

Fairness through Legal Literacy:
A Case for Active Involvement

by

Leila Zanozani Azad

A thesis

presented to the University of Waterloo

in fulfillment of the

thesis requirement for the degree of

Master of Arts

in

Philosophy

Waterloo, Ontario, Canada, 2012

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AUTHOR'S DECLARATION

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

Abstract

This thesis started with one question: “how could we make the legal system more fair for more people?” One possible answer is given to that question in the four chapters that follow: we can achieve a more fair and efficient legal system by providing our citizens with a basic level of legal literacy. That basic education includes a general knowledge of the structure and foundation of law, its content and purpose and finally the role of the people within political systems supporting different kinds of legal theories. I have argued that such education will increase people’s interest about legal matters while encouraging them to take a more active role with regards to legal matters. Often emphasized in this thesis is the role of interpretation within law. I’ve argued that the central role of interpretation in law could serve as an advantage for the citizens given that they sport the belief that they could bring out positive changes within their society and provided that they become motivated to take action based on that belief.

The first step in achieving such changes is increasing legal literacy, an intricate part of which would be to show ordinary citizens the many subtlties that exist at different levels of law. People’s awareness of such subtleties accompanied with further institutional changes which would allow them to seek legal advice at an affordable rate and in different ways – as suggested in chapter four of this thesis - should help prevent many legal troubles from arising in the first place, thereby leading to a more fair and efficient legal state: one in which less injustice is seen and more resources are spent on issues that cannot be helped.

Acknowledgements

I would like to take this opportunity to extend my heartfelt gratitude to my thesis supervisor, Dr. Brian Orend, who has been my guiding light all throughout this project. Working under his supervision has been a pleasure and an honour that has made me grow as a writer and a philosopher.

I would also like to thank the readers on my thesis committee, Dr. Mathieu Doucet and Dr. Shannon Dea. This thesis has been vastly improved thanks to their generous and insightful comments.

Dedication

I would like to dedicate this work to Sahar, with whom I shared all childhood dreams - such as the dream of one day becoming an author.

Above all, this is for my amazing parents and my beloved Madarbozorg, to whom I owe everything.

Finally, I'm dedicating this work to Francis, my joon, whose constant love and support have greatly contributed to the flourishing of this project.

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Preface

Sometimes events in life touch us in a way that we cannot ignore. These events make us think, make us feel and make us react. I had one such experience, amongst others, that I believe is worth talking about.

The following pages are a series of philosophical reflections that have resulted from that experience. These thoughts concern the ethics of law. There is an important distinction to be made between ethics and morality in this context: whereas different kinds of morality form *subsets* of ethics; ethics – as I talk about it – is concerned with more general and universal principles and their embodiment in our legal system. I do not allude to any particular kind of morality in this thesis, as I believe that requires a separate and exclusive set of considerations; instead, I focus on values such as justice and fairness as criteria for evaluating law. The guiding question of this thesis is: “how can we make law more fair and beneficial for more people?” While legal theories have provided helpful insights into how laws are and should be made and applied, they have left out one significant factor that plays an important part in the ethics of law: the role of ordinary people and their knowledge and awareness of the law.

This thesis is an attempt to show the ways in which this kind of knowledge is important in making the law not only more fair but also more efficient. If correct, it implies a need to make some changes in the way people are educated about the law and how they perceive it.

Chapter One

Living the Domino Effect

The domino effect starts with the fall of a first domino and it goes on to knock over as many dominoes as are placed within the chain of dominos. What is the best way to avoid the effect? Prevent the first domino from falling. Here is my story of how I found myself within a huge domino effect and how it affected my vision and goals.

1.1 The blow that set it all off

I was twenty years old, fresh out of college and starting my first year of studies at McGill University. I remember many things from that year and I remember them vividly. I remember my ambitious spirit: the kind that makes you feel like you're unstoppable. I remember the good feeling of freedom that I got from walking the streets of downtown Montreal as a young adult, ready to discover the path to the rest of my life. I was determined, happy, and open to the world. It was some time before I experienced things that would change my perspective on life.

The experience that I'm talking about started very subtly: yes, like many significant events in our life, it almost didn't happen at all. One day, at the end of one of my introductory courses in psychology, a couple of students walked in and made an announcement regarding a "Summer Management Program" for students. They presented it as a great experience, a C.V. builder that would earn the participants between \$9000-\$16000 for the summer while putting the participants ahead of

their peers. Those who were interested were asked to sign up for an information session to learn more about the program. I stood there looking at the front of the auditorium where the people had made the announcement. I couldn't really see their faces from afar. It took a few seconds until I decided that it sounded like a good opportunity and that it couldn't hurt to sign up to hear more about this program. So I did.

I received a call a few days later. Some lady named Sophie informed me of the time and the place where the information session was taking place. When I showed up at the information session, the room was *full* of young university students, most of whom were in their first year of studies. When the person in charge of the session started speaking, she had full control. She told us of the top quality of their company, its long-standing history - of nearly thirty years - and its selective nature when it came to hiring, which wouldn't mean much to us if it weren't accompanied by a chance to be hired by this great company. Her description of the majority of students going through their undergraduate studies without any outstanding extra-curricular experiences resonated as true to most of us. She told us that, without having 'real-world' experience upon graduating, we would be in a position of disadvantage compared to people who *did* have that kind of experience. She marketed the program as something which would be useful to people of every field and she told us that we would gain some invaluable experience by taking part in the program that this company was offering to us.

In terms of the details of the program, we were told that we would be running our own business: an enticing proposal for the group of young students who were gathered in the room. The company would train us and help us succeed. But before that, they had to make sure of our interest. On a scale of one to ten - one being least interested and ten being fully interested - we had to vote *twelve* in terms of how badly we wanted to be a part of this great, life-changing experience. We were then asked to sign up again if we wished to enter the hiring process.

Four years later, the term 'life-changing' has acquired a whole new meaning for me. As I learned, this term does not always bear a positive connotation, at least not until after one has made something worthwhile out of it. My experience with this program *did* change my life but it did so in a very costly, bitter manner. My first mistake - strike one - was that I, like many other students, trusted the people who were offering this program to us. That trust ended up hurting us because it was not based on right or sufficient knowledge of the presenters, the program, our rights, or how bad a program (which had been authorized by the university to come and recruit on campus) could turn out to be. While I have taken responsibility for the part of the damages that resulted from my youthful perseverance and stubbornness, a substantial part of what went wrong was - I maintain - due to lack of knowledge and awareness on many different levels; and this lack was beyond me or my fault; it is something that needs closer study, since it can be generalized to many other similar situations.

What followed the day of the information session was a series of phone calls and in-person interviews. At each step of this long-winded hiring process we were told a little more about the excellent experience awaiting us, while being reminded that: “we had to earn our right to work with this company.” The plan was for each hired student to run a painting business offering services to residential houses. We were told that all necessary training would be provided. We were not to worry if we didn’t know how to paint because they would show us. In addition, we weren’t going to be the ones painting in any case: we would hire and train other students to do that. We would be managers learning communication, leadership, and other valuable skills. By the time the last interview rolled around, I was really eager to take part in the program.

That day came on a cold December night; it was around 7:00 pm when I sat down in an empty café in one of McGill’s buildings with the vice president of the company and another student who was also being hired. The vice-president put a contract in front of us that was about twelve pages in length, single-spaced, and in rather small print. He went over the contract with us: nothing he mentioned sounded alarming at all. He was going over the contract in his own words. At the end, he smiled, gave us a pen, and asked if we were ready to start. We both signed the contract.

That contract was to become the bane of my existence for the next nine – seemingly longer - months, not to mention the struggles I had to overcome because of it during the legal proceedings that followed, which came to last about four years.

Signing the contract was my second mistake – strike two. As I found out a few months into the program, the contract left all important responsibilities on my shoulders while it gave the company the right to take heavy royalty payments from me. This could have worked fine *if* I were provided with the right kind of training, which had been previously promised.

For the first time in my life, I started asking and learning about what a contract is and what it entails. Most people’s understanding of a contract corresponds largely to the Oxford English Dictionary’s definition of it: “a mutual agreement between two or more parties that something shall be done or forborne by one or both; a compact, covenant, bargain, *especially* such as has legal effects; a convention between states.”¹ This was my understanding too: a contract is something that creates obligations and responsibilities between two or more parties; it also protects one’s rights in case one party fails to fulfill its duties as have been set out by the contract; it is basically a promissory tool used by people to ensure the advancement of their goals and the protection of their rights.

The more basic question of the legitimacy of any given contract seems to cause people more hesitation and uncertainty. And it is definitely a point that is often overlooked or left unconsidered. By legitimacy, I am referring to the lawfulness of any given contract. Presumably, anyone with rather minimal writing skills could draft what may be called a ‘contract’. And in that sense, there is a direct relation between the legitimacy of a contract and its binding power. Consider the

¹ “Contract,” *Oxford English Dictionary*, accessed March 10th, 2012, <http://www.oed.com/view/Entry/40328?rskey=0HWtGG&result=1&isAdvanced=false#eid>.

following: if someone somehow tricks me into signing a ‘contract’ that requires me to commit murder, I am not actually liable or held legally accountable for not killing the mentioned person. In that sense, some illegitimate contracts are considered null. However, as I found out, when it comes to the question of legitimacy of most contracts, there is an overwhelming gray zone, and that fact didn’t quite set in until I actually heard the lawyers with whom I consulted say that they could not tell what exactly would follow a breach of the particular contract that I had signed with that company. As I will explain, the uncertainty and ambiguity of such cases serve as a reason why we must educate people on legal matters: since education brings people a healthy sense of skepticism and encourages them to seek more information once they can recognize that more information is needed before entering into certain agreements. One way to make sure that recognition takes place is through legal education that aims to increase legal awareness amongst people.

John Rawls’ conception of justice and the requirements of ‘the original position’ provide us with more reasons why we should strive to become aware citizens who actively seek information in legal situations.² John Rawls define justice as fairness by laying down the requirements of what he calls the ‘original position’. The original position is part of a hypothetical thought experiment which aims to envision how justice as fairness could be implemented at the outset of any social binding, presumably in the state of nature prior to the formation of societies. Rawls explains that to conceive fair principles that will bind people together, those

² Special thanks to Dr. Mathieu Doucet for pointing out the relevance of Rawls’ theory of justice in this context and for suggesting the inclusion of a discussion of the latter in this section.

principles need to be decided from behind what he calls 'the veil of ignorance.' In that state, people deciding on the principles are completely ignorant of what their position in society would be once the principles are decided. They would also be ignorant of all other social and personal characteristics that they would be assigned, i.e. their level of intelligence, their rank or opportunities. The idea is that deciding principles from behind the veil of ignorance encourages the conception of fair principles from which everyone could benefit, no matter their rank, power or abilities. Clearly, this picture – as idealistic and rational as it is – is not achieved in reality: contracts are drafted by people who are very well aware of their situation, rank and resources. Nevertheless, Rawls' theory highlights why it is so important for us to be mindful of the fact that the original position – which could potentially create more fair legal situations – is not fulfilled in reality: seeing that contracts and other similar principles are decided by people who are aware of their situation and who bear individualistic interest, it is up to the citizens to point out and try to correct unfair situations when they do arise. And that alone constitutes a valid reason for seeking more information and education on what is involved in each legal situation.

