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BOOK REVIEW

Law's Abstract Judgement and Language as 'the House of Being'

Law's Judgement

by William Lucy, Oxford: Hart Publishing, 2017, 260 + x pp. ISBN: 9781509913282.

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Introduction

In *Law's Judgement*, William Lucy goes about his business in ways that call analytic philosophy to mind. He isolates the features or 'components' of law's abstract judgement (LAJ) and points up the relations between them (p 5).[1] He also relates his analysis to a more general consideration to which he applies the label 'institutional design' (which encompasses the specification of particular norms, doctrines, etc, and their integration into a particular legal system) (p 27). The result of these efforts is highly illuminating. However, it would be wrong to classify *Law's Judgement* as a straightforward instance of legal philosophy in an analytic mode. This is no accident. For Lucy makes it clear that his approach and that of analytic philosophy are different. He does this by rooting his analysis in a particular context (rather than seeking to pursue 'non-local truth' by downplaying or ignoring contextual considerations).[2] The context on which Lucy focuses is that of 'post-feudal', 'bourgeois', or 'liberal' law (pp 22 and 253). Moreover, he identifies himself as seeking to excavate or retrieve from this context the practical impulses that find expression in LAJ. Excavation or retrieval on the model Lucy adopts involves attending closely to the contents of actually-existing legal systems such as those of UK, the USA, and other 'western democracies' (p 163). More particularly, it involves him in extracting from these systems some of the values and ideals that are immanent within them – so as to acquire 'a better, fuller understanding' of their operations (p 152).

As well as taking on this analytic-cum-excavatory task, Lucy also has normative aims. He tells us that 'many jurists and philosophers think that there is a great deal wrong' with LAJ (p 22). Lucy seeks to 'redress the balance of argument' by pointing up the values that inhere within, cluster around, and shape LAJ (p 34). To this end, he devotes close attention to the context in which LAJ occupies a practically significant place. This approach yields an analysis that avoids a pitfall that, on the account offered by Iris Murdoch, is a prominent feature of analytic philosophy. This is its 'dryness'.[3] For reasons we will consider below, this is very much a point in Lucy's favour. In this review, we will explore this point by reference to Charles Taylor, a philosopher who (like Lucy) exhibits discipline of the sort

[†]I am grateful to David McGrogan, Patrick O'Callaghan, and Ian Ward for their comments on earlier drafts of this review.

[1]Lucy points out that his spelling of 'judgement' 'bears no significance', other than that he 'eschew[s] the lawyerly conceit of referring to law's judgements as "judgments"' (p 2, fn 3).

[2]On the pursuit of 'non-local truth' as philosophy's central concern, see T Nagel *The View From Nowhere* (Oxford: Oxford University Press, 1986) p 10.

[3]I Murdoch 'Against dryness: a polemical sketch' (January 1961) Encounter XVI 16. (Murdoch's essay is highly compressed and her critique of dryness applies (in ways that invite development) to analytic philosophy, Continental philosophy and twentieth century literature.)

we associate with the analytic tradition. But Taylor (again like Lucy) is chary of analytic philosophy.[4] As we will see, the upshot is an analysis that carries us in a direction far removed from the analytic tradition. For Lucy's analysis of the context in which law's abstract judgement has its life intersects with Martin Heidegger's account of language as 'the house of being'. Lucy thus provides clues as to how it might be possible to establish a fruitful relationship between the analytic and Continental contributions to what he calls 'the philosophical enterprise' (p 151).

