signs addresses those whose experienced time is excluded from the origin of legal time? How can individuals and groups on the same territory socially relate with each other in the different ethoi of different experienced time? In such circumstances the subject's face is masked outside of time. The mask hides the experienced time nested inside the re-constituting of meaning in the structured time of the jurist, client, witness or other legal person. The addressee, though, acts in a different sense of time than that of the structured time of the institutional objectivity. For example, because the totalising state-centric discourse assumes a territorial border that separates

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the territorial space of a state from the 'rightful' locus of the addressee defined in terms of the border, even a universalist claim, such as one finds in multilateral and regional human rights treaties today, need not access and cannot access the intentional acts of the legal person defined as such inside structure time.

Experiential time is externalized from structured time as if pre-legal, pre-historical or unknowable—unknowable, that is, to the internal standpoint of the structured time of lawyers, judges and other members of the legal profession. Experiential time remains a mysterious "phantom" that "haunts" legal analysis, to reaffirm H.L.A. Hart.[95] Consequently, the meaning-constituting acts of the addressee immersed through experiential time escapes the structure of legal time. Because of the exteriority of structured time vis-à-vis experienced time, individual rights and the state duties rest in a reified world separate from the sociality of experienced time.

In sum, the externality of structured time remains unrelated to the experienced time. The originating moment of a constitution—whether a Critical Date or Values of the present—freezes time and by so doing, reduces experiential time to a structured time with a beginning. The singular experienced event is thereby immunized from social change—or, at least, we presume so. This sense of time contrasts with the experience of time as if the latter's string-like continuity where an event recedes into the past and may eventually be forgotten from the standpoint of the 'now'. The more rigorous the jurist's intellectualized differences amongst concepts, the more binding does the external sense of constitutionality seem to be. The separation and concealment of structured time from the experienced time nested in a social ethos offers the framework for individuals to dominate and profit from others. For, the differentiation of concepts and then their enclosure of experienced event all with reference to the beginning of structured time portends to describe legal reality while that social meaning in experienced time remains logically inaccessible from the standpoint of structured time. The language of structured time, free of experience, becomes a foreign language with complicated conceptual formalities.

Conclusion

The Critical Date and the Founding Values of legal time leave one with this question: 'Is there a social left-over or remainder that jurists have failed to address in structured time?' I have argued that by taking the Critical Date or the Values for granted as the birth of legal time, the meaning-constituting act embodied in experienced and immanent time is submerged in structured time as if the law begins anew with each Critical Date or the posit of Fundamental Values in the living present of each historical phase. From the standpoint of the creation of seeming independent phases of the past, present and future in structured time more generally, the experienced time analytically and temporally before the Critical Date or the Fundamental Values is forgotten. In such a circumstance, though, jurists have

95. Hart, *The Concept of Law*, *supra* note 27 at 87.

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forgotten that they ever forgot what had been experienced in past events before the Critical Date or the Values were posited except as re-presented through the familiar signs of the official structured time. The past, of course, is inaccessible within the structured time because the Critical Date and the Values can only re-present experienced time once there is a beginning to legal time and then only through the familiar language of the structured time.

The consequence is that pre-legal communities and extra-legal social phenomena have been so characterized because the understanding of time in law, that is, legal time, has been dominated by conceptual structuring. The experiential time in communities so categorized as 'pre' or 'extra' has been rendered irrelevant until experiential time is re-presented from the internal standpoint of structured time. Events experienced through an unruptured continuity of time, however, appear as detached fragments whenever jurists reflect, deliberate, justify and decide about the past events. It may also be that the meaning-constituting acts experienced in proto-legality continue to change despite the acceptance inside structured time that such experiential time is a fact fixed in time.

The point is that the belief that the time relevant to law, that is, legal time, must always have a beginning cannot be challenged without dissolving the boundary separating structured time and experiential time, the discourse of law and of non-law. Yet, the use of a Critical Date or Value begs the question of what counts as legal knowledge. If this issue is now apparent, what is the nature of such a social remainder of experienced time concealed inside the structured time? This issue is crucial.

Why is the juristically structured legal time the only time where laws can be identified and considered legitimate? If experienced time is excluded, it can only be represented through the familiar language of structured time. The possibility exists that what has been concealed or forgotten may well suddenly emerge as if a volcanic social eruption inside the universal, explanatory and justificatory claims in structured time. Why does the analytic leap lead to the obligatory feature of a legal claim by or on behalf of peoples whose experienced time remains unrecognized, forgotten or re-presented through the official language of structured time? Why is the experience of time analytically and contingently before structured time not considered performative or of an action-creating character? How can a jurist re-presenting the past through the official language of structured time recognize a claim as legal without addressing the silent experienced time attributed to the pre-legal world? Is the experienced time not a condition of the possibility of law as structured time? Are we left with legal claims as if they were ultimately dwelling in the air? If the experienced time concealed inside the structured time is unknown to, unrecognized by, the jurists of structured time, does not such a concealment call for a renewed interest in the nature of binding laws?

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