However, there is another reason found in Rawls' theory that pushes us to actively seek a legal education: that is, even if the conditions for deciding principles from behind the 'veil of ignorance' were fulfilled; that would still be insufficient for achieving justice. That's because, as Rawls explains:

“...a society is well-ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of

justice. That is, it is a society in which (1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions generally satisfy and are generally known to satisfy these principles.”³

What we must recognize is that the satisfaction of the two points mentioned in the above quote requires that people keep social institutions in check and that translates into assuming an active role within the legal system. More shall be said about some basic ways in which citizens could help in keeping social institutions in check. For now, it is important to stress the relevance of having a basic of legal literacy as a first step towards becoming involved in such matters.

December passed with all its usual festivities. Friends and family were congratulating me for having successfully passed through the hiring process and for taking on the big challenge of running my own business for the summer. There were no spoken suspicions about the nature of the program I was getting involved with. It was towards the end of December that I received an e-mail outlining the upcoming training sessions in January. We would learn about estimating, marketing, and painting technology in a jam-packed three-day weekend at a hotel in Montreal, over coffee and sweets. Day one of the training mostly consisted of self-promotion by the company. We were asked to dress formally: little did we know that it was all part of the game being played on us. The setting and the environment were undoubtedly organized in a savvy effort to make us feel that we *were* involved in something really big: it definitely felt like a formal and exciting session as we sat around tables

³ John Rawls, *A Theory of Justice*, (Cambridge: Harvard University Press, 1971), 11-12, http://books.google.ca/books?id=vcVEPc30ut0C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

listening to the president of the company telling his story of success, working as a young manager with this company years ago. He told us of the great things his company did for him as a young student, and all that he'd been able to achieve as a result of running this company. Day two was all about marketing skills: we were told how to talk to potential customers, how to find customers and, most importantly, how to gain home owners' trust so that they would agree to leave their painting projects to us. We were also given a big binder of paper outlining paint technology. Someone told us some very basic facts about paint technology for all of two hours: we learned that latex paint was used for indoor jobs and oil paint was used for outdoor projects. The same person told us how important it is to prepare any surface before painting it, but he forgot to tell us *all the ways in which* that preparation should, or could, be done. Finally, during day three of this training, we learned how to estimate jobs... from a couple of *pictures*. We each did two "painting exercises" based on those pictures. At the end of the day, we were broken up into groups. Each group was assigned a district manager (someone who had gone through the program in previous years), who was to be the mentor and general supervisor whose job it was to ensure the success of our businesses.

Anyone who's ever picked up a brush may legitimately ask: "how could someone learn how to paint from a book; or from pictures and in just a few hours?" Knowing how to paint properly takes practice and some significant amount of experience. The painter who I contacted as a part of my preparations for court told me that, to become a licensed painter in Quebec, one needs 6000 hours of experience *in addition to* substantial theoretical testing and learning. My manager

took five hours to teach us how to paint: five minutes of that was showing us how to hold a brush and the rest of the four hours and fifty five minutes consisted of *him watching us* paint one solitary indoor room. The unfinished job did not look promising at the end of the day. But this was at the beginning of May. By that time, I and the other managers in the same position, had spent many cold winter nights going door to door, looking for leads to book painting jobs. We had gone into strangers' houses on weekends, or after school, to make estimates for painting contracts. We had convinced people to sign painting contracts that bound us, the students, to the clients. We had taken on the responsibility of finishing those contracts in a satisfactory manner. Until that day in early May, we had not actually tried to paint. I remember feeling tired and worried at the end of the painting session, as I thought of the \$25,000 worth of painting jobs that I had booked. I was terrified to find out that we weren't going to have any more sessions to learn how to paint.

1.2 The fall of the dominos

In the months that followed, I had to hire other students who would execute the painting jobs for me. I had to supervise their work, deal with a lot of angry customers, and drive around town to get paint and supplies to my crews to make sure they could work. Summer days were long and I felt quite alone in dealing with everything that came up (despite the support of my family, who were worried about my health due to all the stress and lack of sleep). The company that hired me was

earning money, while I was only losing money, owing to the royalty part of the contract previously described and the different expenses that I had to shoulder.

My manger had no useful solutions for me and was only pushing me to get more painting contracts, for obvious reasons. My painters became increasingly unhappy, as I couldn't pay them properly: because the company was controlling all the money, and wasn't advancing enough money to me to pay my painters. The whole thing turned into a nightmare, as customers joined in on the "let's-take-advantage-of- students-front", and refused to pay for completed jobs on the last day that we finished their job. They *suddenly* realized that they were not happy with the work we had done.

Why didn't I quit? The contract I had signed mentioned that I would have to pay a fee of \$4000 if I decided to quit. In addition, my clients - to whom I had made a *legal* promise - could pursue legal action against me if I didn't complete their work. The company, on the other hand, was also threatening to pursue me in court if I quit and didn't pay the penalty for quitting. I had unfinished work plus one job which had gone disastrously wrong: my painters had done a bad job of staining one client's deck which had turned fuscia when it was supposed to be light brown. The client was quite angry, and made repeated threats to make me pay for the damage that was caused if I didn't fix it. While my father was advising me to quit and just let go, the threats of the clients and the company were weighing very heavy on my shoulders. I missed my sister's graduation day because I had to work.

Strike three was not having any idea about how the legal system worked.⁴ In other word, I felt utterly illiterate when it came to legal matters. I was not even certain about my rights in this case, even though I had a strong feeling that I had been wronged. In hindsight, I had some bizarre ideas about what being sued entailed, but it was little consolation that older people around me could not say with any certainty which way the case would go if the company or the clients did end up taking me to court. In addition, I wondered - as a law-abiding, tax paying young adult - what being sued would do to my future and my name. The company had done an excellent job of scaring all present and past students: no one wanted to give any advice or say anything that could get them in trouble. As for me, all the stress had completely changed my way of thinking, to the point where I didn't feel like myself anymore. I couldn't wait for the whole thing to be over. It was some time around February 2008 - a few months after my contract with the company had ended - that I filed a claim at the small claims court against the company for all the damages they had caused me. I tried to convince other students to join in with me but no one thought it would be worth the trouble. I wondered where their principles laid and whether they were really convinced that it was a hopeless case and, if so, what led them to think that way.

A quick reflection reveals that my story can be generalized to many different instances, and I believe that alone makes my case an important one to consider carefully: that consideration should include my perspective and reactions – as the

⁴ Strike one was blindly trusting the company and its representatives while strike two was the action that followed as a result of that trust, i.e. signing the contract without any further inquiries.

person who was directly involved with this case- as well as those of my peers and people who were involved with this situation in more indirect, yet important, ways. The reaction of others is important not only because it affected my mindset – much like it would have affected the mindset of anyone else in my position - but also because their collaboration would have made a big difference in how the lawsuit turned out to be. Consider this: the kind of approach to law exhibited by my peers is not at all uncommon, although the nature and severity of consequences for people may vary from case to case. Bosses, companies, and individuals are constantly “forced” to comply with what they may consider to be unjust circumstances or conditions simply because, like my peers, they believe that there is no other or better choice. Many of us *do* feel that we are helpless with regards to the terms and conditions of giant monopolies, cell phone companies, property laws, powerful people, etc. It’s not just that most of us don’t take active measures to counter what we consider to be unjust (albeit legal) conditions; we can actually *knowingly* place ourselves within their grasp. We become obligated to obey and follow terms that were not directly drafted by us. Of course, we do this because we believe that the materials, status, or positions that are offered to us in return add some kind of value to our life: we buy gas because it allows us to travel longer distances to go and visit or help loved ones; we sign cell-phone contracts because cell-phones allow us to run businesses and stay in closer reach of the people in our life. However, the value-added is independent of our *attitude* towards the legal contracts which we enter into for these exchanges to happen.

Many workers do not have the luxury of negotiating the terms of their contract, and many have to take on jobs simply because it will pay the bills for them and help support their families. But presumably nobody rejoices in the thought that they are paying more than they should, or being treated badly, in exchange for something they need or want. In short, whether forced into the situation or not, we're all guilty of this approach: at one point or another we find ourselves in the situation of having to comply with something that we have explicitly agreed to, but with which we are not at ease. This happens even when the dangers of the situation and the legal repercussions are well publicized: the credit card companies and the burden they put on individuals who misuse credit is a case in point. Of course, the cost of many of these contracts is affordable to us and, for the sake of convenience, we often just live with them; however, problematic cases such as mine do arise and that is when the attitude of helplessness could no longer be ignored: we must ask ourselves: "Are we truly helpless or are we merely intimidated by the *apparent* magnitude of the situation within which we find ourselves?" In other words, when the costs of these exchanges greatly outweigh their benefits and we are directly and severely harmed by these costs, we are pushed to think about the situation in more depth. But even then, thinking about our troubles is not enough to help us unless it comes with an action-motivating belief that something can be done to improve our situation. I argue that legal education will form the basis of that kind of belief: the belief that we are not helpless and that something could be done to change many of these situations for the better, especially in solidarity. Moreover, legal education would help stop problematic cases from arising in the first place, as people become

more aware of their rights, how the legal system works and what is at stake. To achieve that kind of awareness, it's important to reflect on experiences like mine and point out what we can change to avoid such cases altogether. I grant that aiming to completely eradicate such cases is unrealistic and therefore a bad goal to set for ourselves. However, I do believe that there is a way to considerably reduce the occurrence of such cases, and that is enough to make this proposal one that is worthy of serious consideration.

1.3 Preventing the fall of the dominos

When harmful cases such as the one I found myself in do arise, the first question is: who's to blame? And why do these cases happen? Are individuals who agree to such contracts or conditions the only culpable parties in these cases? I'm inclined to say no. To claim that "you, or they, should have known better and should not have gotten involved with the given company or law in the first place" is: 1) a false choice in many cases; and 2) treating the issue at a very superficial level. While ordinary citizens do bear *part* of the responsibility with regards to what happens to them - and I have owned up to my own part in my situation - the roots of the problem lay elsewhere. I will argue that often such cases come up because of ordinary people's lack of legal literacy and their misunderstanding of the law, their rights and how those are applied in different situations. I will also show, in the following chapters, how that kind of ignorance leads to other negative consequences for the people. Thus, legal illiteracy sets in motion an often disastrous, even when subtle, domino effect in legal situations that affect people's lives in various ways and

to different degrees. A radical and lasting solution for the prevention of that effect is to plant the first domino on strong grounds, meaning that we must equip people with the right kind of legal knowledge and understanding to keep them strong on their grounds, thus preventing them from falling and thereby causing unnecessary damage for themselves and others. That would, in turn, make our system more efficient (i.e. one that produces the most good with the least amount of waste) by making it more difficult for corporations or other entities to manipulate and take advantage of people's legal naivety, which would lead to a reduction in the number of litigations thereby freeing funds and resources for more difficult and complicated cases that are less preventable.