Lucy on Law's Abstract Judgement

Lucy tells us that 'law's judgement' is 'abstract'. By this he means that it purports to judge 'all its addressees' in the same way (p 4). He develops this point by identifying law's abstract judgement as having three components. First, law 'usually sees its addressees not in all their particularity but, rather, as identical abstract beings' (p 4). For this reason, LAJ contains a 'presumptive identity' component (p 14). Secondly, 'general and objective standards' usually have applicability to all the law's addressees. LAJ thus contains a 'uniformity component' (pp 4 and 188). Thirdly, LAJ contains what Lucy calls an 'avoidability component' (pp 4–5). This element of LAJ limits the applicability of its uniformity component by making it possible for addressees of the law to make 'exculpatory claims' in some circumstances (p 5). As well as itemising LAJ's components, Lucy identifies it as being 'to the forefront of contemporary law's self-understanding' (p 21). By this he means that it captures a sense of what Charles Taylor has called 'aboutness' or 'intentionality' at work in particular practices and institutions.[5] Lucy brings just such a sense of aboutness or intentionality into focus when he directs his readers' attention to the context in which his analysis proceeds. This is a 'liberal' or 'bourgeois' context that, at once, shapes and owes some of its distinct normative character to LAJ. It is a context in which an egalitarian philosophy of government has exerted an increasingly powerful influence on law's operations. According to this philosophy, all addressees of the law have equal moral worth. This is a point Lucy develops by reference to, inter alios, Samuel Scheffler on 'the social and political ideal of equality' and Ronald Dworkin on 'the right to equal concern and respect' (pp 184–200). The egalitarianism Lucy finds in the legal systems he surveys leads him to draw a contrast between them and the feudal settings from which they emerged. This contrast brings into focus the moral attractions of the contexts on which Lucy fastens his attention. While Lucy places emphasis on these attractions, he tells us that LAJ operates on a basis very different from moral judgement as we regularly encounter it in our personal lives. For when we interact with 'our nearest and dearest', we expect them to judge us 'in all our particularity' (p 4). By contrast, LAJ fastens on a limited range of considerations (eg 'basic capacity' or a 'relatively undemanding' conception of agency) (p 64). This leads Lucy to argue that we find in LAJ a commitment to 'opacity' that shields law's addressees from modes of judgement that could tend in the direction of an intrusive 'life-course audit' (pp 162, 187 and 240).

Lucy's efforts to isolate LAJ's features, to distinguish it from other modes of assessment, and to situate it in the context where it has force, make apparent his commitment to analytic rigour and context-sensitivity. But to these features of his exposition, we must add the aim of 'redress[ing] the argumentative balance' in LAJ's favour (p 249). *Law's Judgement* is thus a normative (as well as an analytic-cum-excavatory) project. It seeks to recommend the feature of liberal law to which it devotes attention. While Lucy takes on this task, he recognises that it is 'daunting' (p 25). For the 'charge-sheet' against LAJ is lengthy (p 25). On some analyses, it is an 'anachronism': the residue of a bourgeois era that saw the 'birth of capitalism' and that has passed out of existence (p 22). Just as Lucy is alive to critics of LAJ who argue along these lines, he draws on others who bemoan

[4]NH Smith *C Taylor*: *Meaning, Morals and Modernity* (Cambridge: Polity, 2002) pp 10–11. See also p 12 (where Smith notes that Iris Murdoch taught Taylor as a postgraduate in Oxford and had an 'enduring influence' on him).

[5]C Taylor *The Language Animal*: *The Full Shape of the Human Linguistic Capacity* (Cambridge, Mass: Harvard University, 2016) p 15.

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the way in which it 'suppresses particularity' and (in this way) impedes the pursuit of justice (p 23). He notes that, on their respective accounts, justice requires us to be attentive to individuals and the contexts in which they act.

Alongside these criticisms, Lucy sets the complaint that 'although law is often a means of treating people equally, it is simultaneously … often a means of treating them unequally' (p 24). This, he adds, can generate problems of unfairness. Lucy illustrates this point by reference to, inter alios, 'shortcomers': eg people who cannot (due to mental or physical impairment) meet negligence law's reasonable person standard (p 25). He also flags up the fact that a set of countervailing normative pressures throw light on judicial reluctance to depart from LAJ's uniformity component. Here, he points to an inclusionary impulse at work in the law that derives force from, among other things, the value of 'humanity' and 'dignity' (which, on his nuanced analysis, is both a 'value' and a 'status') (p 147). Moreover, he draws on Thomas E Hill's account of Immanuel Kant's moral philosophy. Hill finds in Kant 'something like a precautionary principle' that enjoins us to treat others, wherever possible, on the basis of equality (p 133). Lucy adds that what Hill has to say on this principle has relevance to case law on negligence law's reasonable person standard that also (as we noted earlier) attracts well-founded criticism running on the theme of unfairness. By alerting us to these two ways of responding to this body of law, he gives us a vivid example of the cross-pressured circumstances in which judges have, on occasion, to make decisions.

This analysis has relevance to a more general but closely associated feature of Lucy's exposition. This is his account of 'law's person' (p 65 (drawing on Naffine)).[6] By 'law's person' he means the conception (or conceptions) of a person that find expression in a legal system. Here, Lucy draws out of the legal systems he surveys a view of the person as an agent who sits on a plane of equality with others. On Lucy's account, this 'agential' person can respond to reasons for action that make him or her an apt addressee of the law (p 56). Moreover, he argues that this conception of the person and LAJ support the claim that an 'inclusionary' or 'fraternal' idea is at work in the law (p 230). However, he also notes that 'oddity' is a feature of some accounts of law's person (p 47). On this topic he makes reference to the Court of Appeal's decision in *Mansfield v Weetabix*.[7] In *Mansfield*, the defendant inflicted harm on the claimant while driving in a state of mental impairment (due to hypoglycaemia). Consequently, he was unable to meet the usual requirements of negligence law's reasonable person standard. The Appeal Court responded to this situation by identifying the defendant's condition as a circumstance that developed gradually (with the result that he was unable to grasp the threat he posed to others).[8] The Court also concluded that it would be unjust to resolve the claim against the defendant since this would involve the imposition of strict liability on a shortcomer.[9] We might describe the 'oddity' Lucy finds in *Mansfield v Weetabix* (and cases like it) more accurately as ambiguity. This is because we can, as Lucy recognises, also interpret *Mansfield* as a case in which the Court of Appeal calibrated its assessment of reasonableness to the 'circumstances' in which the defendant inflicted harm.[10] This is an interpretation that lends support to his account of the 'inclusionary' idea he finds in the law.

In *Mansfield v Weetabix* and cases like it, we see judges struggling to make clear responses to disputes that raise complex questions about agency. Consider *Dunnage v Randall*.[11] In *Dunnage*, the claimant suffered severe burns when he tried to stop a visitor to his home (who was suffering from paranoid schizophrenia) setting fire to himself with petrol. The Court of Appeal applied the reasonable person standard (in an unmodified form) to the visitor's conduct (notwithstanding his mental

[6]See also N Naffine *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Hart Publishing, 2009) p 13.

[7]*Mansfield v Weetabix* [1998] 1 WLR 1263.

[8]Ibid, at 1268 per Leggatt LJ.

[9]Ibid.

[10]Here Lucy draws on M Moran *Rethinking the Reasonable Person*: *an Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003) p 21 (p 47, fn 30).

[11]*Dunnage v Randall* [2015] EWCA Civ 673.

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condition) and, having done so, decided in favour of the claimant. This was an inevitably controversial response to an unprepossessing choice. The Court could leave the claimant (whom Rafferty LJ described as a 'rescuer') uncompensated.[12] Alternatively, it could apply the inapposite label 'faulty' to the conduct that grounded the claim. While the Court recognised that the visitor had not inflicted harm on the claimant wilfully, it determined that (in the absence of some 'unheralded' and 'incapacitating attack') he had been 'acting at [the] relevant times'.[13] In staking out this position, the Court invites sharp moral and doctrinal criticism (the application of a fault-based standard to a short-comer and inconsistency with the decision in *Mansfield*). Criticism along these lines leaves the law looking morally compromised and doctrinally ramshackle.[14] *Dunnage* is thus a case that raises awkward questions about a tendency in the law towards idealisation (most obviously, the presumption of uniformity within LAJ). To explain the decision in *Dunnage* by reference to the concept of fault is to treat the man responsible for the claimant's injuries as an 'agential' person. But the Court of Appeal recognised the implausibility of doing this even as it rendered its decision (by describing him as being in a 'floridly psychotic and highly paranoid' condition).[15] Here, it is tempting to fall back on talk of 'oddity'. While this is the case, it may, for two reasons, be more accurate to talk of institutional ambiguity. First, *Dunnage* provides an instance of pragmatic decision-making. The Court worked along the lines it did so as to give the claimant access to compensation through the visitor's ('householder') insurance policy (which provided cover for accidental but not wilful injury).[16] Secondly, the Appeal Court reached its decision in a context where the impulse to be pragmatic competes with strong tendencies towards idealisation.

Lucy gives us tools with which to analyse the tendency towards idealisation apparent in the law when he engages in a process of excavation or renovation. By 'excavation', he means the effort to identify values within the institutions of which LAJ is a part that will make their and its practical appeal more apparent (p 26). He identifies, inter alia, 'impartiality', 'dignity', and 'equality' as being among these values (p 26). So too is a notion of 'community' that he associates with 'fraternity'. Lucy argues that LAJ serves the end of impartiality by requiring those who apply the law to focus on a 'limited' range of considerations (rather than adopting the 'unseeing' standpoint we associate with '*justitia*') (p 243). When he turns to 'dignity', he argues that LAJ underwrites this value-cum-status by assuming that all people have the qualities we sum up in the word 'humanity' (eg agency) (at least in an undemanding form) (p 244). This point brings him close to 'equality'. On this topic, he places emphasis on the way in which LAJ assumes the equal standing of those to whom it applies (p 203). From here, it is but a short step to 'community'. On Lucy's account, 'community' has to do with the pursuit of 'principle' (by which he means acting on practical postulates – most obviously, legal norms – that all relevant people can endorse) (p 244). In his effort to knit LAJ together with a group of considerations that provide it with 'normative props', Lucy adopts a method that (as he notes) exhibits similarities to that employed by Ronald Dworkin in, for example, *Justice for Hedgehogs* (pp 166 and 197).[17] This approach is perhaps unsurprising in one who admits to 'a penchant for neatness' (p 201).