I am considering this issue in the context of North America, with its democratic political system, and the fairly peaceful life-style which it offers its inhabitants. And, in this context, if private individuals do not bear the full responsibility of the troubles which ensue from a legal situation, something or someone else is also at fault. Likely candidates are legislators, judges, corporations or the foundation and functioning of the legal system itself. Another possibility, the more likely one in this context, is that the legal system and our law enforcers are *for the most part* good and blameless but it's the way in which we, as a society, use and understand the laws and our legal resources which is faulty, and that is what allows entities such as corporations to take advantage of ordinary citizens and get away with it. In other words, it is possible that we, the citizens of a legal state, are just not using the legal system in the right way. I submit that the reason for this misuse is ordinary people's general lack of understanding of law. By that, I'm referring to their

ignorance of the laws, the nature of our legal system, its foundation and purpose. The law seems to work against the innocent in some cases simply because not enough people are aware what law could do for them or, in the case that they *are* aware of its potential, they can't use that power - because using that power requires the collaboration of a *group* of people. As mentioned before, I believe that an increase in legal understanding amongst ordinary people is highly likely to reduce the number of civil cases by preventing some legal problems from arising in the first place and by uniting people in their belief - and action - that something can and must be done to fight legal injustice in cases where it does occur. As a consequence, fewer resources would have to be spent on resolving cases which would have been prevented, had the public had a better knowledge of what each situation presented for them. In that sense, our legal system would be more efficient by focusing resources on solving cases that are more difficult to foresee and prevent than those resulting from a lack of basic legal knowledge.

It is important to note here that ignorance of law and lack of solidarity in response to unjust and unlawful events are two closely related issues that are not to be conflated, but to be seen in relation to one another.⁵ Figuratively speaking, they are two dominos standing next to one another. Ignorance of the law often creates feelings and beliefs of helplessness amongst people, which then leads to lack of solidarity and shying away from action in the face of injustice on the part of the people. This is a significant point, especially considering that many individuals stray

⁵ Many thanks to Dr. Shannon Dea for stressing the importance of pointing out and discussing this distinction.

away from involvement in legal cases due to the costs that are required by legal procedures: yet, in solidarity the costs are often reduced because they are split amongst many individuals – instead of one person having to bear all the costs (including spending time, money and other resources).

1.4 A new approach to legal understanding: The Method

I'm happy to say that, a few months ago, my court case was decided in my favour. I learnt quite a lot from the whole process, mostly because I was made to think and learn about issues and questions that I would perhaps not have considered in a substantial way were it not because I found myself in trouble. Amongst the questions that I had to tackle were the following: what is the place and role of written law in society? What is the place of justice, or other universally valued principles, within law or in conflicts like the one I found myself in? What about rights of the citizens? How are they protected? What are the ways, besides legislation, to change bad laws? I found good answers to those questions by seeking a basic understanding of our legal system, its foundation, and its purpose. To demonstrate and contribute to that understanding is the goal of this thesis, as it is what helped me become a more aware citizen, and also because it is the kind of knowledge that I believe is crucial for anyone else who wishes to protect themselves from the sometimes harmful effects of what may be legal, yet unjust conditions. Therefore, I propose a consideration of these questions as the method to be used in laying down a basic knowledge of law for our citizens, from a young age.

One may wonder about the reasons behind my emphasis on starting legal education at a young age. I would argue that legal education, like any other form of social education, helps develop a certain culture amongst our youth: a culture that encourages them to be critical and observant thinkers in legal matters. It is my conviction that if we wish to raise citizens who are sensitive to such issues, we need to start that education from an early age: for instance in high school, as teenage years are often the time when our sensitivities and major interests are formed. Some suggestions about how we could incorporate such education within our secondary curriculum will be presented in chapter four.

1.5 A new approach to legal understanding: The Positive Agenda

This proposal is also based on and motivated by an observation I made during my research in preparation for court: I realized that, traditionally, the answers to the questions that I had to tackle has come from different perspectives that mainly focus on the lawmakers and law-enforcement entities. I noticed that the role that *ordinary people* play in the legal success of a given state hasn't really gotten much attention. Undoubtedly, legislation *is* focused on a descriptive and normative account of the people, their psychology, actions and reactions; but, by and large, a passive role is attributed to the common people in legal theories. This is true of major legal theories, such as: natural law theory; positivism; and the interpretivist school of thought, as we shall see in the following chapter. The role of the people has not exceeded that of "subjects of the law" who are obligated to obey the law for their own good and for the good of the others; this is despite different and independent kinds of studies and research that have shown the influence of people's beliefs on

their support of or disagreement with different laws – such as those regarding the ownership of guns in America. In a study, Kahan et al. showed people’s cultural beliefs to be one of the most significant factors in determining people’s support of or opposition to ownership of guns. Moreover, they found people dismissed or accepted empirical evidence on “gun control risks” based on whether or not the evidence cohered with their cultural beliefs. Kahan et al thus concluded that:

“Rather than focus on quantifying the impact of gun control laws on crime...academics and others who want to contribute to resolving the gun debate should dedicate themselves to constructing a new expressive idiom that will allow citizens to debate the cultural issues that divide them in an open and constructive way.”⁶

Such studies highlight the subtle yet influential effect that people’s cultural beliefs have on their interactions with the law or issues that are subject of the law. Thus, it is important to nurture and pay heed to the formation of such culture – namely through education. In the present context, that education cannot be complete without the attribution of a more active role to the general population as members of a society where law rules. Emphasizing and defending the attribution of a more active role to our citizens is the positive agenda of this thesis. But first, we must consider what is meant by ‘attribution of an active role’ to the general population.

In the present context, *active* citizens are individuals who can recognize their place within the legal system and possess some basic knowledge of how to

⁶ For examples of such research, see Dan M. Kahan, “More Statistics, Less Persuasion, A Cultural Theory of Gun-Risk Perceptions” *Yale Law School Legal Scholarship Repository* 106 (2003): http://digitalcommons.law.yale.edu/fss_papers/106. Or, Joel Brockner, *et al*, “The Influence of Prior Commitment to an Institution on Reactions to Perceived Unfairness: They Higher They Are, The Harder They Fall,” *Administrative Science Quarterly* 37, no. 2 (1992).

maneuver within it. There are many advantages to contributing an active role to our citizens. For instance, it would help reveal the flaws and complexities of the existing laws while also making our legal system more efficient. The former advantage shall be explained in depth in chapter three where I argue that the input of the ordinary citizens is an important step in making good laws because hearing people's views on different topics will reveal points about our laws and policies which may otherwise have gone unnoticed. The active role of the people is constituted by their interaction with the law as beings who *understand* the law, and react to it accordingly. The legal culture that considers the public to be merely passive subjects – who are to obey the law as it is presented to them without any basic understanding of it – cannot prosper or become better: the best that can be hoped for is obedience to existing laws. Later chapters discuss the issues and dangers that come up in the absence of such understanding. The model which I will put forward in this thesis goes beyond participation of individuals in the state through democracy. It requires a basic yet substantial understanding of the direction and underlying reasons for law, which go well beyond keeping individuals in line through incentives and punishment, as we will see in the next chapter.

Finally a last point of clarification must be made before moving on the next chapters: I would like to discuss – in more depth - what it means for a legal state to be efficient and fair as fairness and efficiency are the two standards according to which I will be evaluating the merits of our legal system. As mentioned before, efficiency, in this context, is measured by the ability to achieve one's end in a way that is most productive and least wasteful: so our legal system would count as more

or less efficient to the extent that it makes use of societal resources to achieve its end.⁷ As far as the standards of fairness are concerned, in this context they don't go far beyond ensuring that one party does not have an unjustified advantage over another party. In a democratic legal state, an example of an unjustified advantage held by the legislative body would be for it to draft laws arbitrarily without any kind of explanation while each member of that body benefited from those laws, at the expense of the general population. An unjustified advantage of the general public, on the other hand, would be for them to have the ability to oust, or annihilate, any part of the legislative system, at *any* time for no valid reasons. By contrast, other advantages - such as people's right to vote in elections or the delegation of law-making to people with the proper education and expertise - are examples of *justified* advantages enjoyed by different constituents of a legal democratic state. Thus, to say that our aim is to create a more fair legal state is to recognize and remedy the *former* kind of advantages.

1.6 An overview of the chapters to come

Two points are important to flag at this point. First, the method I have chosen to use in laying the basic legal knowledge that I am advocating is certainly based on my own research and my personal case. I consider it to be a justified method because it is one that requires relatively small steps on the part of our educators while producing great benefits for our state and its people. Second, through that method I wish to add to the content of legal theory by pointing out the kind of

⁷ The purpose and goal of our laws will be discussed at length in chapter three. Also, while a maximum level of efficiency, in this context, remains an ideal that is beyond the scope of the present work, it is possible to point out ways in which we can make the legal system *more* efficient than it is presently.

positive difference that educating our citizens as active members of the state – as described earlier – could bring about.

To demonstrate and further describe the model that has been outlined here, three major questions will be addressed in the following chapters: 1) What is the foundation and structure of law? 2) What constitutes the content and purpose of law? 3) What role do people play within a legal system? Addressing these questions will take us well into some major debates about what law has been historically, what it is, and what it ought to be. It's important to note that the treatment of these questions will be both descriptive and normative. The goal is to learn from what has been shown to be wrong while noting some of what can be done to improve our legal system: consideration of legal theories is one way to achieve that goal. As shall be shown, valid answers to these three questions not only demonstrate how an increase in the knowledge and awareness of ordinary people regarding our legal system is crucial: they also highlight the dangers and fallouts which ensue from a lack of such knowledge, and the continuation of a system that treats the public as mere subjects.

Chapter two will present a consideration of the dangers that we face as a society of individuals who do not have a basic understanding of the structure of foundation of law. The discussion shall include an overview of three major legal theories: natural law theory, positivism, and the interpretivist school of thought. I maintain that a basic study of some historically important legal theories and where they go wrong would help in achieving two valuable goals: 1) it would help ordinary citizens correct many misconceptions that currently have about law by

showing them the many different forms and meanings that the law can bear in different situations 2) it would help give citizens a better perspective of their place, powers and opportunities within a legal state. Those in turn will encourage more accurate beliefs regarding what can be done in a conflicted legal situation and which could lead to constructive action from the people in correcting injustice.

Chapter three will describe the relationship between the purpose and content of law while highlighting the central role of interpretation within that relationship. It will be argued that people's understanding and use of interpretation is what tips the scale of justice to one side or the other. As it was done in chapter two, some of the ways in which a misunderstanding or lack of knowledge of the relationship between the purpose and content of law risks to create and support injustice will be considered.

After having demonstrated the importance of legal literacy for the people and for the welfare of our legal system, chapter four will go on to lay out the details of some institutional changes that we should implement in our society – especially within the education system. An analogy will be drawn between some recent changes that have been made in our health-care system and similar changes that we could hope to see within our legal system. It's been said time and again that "knowledge is power." It's time for us to apply that to our legal system and those affected by it.

Before closing this chapter, it is important to take some time to explain the relation between the philosophical, the political and the legal theories that will be discussed throughout this thesis. There is a two-way relationship between political

theories, as well as political changes that take place within our society, and the legal changes or decisions that are made. Politics affect law and law affects politics: that much is uncontroversial. So, that is why I allude to some political philosophers and their theories to discuss legal matters in the following chapters. The topics that are discussed within philosophy of law serve as theoretical guidelines concerning the changes that could or should be put into place to improve both the legal and the political realms. Thus, philosophical theories affect – or could provide the grounds and reasons for change – within our political system while political theories explain why and how such changes are significant. Moreover, philosophy of law is seen as a subset of political philosophy and in that sense, the discussion of the two is not only adequate but in many ways crucial.

Chapter Two

The Foundation and Structure of Law

The structure and foundation of law directly determine its function and mode of operation within each society. In fact, knowing what constitutes the foundation and structure of a legal system reveals the first hints about important sources of legal mistakes that occur despite people's best intentions. This chapter aims to show the crucial role that a basic knowledge of the foundation and structure of law plays in the realization of a more fair and efficient legal state.⁸ It argues that learning about the structure and foundation of law gives people the power to assume a more active role within their society and thereby helps ensure the realization of justice and fairness. In that sense, learning about different structures and basis of law is like learning from history: it reminds us of what has gone wrong in different conceptions of the structure and foundation of law while familiarizing us with their methods of operation, which in turn helps clarify the role and duty of the people of any given society vis-à-vis their legal system.

While we cannot reasonably expect everyone to have the knowledge of an expert in legal matters; it is possible and necessary that ordinary people have a general idea about the foundation and structure of the kind of law that reigns over their society. What constitutes the boundaries of a general understanding in this context? I claim that the general understanding necessary for a more fair and efficient legal state does not exceed what will be presented in this thesis.

⁸ The standards of efficiency have already been laid out in chapter one: they refer to producing the best outcomes with the least amount of waste.

Before diving into an overview of different kinds of legal theories that shape the structure and foundation of law, it is important to consider how knowledge of such structures, or lack thereof, affect our lives and our society. That is the aim and focus of the following section.

2.1 How Lack of Legal Knowledge Distorts People’s Perception of Important Issues and Worsens Them: Misunderstanding the Foundation of Law

Before seeking remedies, we need to consider the kind and extent of damages that are being caused by a lack of understanding of the basis and structure of a legal system, on the part of the people. An example of the negative effects of such an ignorance is described in an article titled, “Rough Justice in America: too many laws, too many prisoners,” published last year in *The Economist*. This article tells the heart-breaking story of a legal system that’s being used wrongly and a population that’s contributing to its misuse, through no *inherent* fault of their own.

The article starts by pointing out the problem of high incarceration in the USA: “In 1970 the proportion of Americans behind bars was below one in 400, compared with today’s one in 100.”⁹ The figures are alarming for a few reasons, which will be discussed shortly: “between 2.3 million and 2.4 million Americans are behind bars, roughly one in every 100 adults.”¹⁰ The stats inform us that: “As a

⁹ “Rough Justice in America: Too many laws, Too many Prisoners,” *The Economist*, Print Edition, July 22nd, 2010: <http://www.economist.com/node/16636027>

¹⁰ Ibid.

proportion of its total population, America incarcerates five times more people than Britain, nine times more than Germany and twelve times more than Japan.”¹¹

The problem is not only that many individuals are being imprisoned – and having their lives turned upside down as a result – the equally worrisome part of the problem is that high incarceration has created a misperception, amongst voters, of a corresponding increase in crime. This misperception about the real connection between crime and imprisonment has become the starting point of a vicious circle that has worsened the issue of incarceration by encouraging it. One may argue that the lack of knowledge about how the legal system works has driven the American people away from considering that maybe it is their laws or law enforcement entities that are just too harsh on criminals of small or large scale. This is a blatant example of misuse of a legal system that is – amongst other things - there to ensure justice and safety; instead, people are being imprisoned for long periods of time because of what may be considered ‘small crimes’ that could be dealt with through alternative and less drastic measures, and in addition to that the population is feeling unsafe.

The toughness of criminal laws in the U.S.A. is partly explained by the voters’ demand from the politicians to take a fiercer stand on crime: seeing the growing population of people in prisons, ordinary people have drawn the conclusion that a tougher approach to crime is what is necessary. People’s ignorant opinion about the nature of their legal system has led to unreasonable demands and societal changes

¹¹ “Rough Justice in America: Too many laws, Too many Prisoners,” *The Economist*, Print Edition, July 22nd, 2010: <http://www.economist.com/node/16636027>

that have ended up working against them as a group. It is not hard to see how a basic understanding of punishment – and how or why laws are enforced - could change the perception and demands of the population regarding different legal measures.¹² Or, alternatively, how it might keep them out of legal trouble. The bottom line is that the American legal system has undergone negative changes, such as the transfer of power from qualified judges to politicians who are less qualified in legal matters, because people have made unreasonable demands as a result of their lack of understanding of law, its foundation and structure.¹³

This ignorance has bled through people’s daily lives and is continuing to have severe consequences for them. The article mentioned above tells the story of a woman who was imprisoned for selling *Percocet*, a moderate painkiller. In an attempt to explain her act, she said: “I was planning to do it just once...and I thought it’s not *heroin*.”¹⁴ The judge was obliged to give her a heavier sentence than he saw fit because his power to decide cases based on his trained expertise has been limited through recent – structural - changes in the American legal system which transferred a certain amount of power from judges to politicians. Thus, this young woman was sentenced to go to prison for *seven* years, for a problem that could have been dealt with by much less harsh measures. In fact, the judge mentioned: “Had I

¹² An American judge expressed during a ruling, that: “it’s going to cost upwards of \$50,000 a year to have [someone] in state prison.” It is my view that, with a better understanding of law - its function and structure - many more individuals would challenge the wisdom of that kind of spending. See “Rough Justice in America: Too many laws, Too many Prisoners,” *The Economist*, Print Edition, July 22nd, 2010: <http://www.economist.com/node/16636027>

¹³ “Rough Justice in America: Too many laws, Too many Prisoners,” *The Economist*, Print Edition, July 22nd, 2010: <http://www.economist.com/node/16636027>

¹⁴ “Rough Justice in America: Too many laws, Too many Prisoners,” *The Economist*, Print Edition, July 22nd, 2010: <http://www.economist.com/node/16636027>

the authority, I would send [her] to jail for no more than one year...and a [treatment] programme after that.' But mandatory sentencing laws gave him no choice."¹⁵

2.2 Misunderstanding the structure of Law

The problem has been exacerbated by the vagueness and multitude of laws – mostly because there is no clear understanding, amongst ordinary people, of what role the law, and law enforcers, are there to fulfill: “The system has three big flaws, say criminologists. First, it puts too many people away for too long. Second, it criminalizes acts that need not be criminalized. Third, it is unpredictable. Many laws, especially federal ones, are so vaguely written that people cannot easily tell whether they have broken them.”¹⁶ These critics thus point out the existing structural problems within the executive and judicial parts of the American legal system and it is true that there are structural problems within the legal system, but I maintain that people’s ignorance of such problems has only made the situation worse by feeding a, now established, mode of operation within the legal system which was not intended by the original design of the American legal system¹⁷, if we consider the preservation of order and safety as two of those original goals. The consequences of legal ignorance constitute a perceptible fact that needs immediate attention.

¹⁵ Ibid.

¹⁶ “Rough Justice in America: Too many laws, Too many Prisoners,” *The Economist*, Print Edition, July 22nd, 2010: <http://www.economist.com/node/16636027>

¹⁷ ‘The established mode of operation’ refers to the situation in which misperception leads to enforcement of bad legal practices, such as excessive imprisonment, as described earlier.

Similar examples abound in Canada as well: the issue regarding the treatment of transgender individuals in the workplace is one amongst many.¹⁸ One of the biggest debates regarding transgender individuals has been about their right to use the same facilities as those designated for the gender that they represent. Many institutions, especially those in the private sector, do not allow transsexual women to use women's bathrooms due to fear of litigation which may result from the expressed discomfort of other employees. These institutions argue that the mere presence of a transgender female (a male who identifies himself with the female gender) creates a perceived threat to other women and children. However, a basic legal understanding would reveal that fear of litigation, in these cases, is not justified. In fact, The Ontario Human Rights Commission recognizes the following:

"...during, and after the period of transition, the issue of gender segregated facilities and services might arise. The individual should be able to use the facilities of the gender with which he or she identifies. Segregation is rarely appropriate unless the individual has specifically requested it. This is because segregation may reinforce myths that transgenderism is 'freakish', that transgendered people should keep their distance, or that they are objects of curiosity that should be kept separate from everyone else. In some instances, the individual making the transition prefers or requests a separate washroom until the period of transition is complete. However, if this accommodation is imposed and not requested by the person it may undermine their dignity."¹⁹

Yet, transgendered individuals still have to fight to have their rights recognized. A pre-operative male-to-female transsexual who was denied access to the female washroom in a nightclub filed a human rights claim and the Tribunal decided in her favour, stating that "discrimination against a transsexual constitutes

¹⁸ Special thanks to Dr. Rachel R. McKinnon for raising this issue in relation to the topic at hand.

¹⁹ "Policy on Discrimination and Harassment because of Gender Identity," *Ontario Human Rights Commission*, ISBN : 0-7794-0119-0 (2000): <http://www.ohrc.on.ca/en/resources/Policies/PolicyGenderIdent>

discrimination because of sex.”²⁰ What we must ask ourselves, as a society, is: why is it that, in a country where laws protecting sex and gender have come such a long way, a group of individuals still have to fight to have those *same* rights recognized? Or worse yet, why should they have to fight against the outright *denial* of these rights? The severity of this problem should be evident: the ability to lead a normal life – along with the dignity – of a group of people is being trumped by a not well justified fear of litigation (by companies and institutions) and, worse yet, by our government’s failure to recognize the place of this group’s claims within the Canadian constitution.²¹ A legal education regarding the structure and foundation of the law would allow companies and other institutions to deal with issues relating to the treatment of transgendered individuals, and similar cases, with more ease and confidence. Meanwhile, an educated population would place more pressure on its government to recognize these rights in fundamental and structural ways.

Similar processes are seen in our education system, where a lack of legal knowledge - paired with fear of litigation - is increasingly shaping our schools’ and educators’ way of teaching.²² This pertains especially to teachers since they often have to make instantaneous decisions: for them the probability of making “wrong”

²⁰ John Ibbitson, “Transgendered-rights bill headed for defeat in Tory-held Senate,” *The Globe and Mail*, February 10th, 2011: <http://www.theglobeandmail.com/news/politics/ottawa-notebook/transgendered-rights-bill-headed-for-defeat-in-tory-held-senate/article1902266/>

²¹ According to Transport Canada’s “Identity Screening Regulations,” an airline is not allowed to transport a passenger who appears to be a different gender than what is listed on their official travel document. This regulation goes not only against Canadians’ basic right to mobility; it also effectively bans transgendered individuals who haven’t completed a sex change operation or who live their life as a different gender than the one specified on their passport from flying. See “Transgendered People are Completely Banned from Boarding Airplanes in Canada” *Christin Milloy: Toward a brighter future, for all humanity* (blog), February 2nd, 2012, <http://chrismilloy.ca/2012/01/transgender-people-are-completely-banned-from-boarding-airplanes-in-canada/>

²² Troy A. Davis, “The Worrisome State of Legal Literacy among Teachers and Administrators,” *Canadian Journal for New Scholars in Education 2*, no. 1 (2009).

decisions is much higher since what they say or their approach to a given topic could stir controversy, which could then lead to personal and enduring lawsuits. In these cases, it is important to raise awareness about associations such as *The Canadian Association for the Practical Study of Law in Education* (CAPSLE) that provide a forum for studying legal issues as they pertain to education.²³ The immediate and long-term impact of education on the population make this issue a pressing one as a poor quality education has direct and dire consequences on so many different levels: it would be a shame for our education to suffer due to our educators' fear of litigation.