Lucy tells us that his aim, in pointing up the relationship between LAJ and 'impartiality', 'dignity', 'equality', and 'community' is to offer an analysis that we can label 'holistic' (p 247). This is a point he drives home in a number of other ways. He forges links between LAJ, the larger politico-legal whole of which it is a part, and the community it plays a significant part in instantiating and sustaining. This leads him to describe LAJ as a 'social-institutional form' that has its life in what Alan Norrie describes

[12]Ibid, at [3] per Rafferty LJ.

[13]Ibid, at [127] and [136] per Vos LJ.

[14]In *Dunnage*, the Court of Appeal sought to distinguish *Mansfield v Weetabix* on grounds that academic commentators have found unconvincing. See *Dunnage v Randall*, above n 11, at [147] (where Arden LJ described the visitor as not having been 'in control of machinery of which he unforeseeably lo[st] control'), and J Steele *Tort Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 4th edn, 2017) p 124.

[15]*Dunnage v Randall*, above n 11, at [25] per Rafferty LJ.

[16]Ibid, at [156] per Arden LJ, and Steele, above n 14, p 124.

[17]R Dworkin *Justice for Hedgehogs* (Cambridge, Mass: Harvard University Press, 2011) p 328.

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as a wider 'constellation' (p 245). Consequently, Lucy is able to throw light on the 'liberal' context in which he roots his analysis. This is a context in which LAJ bulks large as a reference point for reflection on law's applicability to particular sets of circumstances. Lucy makes this clear when he states that those who engage in such reflection typically affirm LAJ's 'components' even when they apply the law in ways that 'do a poor job of instantiating them' (p 11). Here, he identifies LAJ's components as authoritative guides to action around which judges and other legal officials feel an obligation to 'navigate' (p 11). Thus they are 'fixed agitation points' that anchor the law's response to practical problems (p 11).

We will examine this point in greater detail below. But before we turn to it, some points Lucy makes concerning legal philosophy merit consideration since they have relevance to the language-focused response that this review makes to his account of LAJ. Lucy describes his approach to LAJ as 'broadly jurisprudential' (p 31). Moreover, he distinguishes his jurisprudential position from two approaches to legal philosophy that have attracted criticism on the ground that they are 'boring' (p 31). The first of these approaches is that of 'the self-consciously "analytical" wing of … jurisprudence' (which has, among other things, attended, in fine-grained detail, to 'the existence conditions of law in general') (p 31). Lucy finds in legal philosophy on this model a tendency towards abstraction that impedes 'engagement' with law as it exists (p 31). He also takes philosophers who work along these lines to task on the ground that they breach a 'duty … to get clear about the nature of our … social condition' (p 242). The second body of thought from which he distances himself is 'an older tradition of jurisprudence' that finds expression in 'a … study of legal concepts' that is 'dreary' and (so it would seem) directionless (p 32).[18] Lucy also describes these two bodies of thought as 'the Scylla and Charybdis' between which he seeks to 'sail' (p 32).

This is an aspiration that has affinities with that on display in Iris Murdoch's essay 'Against Dryness'. Murdoch criticises analytic philosophy on account of its 'dryness'. According to Murdoch, 'dryness' manifests itself when philosophers cease to 'grapple[ ] with reality' as a result of striving to make 'clear' responses to 'small', 'self-contained' problems.[19] But while critical of 'dryness', Murdoch was also unimpressed by investigations that, in their determination to record facts, turn a particular context into a 'large, shapeless quasi-documentary object'.[20] On her analysis, investigation on this model often shows too little interest in analysis and the insights it can yield. Murdoch's critique of 'dryness' has obvious relevance to the analytical wing of jurisprudence Lucy describes (and her determination to grapple with reality calls to mind the 'duty' he identifies philosophers as being under). Likewise, her critical response to fact-focused contextual investigation has relevance to the 'older tradition of jurisprudence' Lucy finds wanting. In each case, a strong tendency to become bogged down in detail is apparent. Thus we find in Lucy, as in Murdoch, a call for philosophical analysis that is, at once, alive to but able to resist the tendency to become enmeshed in and perhaps even blinded by context. But while this is the case, there are reasons for thinking that Lucy could and (given his aims) should have pushed his analysis further in the direction indicated by Murdoch. This is a point to which we will return, having looked more closely at law and language.