These are just a few examples of how uncertainty regarding the structure and foundation of law, on the part of the people, companies and our educators has created an obstacle for the full realization of justice and social growth in our society.

However, one may still question the degree of helpfulness of learning abstract concepts - such as the foundations and structure of law - in ordinary citizens' day-to-day affairs. While it is true that such knowledge will not guard citizens from all legal problems, it will serve as a compass that guides them through legal situations. For instance, knowing what constitutes the foundation and structure of a legal system helps rule out certain possibilities and allows people to consider others. In fact such general knowledge is helpful on personal, social, and political grounds. On a personal level, it at least shows people how and where they could get help when they are confronted with problems while also decreasing the

²³ Capsle, *Canadian Association for Practical Study of Law in Education*, March 12th, 2012, <http://www.capsle.ca/index.php?lang=1&menid=01&mtyp=3>.

feeling of helplessness which comes with the lack of that kind of knowledge. On a social level, awareness of what constitutes the basis of our legal system affects people's and groups' interaction with one another; for instance, the efforts of companies that capitalize on the ignorance of the general population would largely fail, or at least be reliably reduced. On a political level, such knowledge would lead citizens to see social phenomena, such as excessive imprisonment, for what they really are, and as a result, it would help them cast more educated votes and support better politicians and social programs. All these changes would improve the daily lives of the citizens. Therefore, it is simply not true that abstract knowledge about the basis of a legal system is not helpful for individuals on a personal and collective level.

2.3 An overview of three major legal theories

This section includes an overview of three historically significant legal theories: natural law theory, positivism as well as the interpretivist theory of law. The aim in discussing these theories is to see where they have gone wrong while also underlying important elements that form the structure and foundation of good legal systems. That knowledge will show us that without citizens' involvement in the legal system, our society risks becoming unfair and inefficient in its functioning.

Some reflection and a close study of these three legal theories reveals a common thread that runs through them: interpretation. Undoubtedly, different theories use interpretation in different ways. But what remains constant is the seminal role that interpretation plays in each legal theory and its enactment.

Recognizing the role that interpretation plays in the structure and foundation of a legal system sheds light on some venues for action which would otherwise remain unknown to the ordinary citizens. I submit that it is the knowledge of various roles that interpretation fulfills in each legal system that can serve as a good basis for a general understanding that will help people achieve a better understanding of the laws, which will in turn make for a more efficient and fair legal state.

How could the recognition of the place of interpretation in law help ordinary citizens achieve fairness in their society? An analogy should help answer that question: an analogy between a legal state and sports games. The players are an integral part of any sports team: without them there would be no team and no game to play. The players represent the people of the state, without people there would be no state or country to begin with. The laws of the state are analogous to the rules of the game: the players need to know and understand the rules of the game they are playing in order to play correctly and well. Knowledge of the rules allows for the conception of strategies and better play. Similarly, people need to know the laws of their land if they are to contribute to its order and prosperity. However, the best players and the best citizens understand the basis of the entity – or the game – of which they are a part. Since interpretation *shapes* the rules of the game and the laws of the land, it is *crucial* for the players, just as it is for the citizens, to have an awareness and understanding of the changes that are brought about by interpretation. For example, good soccer players are aware of all the ways in which their positioning could lead to an offside call. In other words, they know how the referees could interpret their moves. Similarly, citizens need to have a basic

knowledge of how different laws may apply to different situations. Notice that in sports mere knowledge of the rules or laws is not sufficient when most teams have an advanced understanding of the dynamics of the rules of the game; similarly, in a fast-changing world, merely knowing the laws of a given society without understanding how different interpretations affect them is not sufficient for a fair and happy state, although it is a necessary step towards achieving that state.

Now that we have established the reasons for the importance of the knowledge of the foundation and structure of law in the betterment of society, it is time to examine different legal theories and the role that interpretation plays within each. For each theory, we will study the role of interpretation in methodology, scope, and determinacy²⁴ as well as the intent of the legislators.²⁵ A consideration of these points serves as a nice method in understanding the structure and foundation of each legal theory. Methodology reveals the methods through which law is conceived, determinacy draws the boundaries of the system in question, while the intent of the legislators expresses the priorities of those who support the legal theory in question. These constitute three venues through which important changes are brought about in a legal state. Therefore, the knowledge of them is important for citizens' protection and practice of choice.

²⁴ Determinacy, in this context, refers to the extent to which the legal system can constrain, dictate or guide our actions and choices in life.

²⁵ This approach has been inspired by Andrei Marmor's approach in his book *Law and Interpretation: Essays in Legal Philosophy*, 1995.

2.4 Methodology of Natural Law

The oldest theory of law is that of natural law. Broadly construed, natural law claims that law is determined by a set of *principles*. Different variations of natural law theory differ in what they believe the source of these principles to be. Some saw it in the word of God and religion. This was the view of Thomas Aquinas: he conceived natural law as humans' participation in the eternal law that was created by God.²⁶ Other variations of natural law saw the origin of these principles in the order of the universe, without necessarily mentioning the existence of a divinity: Plato and Aristotle advocated this kind of view. Plato spoke of the forms while Aristotle claimed that individuals should be educated to achieve virtue and live in harmony with the order of the universe.²⁷

More recent proponents of natural law have claimed that the principles that determine law are discovered through the use of reason: the idea is that human reason can analyze the nature of individuals and the world and find in it the rules and obligations that bind individuals to society and to each other. John Finnis' theory, covered later in this chapter, is one amongst these theories. The difference between this last view and that of Plato and Aristotle is that the latter presupposed a determinate kind of order to exist in the universe; the former makes no such claim, instead holding a more agnostic view about the existence of a predetermined order in the universe. The kind of natural law that relies on human rationality to discover

²⁶ Aquinas, *On Law, Morality and Politics*, Translated by William P. Baumgarth and Richard J. Regan, (Indianapolis: Hackett Publishing Company, Inc, 2002), Chapter II.

²⁷ Plato, "Phaedo" in *Plato, Complete Works*, John M. Cooper ed., D.S. Hutchinson Associate ed. (Indianapolis: Hackett Publishing Company, 1997), 49. Also see Aristotle, *Nicomachean Ethics*, Trans. Terence Irwin (Indianapolis: Hackett Publishing Company, 1999).

laws relies solely on our ability to *reason well*. The acceptance of this view raises important questions about the determinacy and scope of laws. However, before addressing those questions, it's important to evaluate the methodologies that have been proposed so far.

To better understand these methods we can consider them according to two different conceptions of realism. In understanding the theories of Aquinas, Plato and Aristotle, it is helpful to consider Dummett's formulation of realism. Dummett states: "the primary tenet of realism, as applied to some given class of statements, is that each statement in the class is determined as true or not true, independently of our knowledge, by some objective reality whose existence and constitution is, again, independent of our knowledge."²⁸ The implication of this method is that claims to legality are either true or false, with no grey zone in between. What's more is that the truth-value of these claims distinguishes actions as either lawful or unlawful in accordance with a higher and independent authority. Societies that embrace this method equate lawfulness with goodness and correctness while considering unlawfulness as incorrect. Law and morality are one and the same in these societies and, more importantly, according to these theories moral pluralism is a myth.

Moral pluralism – also referred to as value pluralism – is defined, in general terms, as the view that many different moral values exist and are valid, even though they may contradict one another. One of the basic debates in moral pluralism concerns the reducibility of moral values: i.e., whether moral values are all reducible

²⁸ Andrei Marmor, *Interpretation and legal theory* (Oxford and Portland: Hart Publishing, 2005), 66.

to one super-value or whether there are really several distinct moral values, existing independently of one another.²⁹ Some proponents of value pluralism, like William Galston, have claimed that not all values are commensurable: they may neither be reduced to one super value nor ranked in order of importance.³⁰ There may just be independent and conflicting values that could be considered equally good. His theory considers value pluralism in relation to liberalism as a political theory. However, for our purposes it is important to note that from the perspective of traditional natural law theory, one of the main problems with moral pluralism is its lack of distinct limits in what could be considered a value: such problems could arise for theories of people like Galston. This is because older versions of natural law theory conceived determinate limits to what could be considered a value, or as good; whereas, within withing certain conceptions of moral pluralism, there is room to argue for or against the validity of different values.

We can already see how by rejection of moral pluralism, divine natural law can create tension and clashes amongst people holding different belief systems. Divine natural law thus limits the possibility of action for the people, since any objections they make can be considered as an act against the law.

On the other hand, the newer kind of natural law theory – which relies on reason to discover laws - is more flexible while taking a different kind of realist approach. Realism, in this context, claims to report facts as they happen; in other

²⁹ Mason, Elinor, "Value Pluralism", *The Stanford Encyclopedia of Philosophy (Fall 2011 Edition)*, ed. Edward N. Zalta, <http://plato.stanford.edu/archives/fall2011/entries/value-pluralism/>.

³⁰ William A. Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002), 48-60.

words, moral claims are taken to be right if they accord with how things really are. This form of realism departs from Dummett's version of realism which was described earlier. According to newer conceptions of natural law theory, it is completely reasonable to assume that A could be reduced to B or C in certain circumstances, while still carrying distinct characteristics of A.³¹ In other words, the same laws could apply differently in different circumstances while still carrying the same core principles and meanings.

Laws of censorship and copyright are two examples amongst many. While the core idea underlying copyright laws is the protection of intellectual and creative property, censorship laws restrict the use and propagation of information, for different reasons (often under the pretense of protecting the population). The basic purpose of these laws is manifested differently in each situation, sometimes to people's dismay. For instance, many have objected to Canada's Bill C-32, which places "digital locks" on the use and propagation of information, claiming that this form of censorship stifles creativity and ruins Canada's chance to distinguish itself in a digital world. Michael Geist, one of these critics and a professor of law at University of Ottawa, has been vocal in expressing his discontent with this bill.³² On the other hand, less business-minded artists have found themselves in agreement

³¹ This relates to Putnam's use of the indexical to refer to different things that bear similar characteristics. See Hilary Putnam, "The meaning of 'meaning'" in *Mind, Language and Reality* (Cambridge: Cambridge University Press, 1975), 215.

³² Scott Simpson, "Canadian laws would have prevented YouTube, Google from emerging here, e-prof laments," *The Vancouver Sun: Innovation* (Blog), November 1st, 2011 (10:18 am), <http://blogs.vancouversun.com/2011/11/01/canadian-laws-would-have-stopped-youtube-google-from-emerging-here-e-prof-laments/>

with the terms of Bill C-32, seeing it as a way of protecting the value of their work.³³ Thus, laws of censorship and copyright take different forms while still holding their core purpose and values. It's also worthwhile to note that laws, such as those of censorship and copyright, can have different manifestations under the newer conception of natural law theory because valid changes in our reasoning should be reflected in our laws, based on this view.

2.5 Scope and determinacy of Natural Law

It is important to note that, for the variations of natural law which are not focused on rationality as the *source* of law, the original source of natural law - be it God, nature, religion or the holy book - is regarded as the standard *for* rationality. This is a noteworthy distinction: saying that rationality is the source of law is a broad claim that is *in theory* meant to include an objective use of reason; *in practice*, it leads to the adaptation of the kind of instrumental rationality that finds its way to power or is embraced by most people. This is an important distinction as it shows structural changes that depart from the original conception of the theory of natural law, and it's important that people recognize that in protecting their rights. On the other hand, saying that divine revelation or the determinate order of the universe are the standards of rationality - for judging individuals' acts and legal cases - is to adopt a very narrow meaning of rationality which does not easily allow other

³³ James Gannon "Bill C-32, copyright and digital locks," *thestar.com*, Published September 3rd, 2010. <http://www.thestar.com/opinion/editorialopinion/article/856210--bill-c-32-copyright-and-digital-locks>

worldviews to affect or change those principles. Let us call the former “rational natural law” and the latter “divine natural law”.

The question now is: what is the scope and power of determinacy of each theory? Historically, divine natural law could mean burning at the stake those who committed major offences. This was mostly because there was no room for negotiating with what those in power claimed divine natural law dictated. Both the scope and determinacy of the laws were narrow and defined. In the modern world however, interpretation has come to play a major role even in systems that embrace divine natural law. An example of that is seen in the case of Islamic countries where religion and the state are still not separate on a social and political level in a significant manner. In those countries, different interpretations of how Islam requires women to dress have led to different laws to that effect. In Iran, women have to cover their hair and dress in loose clothing in public places. In parts of Afghanistan, women have to wear the burqa, covering their whole body except for a small opening for the eyes. The rules of both countries are said to be based on Islam’s commandments; but they are clearly the result of different interpretations of Islam, if we consider the official reasoning that is offered for such rules and forget the socio-political reasons that have probably inspired them. For now, suffice to note that adopting divine natural law theory has and does lead to different kinds of laws nowadays, and that is interesting, considering the determinate and unchanging nature which the original proponents of natural law theory imagined for it. In other words, interpretation seems inescapable.

2.6 Scope and Determinacy of Rational Natural Law

Even though their methods are different, the results of both kinds of natural law converge. That is what is established as law is the result of society's *interpretation of* what it considers the independent and higher source for law. The limits and determinacy of rational natural law are determined by the power and validity of reasons that support it: thus, there is usually more room for change within this kind of natural law than in divine natural law. It is interesting to note the malleability of laws within each system, despite appearances of unchangeability and determinacy. We can already observe how knowledge of the foundation of natural law would affect the lives and decisions of the people living under such systems: divine and rational natural law do have room for change *based on their own standards*. As Andrei Marmor expresses, in relation to a realist account of law, which natural law falls under: "Law must have a critical aspect, as it were, which may, or may not, be recognized correctly by the pertinent agents."³⁴ Where the government fails to acknowledge the role and place of the people's view within the legal system, with a pertinent and basic legal literacy people can realize that there is real hope for change to come about: that belief could lead to action on the part of the people which would then place pressure on governments and thereby stop at least some unjust events from occurring, on large or small scales – and that is something worthwhile to strive for.³⁵ Marmor's claim regarding the critical aspect of law

³⁴ Andrei Marmor, *Interpretation and legal theory* (Oxford and Portland: Hart Publishing, 2005), 74.

³⁵ Please note that I am not implying that the realization that there is hope will change a legal society over night as there are surely other aspects such as socioeconomic and political issues within each society that contribute to its problems. Rather people's realization of their role and power is a first

stands independently of whether or not governments acknowledge it. Of course, anyone who has witnessed the rule of natural law can attest to the fact that the possibility for change and flexibility of laws are not usually highly advertised in those societies; on the contrary, natural law regimes often put tremendous propaganda efforts into making people believe that law is one and unchanging. In a sense, such regimes misrepresent the structure and foundation of their legal system for the sake of keeping political power and control over the people. That is why it is so important for more people to recognize this misrepresentation for what it really is.

But it seems like more needs to be known about the intentions and direction of those in favour of natural law theory before we can judge their project as a worthy or unworthy foundation for law. After all, repressive regimes as well as many human rights activists rely on natural law arguments to advance their goals.

2.7 The Intention of Natural Legislators

The notion of intention has a long and complicated history in philosophy, not to mention multiple meanings. For our purposes, intention will designate the expressed aims of an agent: i.e., what the agent expresses to be their goal. I am leaving unexpressed other forms of intentions, because their discussion would lead us well into psychology and away from legal philosophy. What is important for our purposes is the consideration of how the knowledge of expressed intentions of a government, in conjunction with the legal theory used by that government, affects

step to be taken towards change for the better, especially considering the existing relation between improvement within any legal system and the social and political changes that could follow from it.

ordinary people's lives and decisions. The big question is whether or not the intentions of the government are consistent with the kind of legal theory that it supports.

The Universal Declaration of Human Rights (UDHR) lists a number of rights and privileges that many nations have vowed to safeguard: the protection of these rights is therefore the intention of most countries, which makes these rights a good standard for the aptness of any legal theory and system. Does natural law theory, as a legal theory, support the structures that protect human rights and thus fulfill the government's duty to ordinary people? Let's take the following article of the UDHR as a standard: "20. (1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association."³⁶ It immediately becomes clear that, in any country where divine natural law reigns, and people do not enjoy freedom of religion, their human right is being violated: because they have at least one association chosen for them without their input.

There are other inconsistencies between natural law theory and expressed intentions of governments. The first problem is *internal inconsistency* within divine natural law: i.e., the different understandings and beliefs that exist with regards to "the word of God." That's problematic because a fundamental assumption of divine natural law is that it leads to a set of determinate principles. However, in practice, the element of interpretation has rendered divine natural law doubtful because divine commandments often take varying and even contradicting forms *even within*

³⁶ "The Universal Declaration of Human Rights: Article 20," *The United Nations*, accessed March 21st, 2012, <http://www.un.org/en/documents/udhr/index.shtml#a20>.

the same religion. The second problem is *external inconsistency*: different people have different religious views that are based on beliefs backed by faith alone. That makes it very difficult to determine which religious view should be adopted as the basis of law. The differences in religious views make cohabitation of people with different religious beliefs at best difficult and at worst impossible, under divine natural law. But the real problem arises when the laws of the land infringe upon individuals' liberty to follow their own religious views. It is hard to come up with a valid reason that proves one religion to be better than the other. The question could arise: why should we take Islam, and not Christianity, as the basis of law? Furthermore, the proclamation of 'new' religions could render the task of managing the state virtually impossible.

Rational natural law is also problematic when it becomes fixated on one form of rationality alone. It is clear that rationality relies on observation, which is heavily influenced by one's worldview. The issue is that our culture and environment *predispose* us to have a certain understanding of our world and sometimes we may find ourselves locked in a certain worldview without realizing it. This could, and has in some places, led to the imposition of certain associations against ordinary people's free will. In fact, rational natural law presents us with the same problem as divine natural law, with a minor difference: divine natural law relies on values determined by God whereas rational natural law relies on values determined by a group of people: the legislators or those in power. Depending on the dynamics of the politics of the country in question, the *reasoning* of the legislators may or may not be faced with major opposition. For that reason, a functional use of rational natural law

theory requires an open system that considers various views in a fair manner. Only in that case could we hope for consistency between protection of people's rights, such as freedom of association and the form of the government.

However, the more serious problem for rational natural law theory is its attempt to deduce prescriptive claims from descriptive states. This issue is directly related to Hume's problem of induction and causality. Hume reminds us that, just because a series of events have always been observed to occur in a certain way, we can not assume they will always occur in the same way. Similarly, basing laws on what we have observed to be "the nature of the world" is an imperfect method that is in need of qualification. It is true that theories of probability have shown the level of certainty with which we could predict future events. And certain laws, such as those protecting property, are certainly a result of what we have learned from previous experience. However, the future-oriented nature of some laws - as well as their dealings with complex beings such as ourselves - make it difficult always to form accurate predictions merely on descriptive grounds. Here, we see the importance of allowing interpretation within a good legal system. In the same context, also important to consider are the moral issues that follow from a translation of 'is' to 'ought': more will be said on this issue when we discuss the place of morality in law. For now, we must note the crucial role that interpretation, by people and the government, plays in making rational natural law fair and efficient; without interpretation this system is susceptible to wrong turns.

It is difficult but possible to speak of the foundations and structure of natural law theory without discussing the purpose of law more generally.³⁷ However, there is a way to set the foundation of natural law so that it: a) does not come in conflict with people's personal beliefs; while b) it tailors to the particularities of different cases. John Finnis, whose theory has been characterized as a kind of "neo-naturalism" has proposed to take objective goods as the source of the principles on which law should be based. More precisely, his claim is that practical reason must start from a set of objective goods that are not extracted from descriptive accounts, but contribute to "forms of human flourishing."³⁸ He claims that such principles are self-evident and discovered through the use of practical reason. According to his account, the good is independent of our desires: while desires could be irrational, the good is a part of rationality. It is very important to put the *good*, derived from the objective goods of life, before the *right* to ensure that the law serves the common good without imposing any views on people. That means that law in its foundation must focus on what everyone considers to be good, not what different views consider to be the right option. Finnis gives examples of these objective goods: life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion.³⁹

While Finnis' account gets past some of the problems that divine and rational natural law share - such as imposition of certain views on people and blockade of people's personal goals - it still faces the problem of objectivity. There are indeed

³⁷ Next chapter will add to this discussion by focusing on the purpose of law.

³⁸ John Finnis, *Fundamentals of Ethics* (Washington: Georgetown University Press, 1983), 48-50.

³⁹ *Ibid.*

different kinds of objectivity and different ways of achieving objectivity: therefore, many individuals may find that there is room for debate within Finnis' account of objective goods. Moreover, the broad character of these objective goods leaves much room for debate: the aesthetic, for example, has different definitions for different people. However, this problem may be only one of terminology. In fact, the replacement of the conception of objective goods with that of "universally valued goods" has the chance of redeeming Finnis' account. There is something very appealing about taking universally valued principles as the basis of law-making and law enforcement. In this sense, law takes on the role of assuring the *possibility* of fulfilling and protecting values that are basic and important to most people, without taking away the practice of choice from people. Thus, universally valued goods must necessarily be a part of the foundations of a healthy legal system. The question is whether or not universally valued goods form sufficient grounds for a healthy legal structure? It seems that every society will still need laws that are particular to its culture and customs to protect its authenticity. And this is where we are reminded of the importance of an active approach from the part of the people.

Thus, it seems like rational natural theory needs to be complemented by other theories or structures to be satisfying. Making room for widely shared cultural values in the foundation of law has had its supporters and opponents throughout the years. The issue is directly linked to the debate about the relation between morality and law: should we allow morality to be a part of law or should the two remain separate? The positivist theory of law strongly opposes the idea of mixing morality and law. In the following section we will consider some of the main

arguments of the distinguished H.L.A. Hart, as one of the main advocates of positivism. It is very important to note that Hart did not deny that the content of the laws could be inspired by different values and principles; rather, he claimed that moral reasoning does not constitute a necessary nor sufficient reason for validity of laws.⁴⁰ What that implies is that moral reasons are not enough to turn an accepted rule into law and that laws could be made without any moral reasons supporting them.