Law, language, and 'the house of being'

As we have noted, Lucy identifies his analysis as applicable to (post-feudal) liberal legal orders. His concerns (as he recognises) thus intersect with those of HLA Hart in *The Concept of Law* (pp 100–101). While Hart understood himself to be making a contribution to general jurisprudence, he focused on modern municipal (or, more particularly, liberal or Western) legal systems. He identifies these

[18]Lucy illustrates this tradition by reference to 'the jurisprudence textbooks' of, inter alios, J Salmond *On Jurisprudence* (London: Sweet & Maxwell, 12th edn, 1902) and F Pollock *A First Book on Jurisprudence* (London: Macmillan, 6th edn, 1929).

[19]Murdoch, above n 3, 19. See also R. Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Cambridge, Massachusetts: Harvard University Press, 1998), 129–130 (on the 'stiff, awkward, and isolated' results of philosophical dryness).

[20]Murdoch, above n 3, at 18.

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systems as normative spaces that radiate down and out from a highest-order norm (the 'rule of recognition') by reference to which it is possible to determine the 'validity' of lower-order law.[21] In his analysis, Hart gave pride of place to rules. Here, we see him taking a close interest in the contents of the normative space he describes. It is an interest he shares with Lucy. For Lucy, as we have noted, identifies LAJ and the values with which he associates it as prominent features of (or, at least, relevant to the operations of) just the sort of normative spaces Hart describes. Likewise, Hart and Lucy each show an interest in core and more marginal concerns within the spaces they examine. This is apparent in *The Concept of Law* when Hart draws a distinction between the core of certainty that legal rules exhibit and the penumbra of doubt that marks their outer limits.[22] LAJ is the core concern on which Lucy focuses. But its components (as we noted earlier) constitute 'agitation points' that (like Hart's penumbra) invite critical reflection and disagreement. In Hart, disagreement has to do with the question as to whether those who apply the law should encompass a penumbral set of circumstances within an existing rule. As with the disagreements on which Hart dwells, Lucy focuses on what we might call scope questions and the 'reflective critical attitude' exhibited by those who respond to them (p 101).[23] Should we, for example, treat a defendant who is a 'short-comer' as an apt addressee of negligence law's reasonable person test? Or should we treat his or her cognitive or other limitations as a basis on which to depart from LAJ's presumptive identity component? Those who answer these and other such questions exercise (or, at least, seek to influence the exercise of) what Lucy calls 'stipulative sovereignty over [legal] language' (p 54).

Lucy tells us that, as we reflect on and work up answers to questions of this sort, we adopt the 'participants' point of view' (p 29). Hart makes the same point vis-à-vis legal language when he tells us that we acquire a sense of how to apply it when we take up the point of view 'internal' to a legal system.[24] Here, we see both Lucy and Hart talking in terms that have to do with 'reflection' of the sort that Charles Taylor describes in *The Language Animal*. Taylor takes his cues on reflection from the eighteenth-century philosopher, Gottfried Herder, and argues that language is at once an expression of and constituent of the context in which people use it. On this view, language does not simply pick out the objects to which it applies (eg a person). Rather, it gives expression to a particular understanding of such objects. Taylor develops this point by drawing on another philosopher, Martin Heidegger. Heidegger (who had a taste for making grand statements of position) described language as 'the house of being'.[25] Heidegger used this phrase to convey a sense of the way in which those who use a particular language have at their disposal a normatively charged resource that delivers a distinct intersubjective experience. Taylor presses this point further when he talks of 'an environment' in which 'action and design' determine how things are understood and 'arranged'.[26] Two points afford a basis on which to explain how Taylor's account of language relates to Lucy's exposition. First, Taylor (channelling Herder and Heidegger) lends support to the view that we should see LAJ as a constituent of a distinct (post-feudal) 'constellation' or 'environment'. It is a constellation in which those who participate in law's operations do so in ways that sustain and shape the life of a liberal ('fraternal') community. They do this by using and reflecting on the range of circumstances in which it is apt to apply the language in which LAJ finds expression. They thus exhibit a strong commitment to 'elucidation' and 'dialogue' (pp 228 and 250). Lucy makes the practical significance of these points apparent when, for example, he identifies 'dignity' (understood as both a 'value' and a 'status') as informing the law in a wide range of areas (p 147). These areas include prohibitions on torture, demeaning punishment, and hate speech, 'rights understood as protected spheres of choice', the award of aggravated damages, and guarantees against penury and destitution (pp 153–154 and 156). Secondly, the context in which Lucy roots his analysis provides an example of 'the house of being' (as Heidegger understands it). For LAJ

[21]HLA Hart *The Concept of Law* (Oxford: Clarendon Press, 3rd edn, 2012) p 108.
[22]Ibid, pp 123 and 134.
[23]Lucy makes reference to HLA Hart *The Concept of Law* (Oxford: Clarendon Press, 2nd edn, 1994) p 57.
[24]Hart, above n 21, pp 98, 104, and 108.
[25]M Heidegger *Pathmarks* (Cambridge: Cambridge University Press, 1998) p 254. See also Taylor, above n 5, p 22.
[26]Taylor, above n 5, pp 22–23.

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and the values with which Lucy associates it (impartiality, dignity, equality, and community) are building blocks in a distinctly liberal edifice.

While we can use Taylor to bring these points out, we should also note a significant difference between his concerns and those of Lucy. Taylor focuses on cultural contexts in which reflective processes (that language shapes in particular ways) unfold. While context and language have prominence in Lucy's exposition, his attention is very much on institutional settings that exhibit a strong commitment to systematicity. Consequently, he devotes close attention to a set of normative outputs (most obviously, the components of LAJ) common to the legal systems he surveys. But while an effort to bring these outputs into focus features in his exposition, it is most certainly not all that it has to offer. Lucy is alive to reflection on the model that features in Taylor's analysis. This is plain to see when he talks of the 'agitation points' constituted by LAJ's components. These agitation points invite processes of reflection that are as much a part of the institutional contexts he examines as are the norms that occupy a place in them. Moreover, he conveys a sense of the way in which the atmosphere can change in these particular houses of being. For he notes that controversies that have to do with dignity (and the other considerations that feature in his analysis) may, in the context of 'quotidian … legal controversies', generate 'resonances and dissonances' (p 152).

These are points we can develop by reference to the concept of community and what we can call a placeholder theory of language. An understanding of 'community', in a sense that Lucy does not mention, affords a basis on which to offer an account of language (and likewise institutions) as placeholders. The understanding in question is that of an interpretive community (in the sense Stanley Fish has elaborated). Fish tells us that such a community exists in circumstances where a group is composed of individuals who apprehend the objects to which they devote attention in the same way. Fish employs this concept of community to support the conclusion that, on matters of interpretation, our focus should be neither on the words of a text nor on the intentions of its author(s).[27] Rather, it should be on the 'base of agreement' that exists between groups whose members ascribe significance to particular objects (eg judges who treat the reasonable person standard as an authoritative but malleable reference point when deciding negligence claims).[28] Fish tells us that this base of agreement reflects 'concerns' that the members of an interpretive community have in common.[29] While Fish talks of common concerns that reflect a base of agreement, he does not mean that the members of such a community are as one on all points at all times. He recognises that interpretive disagreements are a feature of life in such contexts. However, the base of agreement he describes works to anchor interpretive disputes. This is because the current consensus on meaning presents those who seek to move away from it with a starting point to which they must be attentive. Moreover, they must stake out positions that are sufficiently persuasive to elicit a positive response from other group members who treat the starting point from which they begin as authoritative.

Fish's account of interpretive communities reveals language to be a placeholder for understandings that are amenable to alteration in the light of argument that is, at once, rooted in context and persuasive. Lucy offers a similar analysis. This is apparent when he describes the components of LAJ as 'agitation points' around which addressees of the law may seek to 'navigate'. A further affinity between his analysis and that of Fish becomes apparent when we recall the emphasis he places on 'dialogue' and 'elucidation'. The dialogue he has in mind relates, inter alia, to LAJ's components and associated matters of institutional design. Moreover, the more general ideas that feature in Lucy's analysis (impartiality, dignity, equality, etc) inflect participants' thinking even in circumstances where they do not make explicit appeal to them. Here, we can see shared 'concerns' of the sort that feature in Fish's account of interpretive communities. These concerns become, as it were, a hub around which the life of a

[27]SE Fish *Is There A Text in This Class? The Authority of Interpretive Communities* (Cambridge, Mass: Harvard University Press, 1980) ch 13.