This section partially concludes that rational natural theory *could* be an acceptable foundation for law: the definitive verdict will depend on the conclusions we reach about the place of morality within law and how feasible it is to protect basic liberties under a system that supports rational natural law. This presentation of natural law theory has hopefully revealed the many subtleties and implications that this theory carries: it should be clear that the knowledge of these points is an important step in forming an educated judgment about the foundations of a government and its policies which, in turn, determine the protection of individual and communal rights and privileges.

2.8 Methodology of Legal Positivism

Positivism had its beginnings in the works of Jeremy Bentham and John Austin, who criticized proponents of natural law such as William Blackstone who saw the law as enforcement of natural rights. The main worry that positivists such as Bentham expressed about natural law theory was its confusion of two separate

⁴⁰ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 181-195.

elements: 1) that of what the laws *are*; and 2) the merit of the laws, i.e. an evaluation of what they *should* be.⁴¹ In their view, conflating these two questions risked to bring under question the authority and effectiveness of the law. Positivists also considered the principles of natural law to be too indeterminate and difficult to know.

The positivists asserted that the law is what is written down, what is *posited* by human beings. We will call this view the 'black letter view'. However, there are important distinctions and disputes even amongst positivists regarding the law and what it represents. For instance, Austin conceived law as a body of commands set forth by the sovereign, who is the body that is regularly obeyed by people. For him, obligation to do something meant the likelihood of being punished in the event of disobedience.⁴²

Others, such as H.L.A. Hart, brought forth a different conception of law and its terms. For Hart, punishment is only an auxiliary function of the law that in no way defines its core. In other words, Hart claims that there is more to law than just punishment and obedience. He compares law to orders backed by threats using his example of the gunman making threats to others, only to show that the example of the gunman (and analogous models) are obviously lacking in representing law. For Hart, what differentiates law from mere orders backed by threats is its internal

⁴¹ Jeremy Bentham, "Critique of the Doctrine of Inalienable, Natural Rights" in *Anarchical Fallacies*, vol. 2, ed. L.B. Bowring, accessed February 5th, 2012, <http://www.ditext.com/bentham/bentham.html>.

⁴² John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: The Cambridge University, 1995), 3-5.

acceptance by most people and its persistence through time.⁴³ The orders of a gunman do not represent legal obligations; rather they *oblige* the individual(s) in question to follow the orders only momentarily; the force of the gunman's demand is gone once the gun is dropped and the gunman is no longer present. In that sense there is only what Hart calls an external, i.e. observable, aspect to the "obligation" that the gunman imposes: his victims have no internal acceptance of what is being asked of them. Orders backed by threats miss the internal aspect that the concept of law enjoys: i.e., its authority and acceptance by people even in the absence of force.

One of the most seminal points that Hart makes is that law is sustained through a concept and a system. This concept could be best described as a legitimate authority that is sustained through a system. Hart explicitly defines law as the union of primary rules, i.e. rules as directives that tell us what to do and what not to do, and secondary rules, which basically specify how the primary rules are to be applied.⁴⁴ It is thanks to this system of primary and secondary rules that law exists. The most important secondary rule is that of recognition, which recognizes the source of law as a set of precedents or statutes.⁴⁵ That is the theoretical formulation of legal positivism.

2.9 Some Important Subtleties of Legal Positivism

In practice, the difficulty that Hart's account faces is that the legal system heavily depends on individuals' general acceptance of primary and secondary rules:

⁴³ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 24.

⁴⁴ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 77-89.

⁴⁵ *Ibid.*

where that is not the case, corruption and disorder are experienced. The key question is: what makes people accept or reject social or legal rules? It is likely that their moral principles and convictions play a significant role in that respect. If that is right, it means that people's attitudes have an indirect yet consequential effect on the validity of the laws of the land, and that poses a problem for Hart's claim regarding the independence of morality from law.

We may stop and ask whether it is our moral convictions that make us accept or reject laws, or is it the laws of the land that shape our moral convictions in the first place? If the latter is the case, then Hart could be right in saying that law exists independently of morality. However, the existence of major and local opposition groups against important laws in any country - such as laws regarding the prevalent political setting of that country - seem to suggest otherwise. Bad Iranian laws regarding the education, leadership and religion in that country have raised discontent and widespread disagreement amongst a major portion of the new generation in Iran: a testament to the claim that prevailing laws do not always shape the morality of a population.⁴⁶ In addition, it is people's moral convictions about their rights and their preferred way of life that pushes them to ask for a change in the legal system and its functioning. So, there is little doubt that moral principles have an important influence on people's acceptance or rejection of laws. Seeing that Hart defines law as the union of primary and secondary rules and, because the

⁴⁶ Not much time has passed since the demonstrations that followed the rigged presidential elections of 2009 in Iran. Out of those those demonstrations was born what has come to be known as the "Green Movement". The point to note is that the moral convictions of people of Iran did not change with the wishes of the oppressive regime of that country. See Slater Bakhtavar, *Iran: The Green Movement* (Irving: Parsa Enterprises, LLC, 2009).

proper functioning of this system requires an internal acceptance of its rules, and because that acceptance is affected by people's moral convictions, Hart must concede that law is not independent of morality, but very much shaped and affected by it.

But could we make the transition from "law and morality are interdependent" to "morality *should* be an important factor in the formation and the rule of law"? It seems that unless such a transition is made in practice, unhappiness, disobedience and disorder will follow on the part of the people. At the same time, we certainly do not want moral claims to undermine the authority of law: that is to say, we cannot always accept moral reasoning as a justification for legal disobedience. That is why it is important to make a distinction between the role of morality in shaping the content of the laws and the moral obligation to obey the law. The latter must reign supreme in most cases for two reasons: 1) to avoid chaos and disorder within society and 2) because good laws already include a consideration of different moral convictions and in that sense the law is supposed to be considerate of while taking into account the moral convictions of the people.⁴⁷ A good legal system includes legal ways in which disagreement with the law and moral concerns could be expressed and dealt with in an orderly and civil manner. Furthermore, in a healthy legal system morality has already been studied and considered in the making of the laws, which should reduce discontentment due to moral concerns.

⁴⁷ How this kind of consideration is achieved is a separate question that shall be *partly* addressed in the chapters to come.

The question is: to what extent can legal positivism incorporate moral principles, if at all, and how?

2.10 Scope and Determinacy of Legal Positivism

Those who acknowledge the role that moral principles play in law often disagree about how a balance between law and morality is achieved or how it should be achieved. But they do not only disagree amongst themselves, they also have to address the fundamental claims of skeptics who claim, for different reasons, that moral principles have no place in law.

The objection of skeptics is important but not irrefutable. There are two major forms of skepticism with respect to morality. One makes a metaphysical claim, saying that moral principles cannot be proven or seen in the way that hypotheses in physics could be tested and proven. The argument is that because we cannot test moral claims in the way that we can test scientific claims, moral principles remain uncertain and would constitute shaky grounds for our legal system. The same skeptics worry that the great variety of moral convictions that people hold would create pragmatic issues in the process of writing the law. Similar views that attack the metaphysical standing of moral principles fall under what Ronald Dworkin has labeled “external skepticism”⁴⁸.

External skepticism is sidestepped if we consider the central place that morality plays in our lives. For instance, contracting is a way of ensuring that individuals follow up on their promises, which is generally a moral obligation. We

⁴⁸ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 79-80.

can easily think of many other laws that are justified by, or based on, some moral principle: laws against perjury and laws against sexual misconduct are only two in that category. We make important decisions in our lives based on the moral responsibilities that we have towards our family, friends and colleagues. In short, the importance and significance of the *place* of morality in our lives is undeniable. Therefore, even if we cannot prove the *metaphysical* place of morality in the universe, we can certainly realize its importance within the physical realm that we inhabit as humans. Moral claims, even if they are not “out there to be seen” are perceivable in other ways. As far as the testability of moral claims is concerned, the mere fact that moral claims are evaluated in a different way than scientific claims is no evidence against their credibility or legitimacy. Proponents of different moral theories have given convincing moral arguments to support their claims.

The other form of skepticism is internal skepticism. Internal skeptics question the substance of moral principles. Simply put, they do not reject the place or importance of morality in the world; but they do worry about the subjective nature of moral claims. Subjectivity is worrisome because it is based on personal opinions. Personal opinions are problematic because they often rely on personal interests, they are often uneducated and, most importantly, there are an uncountable number of them within each society. Once again, skeptics worry that - without “concrete” proof - moral judgments remain like ice cream flavours: there is no way of proving which ice cream flavour is more delicious. In response to this, the defender of moral principles could say that our social practices and the role of morality in our lives impose certain *meanings* and consequences upon moral claims

and actions that follow from those claims that ice cream flavours do not have. For instance, the act of stealing has a consequence and meaning for people that ice cream flavours do not in ordinary circumstances. We do not find murder acceptable even if it helps the psychopath feel better to kill others; the same cannot be said of many other matters that some consider as merely subjective. Even though a full response to skepticism, in the context of law, would include an account of *how* we are to successfully manage and incorporate moral principles within our legal system; we can see now that moral principles, when qualified and defended, are not merely a matter of purely personal, subjective opinion.⁴⁹ And that is important to point out because it gives moral claims a significant and credible voice when it comes to determining laws and principles. Moral claims are entrenched in the complex web of social phenomena and their correctness is defined and evaluated based on social dynamics that affect society as a whole. Simply put, we can argue against moral convictions but we cannot argue that someone is “wrong” in picking strawberry as their favourite flavour of ice cream. Thus, we could and we must sidestep internal skepticism when it comes to legal issues. If that argument is correct, another obstacle is removed from the way of legal positivists to allow the inclusion of moral principles in law.

⁴⁹ A model for incorporation of moral principles in law will be sketched as this chapter, and the following ones, unfold.

2.11 Intentions of Legal Positivists

While rejecting skepticism as an approach, we must not take its claims too lightly. There is a lesson to take away from the observation that moral claims are different from scientific ones or most other claims that we come across: we must remember that the proofs supporting moral principles will be more theoretical than empirical in nature. Meanwhile the empirical component of the reasoning that's offered in support of moral principles will require a special kind of consideration. Moral evidence has to be considered alongside other, and often conflicting, evidence. The concern of skeptics may be a result of the fact that we are not quite settled on how properly to carry out such considerations. This observation brings us back to the question of *how* exactly should we incorporate moral principles in law?

One solution is found in John Dewey's theory of democracy and law. He points out the direct connection that exists between democracy and law, suggesting that "an understanding of law can only follow from an accurate understanding of the social and political context within which it functions."⁵⁰ For Dewey, democracy is a way of life that is social before it is political: in other words, for there to be a real democratic state a certain culture needs to prevail in the society *first*. Similarly, to make laws within a democratic state, one needs to understand the cultural, social and political realities of that society. The relation between social phenomena, on the one hand, and the legal and political structure of a society, on the other, is a two-way relation in which all members react to one another while affecting each other.

⁵⁰ Brian E. Butler, "Democracy and Law: Situating Law within John Dewey's Democratic Vision," *Etica & Politica* XII, no. 1 (2010): 256.