[28]Ibid, p 147.

[29]SE Fish *Think Again: Contrarian Reflections on Life, Culture, Politics, Religion, Law, and Education* (Princeton: Princeton University Press, 2015) p 181. See also L Wittgenstein *Philosophical Investigations* (Oxford: Basil Blackwell, GEM Anscombe (trans), 1978 [1953]) p 88 [242] (on agreement in judgments).

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fraternal community moves. Such movement is a practical necessity. For we are (as Hart recognised in his account of penumbral problems) beset by contingencies that raise awkward questions about the positions (linguistic and, more particularly, legal) that we have staked out.[30] In light of these points, we can draw the conclusion that our understandings and the institutions in which they find expression (eg LAJ) create opportunities to engage in reflection on the model Taylor describes. While this is the case, we should not assume that reflection will yield particularly satisfactory results. The cases Lucy considers on short-comers illustrate this point. These cases present us with complexities of a sort with which philosophy on the dry model Murdoch criticises is reluctant to engage (eg contexts that, in all their particularity, take on a messy aspect). However (and for reasons we will explore below), it does not follow from this point that the contextual approach on display in *Law's Judgement* is unable to deliver non-local truths.

Contextual analysis and general jurisprudence

Lucy (like Murdoch) cleaves to the idea that philosophy can, and should, seek to pursue truths that are alive to context. To this end, he has sought to throw light on a prominent institutional feature of the 'liberal' legal context he surveys. To work along these lines is fraught with difficulty. The most straightforward part of the job would seem to be rigorous analysis. We see Lucy doing this when he brings into focus the components of LAJ and the institutional (and wider 'political, social and cultural') context of which it is a part (p 152). Matters take on a trickier appearance when he offers an analysis of the 'participants' point of view'. Those who seek to 'see' law (and other institutions) from the inside court the danger of embracing, rather than coolly appraising, the contexts and projects on which they focus their attention.[31] But to draw a sharp distinction between enumerating the features of an institution or practice and the attitudes of those who participate in its operations is surely mistaken. For we cannot, as we noted earlier, unscramble the two. Taylor's account of reflection shows this to be the case.[32]

When we view Lucy's exposition from the standpoint of analytic philosophy, it invites the criticism that context-sensitivity compromises it as a contribution to general jurisprudence. For the general jurisprude seeks to deliver universal (or 'non-local') truth-claims. Moreover, a proponent of jurisprudence on this model might find in Lucy a degree of immersion in context that reduces his contribution to anthropology and/or history (a meditation on the way in which the denizens of a particular context 'do things around here').[33] This is a way of responding to contextual analysis to which Lucy is alive. He makes this clear when he notes that critics of such an approach may write it off as 'mere reportage' (p 138). However, there are reasons for thinking that criticism running on this theme would be wide of the mark. The links we have forged between Lucy's exposition and Taylor on language and Fish on interpretive communities afford a basis on which to explain why this is the case. Lucy, Taylor, and Fish (in their respective and complementary ways) make it possible for us to see LAJ as a linguistic placeholder. When we view it in this way, we can see it as a token of a universal type: a linguistic artefact that sustains 'the house of being' in a particular form. If this point is correct, it becomes difficult (or perhaps even impossible) for a critic pursuing the theme we considered earlier to draw the conclusion that Lucy's analysis fails to pass muster as a contribution to general jurisprudence.

[30]Hart, above n 21, p 133.

[31]See JM Balkin 'Understanding legal understanding: the legal subject and the problem of legal coherence' (1995) 105 Yale LJ 105 at 162 (on the problems of 'conformation'; and 'co-optation') (drawing on H-G Gadamer *Truth and Method* (New York: Seabury Press, 1975) p 446).

[32]While we cannot pursue the point in detail here, Taylor's (Herderian-cum-Heideggerian) account of reflection gives expression to the assumption that 'facts' are always theory-laden. On the theory-ladenness of fact, see R Mullender 'There is no such thing as a safe space' (2019) 82 Modern Law Review 549.

[33]See S Collini *Absent Minds: Intellectuals in Britain* (Oxford: Oxford University Press, 2006) p 342 (on the charge of 'relativism' as a response to efforts (on the part of RG Collingwood) to deliver philosophical analyses attuned to historical context).

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More generally, the use we have made of Murdoch, Taylor, Fish, and Heidegger in this review makes it possible to point up some affinities between the method on display in *Law's Judgement* and Continental philosophy (on the model instantiated by Heidegger). These affinities become apparent when we think of Lucy's efforts to forge 'connections' between institutional considerations (LAJ's 'components') and the 'constellation' of which it is a part. These efforts involve him in the pursuit of a holistic project. This project calls to mind Heidegger's description of philosophy as an activity that has to do with 'going-to-the-roots' so as to 'inquir[e] into the whole'.[34] More particularly (and again to draw on Heidegger), we find Lucy seeking to bring a component in a mode of existence (LAJ) into illuminating relations with a group of ideas that help us to understand it. Hence, we might see Lucy (along with Heidegger, Taylor, Murdoch, and Fish) as throwing light on a house of being-based interdisciplinary theory (HOBBIT). In Lucy's case, we are led, with great assurance, through a dwelling in which there is an enduring commitment to treat the law's addressees in ways that underwrite their status as equals. But there is also a commitment to critical reflection on the difficulties involved in doing this (and some awkwardness in the responses that judges and lawyers make to them: eg the Appeal Court's decision in *Mansfield v Weetabix*). Here we see what Taylor has called a 'gathering of attention' in circumstances where our existing descriptions may 'give out'.[35] But while this is the case, we find ourselves 'situated in a [particular] context of words' that fosters in us a 'refined sense of human meanings'.[36] It is this 'sense of human meanings' that guides judgement in the particular constellation or house of being we have been considering. Judgement in this context is, as Lucy notes, concerned with a distinct (egalitarian) 'mode of belonging' (p 242).[37]

Conclusions

Lucy's abilities as an analyst are plain to see in *Law's Judgement*. He brings the components of LAJ (presumptive identity, uniform application, and limited avoidability) into sharp focus. He also forges illuminating connections between them and a cluster of values (including impartiality, equality, and dignity) to which they have given at least incipient expression along a lengthy timeline. These features of his exposition reveal commitments to rigorous analysis and clarity of expression that mark Lucy out as a bearer of philosophy's analytic tradition. But alongside these features of *Law's Judgement* we must set a further (and broad-ranging) aim. Lucy seeks to embed LAJ in the 'post-feudal' or 'bourgeois' or 'liberal' context where, on his analysis, it has its life. To this end, he uses an array of concepts (including 'community' and 'constellation') that reveal LAJ to be part of a much larger politico-legal-cum-cultural whole. The upshot is a holistic analysis that does not run afoul of a problem that is clearly on Lucy's mind and to which Iris Murdoch applies the label 'dryness'. For Lucy conveys a sense of practical life in the context where the considerations encompassed by LAJ have normative force. As he unfolds his exposition, he makes apparent a tendency towards idealisation in this context. It is a context in which those who apply the law are reluctant to qualify their commitment to the egalitarian conception of the person that finds expression in LAJ. Lucy makes this tendency towards idealisation and the difficulties to which it gives rise vivid in, for example, his account of negligence law's reasonable person standard. We see judges struggling to make apt responses to negligence claims that concern short-comers. This example makes it plain that, if we are to avoid the problem of dryness, we must focus not merely on what those who participate in law's operations say but also on what they do (and thus act in conformity with the motto *respice finem*).[38] In the context Lucy surveys,

[34]M Heidegger *The Essence of Human Freedom: an Introduction to Philosophy* (London: Continuum, 2005) p 13.

[35]Taylor, above n 5, pp 9, 11, and 18.

[36]Ibid, pp 18 and 28.

[37]The egalitarianism of this mode of belonging provides an example of what Herder called a *Schwerpunkt*: the centre of gravity in a particular culture or form of life. For more detailed examination of this concept see R Mullender 'The scattergun and the owl: Brian Simpson on Herbert Hart' (2013) 26 Canadian Journal of Law and Jurisprudence 491 at 499.

[38]On one reading, this motto tells us '[not to] look just at what they say … but at what they actually do, and what *actually happens* as a result'. See R Guess *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008) p 10.

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their expressions of commitment to an egalitarian ideal sit alongside attentiveness to human and circumstantial variability. Consequently, Lucy is able to throw light on a house of being that, while built on ambitious lines, is untidy. This is a significant achievement for an author who has worked up his analysis in a context where idealisation too often gets out of hand and who owns up to 'a penchant for neatness'.

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