Therefore, the laws must demonstrate an understanding of social realities, which include the moral beliefs of the ordinary people. Ignoring such realities is, according to Dewey, a “betrayal of human freedom no matter in what guise it presents itself”⁵¹

The solution for including moral values in our laws, inspired by Dewey’s account, is as follows: we need to allow for an understanding of moral realities of the society through multiple avenues that make possible the communication of information and set the grounds for discussion and inclusion of morality in law. For instance, attention to different groups that are formed upon a basis of shared interests will encourage the inclusion - or at least a consideration - of moral values that people hold; this approach stands in contrast to the top-down constitutional approach which leaves the task of law-making in the politicians’ hands alone. Such a system utilizes the expertise of professionals and the creative spirit of the people, which reflects a wide range of concerns and experiences to give rise to laws that match each society’s realities. Democracy and law reinforce one another in this model.

The realization of such a system is a project underway in countries like Canada: we already observe laws and lively discussions reflecting concerns about issues like “reasonable accommodation.” However, written laws can only address so many moral and social issues. That means that legal positivism, in its best form, needs supplementation to fully address the needs of a society. The foundation and

⁵¹ Brian E. Butler, “Democracy and Law: Situating Law within John Dewey’s Democratic Vision,” *Etica & Politica* XII, no. 1 (2010): 257.

structure of law call for another feature to compensate in cases where written laws fall short. Ronald Dworkin suggests interpretation as the saving feature in law.

2.12 Dworkin and The Methodology of The Interpretivist View

Direct application of the black letter view has caused issues in the past and, without reform, it will continue to do so. Issues arise because written laws are often too broad or too narrow in nature to tailor to the specificity of the situations which arise in everyday civil cases: my case – as described in the introduction - is an example of that. There are no written laws that directly tell us what is to be done in a case where a company manipulates young students to sign a contract; even if there are laws regarding manipulation, forced consent, and so on.

Even a positivist like Hart admits that one of the reasons for the ambiguity that surrounds the notion of law is the existence of such cases, which he calls “borderline cases”: these are cases that fall outside of direct application of written laws.⁵² The role of the judge or the court in such cases, according to Hart, is to make new rules, based on discretion and precedent. But even in cases that do not qualify as borderline cases, a judge may choose to prioritize one rule over the other, leading the case towards one outcome over the other. It is not surprising that controversy surrounds the court decisions that we do hear about, breeding disagreement not only amongst ordinary people but especially amongst judges, lawyers, and law makers. In fact, ‘rule scepticism’ refers to the ability of the courts and judges to set

⁵² H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 1-13.

new precedent and rules to point out that such a process could become boundless, nullifying law as an institution.

Added to the already complex nature of a court's decision is the argument surrounding the nature of the disagreements that arise between professionals in law. The nature of this disagreement is important because it directly determines the way we manage matters in jurisdiction and legislation. The positivists are inclined to say that the uncertainty surrounding borderline cases is a result of the open texture nature of language. In other words, they believe the issue to be a semantic one. They claim that uncertainty in such cases is resolved by digging through written laws and staying as faithful as possible to the 'black letter view' of law. They thus claim that there is, or ought, not to be any *real* disagreement regarding how to decide a case. However, reality has proven otherwise: new claims regarding individual rights are often expressed in new and different ways, posing new semantic challenges for the courts and legislators. Moreover, societal progress and changes in people's mentality often move quicker than the changes in our laws, creating new issues and *genuine* disagreement about how new cases are to be ruled. Similarly, natural law theorists would side with the positivists in claiming that law does set the grounds to settle any disagreement, one must only figure out under which natural law or duty each case falls. However, it is once again interpretation that ultimately decides the general direction of our legal system or particular cases, which makes it important to people to voice their opinion if they wish the balance of justice to reach equilibrium. In fact, the complexity of human circumstances and the mere fact that we need institutions such as the courthouse is evidence that

disagreement is real within jurisprudence. The real question to consider is: in what way are we to deal with this kind of disagreement? Seeing that the root of such disagreements is ideological in nature, interpretation of the laws and situations at hand seem to be the only way to resolve the issues.

The use of interpretation is further justified by the fact that it helps support two main goals of the legal system: 1) the preservation of order; and 2) the protection of rights, liberties and important values (henceforth referred to as protection of rights). The connection that exists between these two functions of law is obvious: often one is compromised at the expense of the other. Now, there are, undoubtedly, many other functions that law fulfills. Therefore, my choice of the two above-mentioned goals might need some defending. Firstly, the conflicting and general nature of these two goals makes it so that they require the support of an institution like law if they are to be realized mutually at all. Secondly and on more theoretical grounds, the conflicting and basic nature of these two goals brings out some fundamental and difficult legal questions that can *only* be resolved through interpretation. Without legal interpretation, we might have to give up order, or our rights, almost indefinitely. Let us now consider how interpretation is to be included in legal reasoning and legal verdicts.

The method that Dworkin suggests goes as follows: interpretation is broken down into three steps.⁵³ The first step is the “preinterpretive stage,” which distinguishes the various elements that make up the content of a given law or

⁵³ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 65-68.

situation. So, if we consider this thesis as an example, the first stage of interpretation would involve identifying its chapters. The second stage involves the identification of some general justification for the main elements that were pointed out at the first stage: this is called “the interpretive stage”. During this second stage, the interpreter seeks to give reasons or justifications for why the elements of the first stage were identified in the first place. In the case of my thesis, this stage would require giving justifications for the existence of each chapter of this thesis. I would have to explain why it was important or necessary to lay out the chapters as I have and not otherwise. The third and final stage involves reform that comes in the shape of adjustment of what the law or social practice in question really requires; this stage is necessary to ensure that the law or social practice in question actually serves the justification that was given in the second stage. Again, in the case of this thesis, this stage would require adding new and relevant information that are found through research to each chapter to keep its content true to its original purpose. Similarly, the final stage of interpretation – in the context of law - is basically about updating the law. Based on Dworkin’s method, the process of applying law or understanding any given social practice is the act of studying its roots and reconsidering the original reasons for its existence in light of the case or situation at hand.

2.13 Scope and Determinacy of Interpretivism

Two major objections are brought against Dworkin’s method. The first worry is about the limit of interpretation: one may worry that interpretation may become

boundless, taking us far from our original purposes. Put differently, the worry is: how are we to keep interpretation in line? What if good interpretations blind us to better interpretations that exist and are not yet presented to us? Fortunately, there are limits to this interpretive account, which prevent it from running wild. The obligation of being consistent with precedent, as well as the professional obligations of the judges and courts, keep the general direction of the legal system in line. The recognition of phenomena such as 'judicial activism', which refers to a judicial ruling that is based on personal or political convictions rather than existing laws, is evidence of our society's awareness of deviant instances and our general desire to oppose such cases. Moreover, the hierarchy that exists within the judicial system makes it possible for the decisions of lower courts to be revoked or overruled by those of higher courts. Nevertheless, it is not unheard of that the courts sometimes make odd decisions. In those cases, the issue is not found within the legal system but it is caused by ordinary people's ignorance of the laws or their rights: we will discuss that issue in depth in the following chapters. However, as far as the creative element of the interpretive method suggested by Dworkin is concerned, history, the intellectual community, as well as the widely accepted - and critically discussed values of each society - act as limiting factors for the kind of interpretation that is accepted by each society.

The second objection to this interpretivist method is the following: what happens when bad laws apply to a given case? 'Bad' in this context means inadequate, or lacking insight. This is a serious problem for laws that are construed too broadly without being officially supported by more specific mandates. The

problem is, of course, that laws which are flawed in that way could lead to bad interpretations and wrong decisions. Luckily, or unfortunately, in such cases the burden of justice falls on the representation of the case. It is the job of the lawyers or people involved in the case to highlight the relevant points and the peculiarity of the case at hand so that legislators and the jurists can make and apply the laws in a just manner. I argue in later chapters that educating the population in matters of representation, their rights, and the existing laws is an integral part of assuring that we have a healthy legal system. A major part of the problem with bad laws, in this context, is a lack or problem of communication between the people and those responsible for making and enforcing the law. If our legislators are not hearing or understanding the issues that arise every day for the ordinary folk, that ignorance could contribute to decisions that later reflect negatively on the people. Of course, this could be the result of bad intentions and legislators could simply be closing their eyes to certain problems and concerns; however, what is unsettling is that inadequate laws are made even when the best intentions are at play amongst professionals in law. For instance, the banning of the operation of companies like the one I was working with would require a thorough exposition of the extent of the damage that the company is doing to so many students each year: that would make a real and credible case only if a sufficient number of people spoke out about their experience.

In sum, the interpretivist method seems to give citizens a lot of room to maneuver within the legal system: much of how injustice is dealt with is left in their

hands as they choose whether or not to overlook or to take action against the denial of their rights.

2.14 Intent of the Interpretivists

The interpretivist school has progressive and social aims. Their aim is progressive in the sense that the supporters of this view wish to implement the necessary reforms to the existing legal system. They have a social approach because they aim to protect and reinforce justice for all individuals in society. However, these goals are only achievable with the participation of an educated population.

Hopefully, by now it has become clear that moral principles *do* have some place in law, even if further work needs to be done to better understand and define their place in law. I have hoped to show in this chapter, drawing on Dworkin, that written laws alone are lacking in power to do what is usually expected of them: i.e., to preserve order and protect our rights and privileges. At the same time, there is a direct relation between legal principles of each society and individual rights: an increase in awareness of this relation is the first step towards a proper incorporation of principles within law. Another goal of this section has been to show that, without ordinary people's input and participation, legal decisions could go astray and the legal system could take directions that are undesirable for the general public, especially when interpretation is involved. The knowledge of the foundation and structure of the prevailing legal system and alternative ones is an imperative for contributing to any legal system and society because it determines

ordinary people's place within their legal state by informing them about the ways in which they can contribute to achievement of justice and fairness.

I remember going for coffee with a friend who was in his third year of law school, about two years ago, to discuss my case. After some explanation and exchange of opinions and, in response to my claim that justice ought to be on my side (since what the company had done was so wrong) he replied: "This is why the small claims courts are so clogged with unnecessary cases: people just wrongly assume that the law will be on their side." I thought that was a strange claim at the time. Could we really expect people to have an intimate knowledge of the way the legal system works if no explicit efforts are made outside of law schools to educate them? And, without that kind of knowledge, could we really blame people for using the small claims court to defend what they feel has been wrongly taken from them while hoping for the best? His annoyance was unsubstantiated, I thought. And upon reflection, it has become clear that, to create the kind of democratic culture which Dewey has described and strived for, a thorough understanding of the notion of human rights has to be part of our project as a society.

Chapter Three

The Content and Purpose of Law

The previous chapter focused on the foundation and structure of law. This chapter focuses on the content and purpose of law. Conceptually speaking, it is wrong to separate these two chapters because the topic of each determines the content of the other. However, this separation is helpful in the present context; since it reveals another perspective through which we must see our legal system and another way in which we could make it serve us better - as a society and individuals. The aim of the present chapter is to explore the relation between the content and purpose of law; and the impact that a substantial knowledge (or misunderstanding) of this relation has on our everyday life. I take human rights as an instance of the content of law and I take preservation of order and protection of rights as the basic purpose of law. The presupposition is, indeed, that law has a purely functional purpose: it is useful and desirable only in so far as it serves its purpose.

A point may be raised about the usefulness or aptness of using human rights as an example of what constitutes the content of law, in this context. The worry may be that since human rights are already at the margins of application of law; and given that positive contribution to them requires a great deal of expertise and knowledge of the field of legal protection of human rights, not to mention the context within which these laws are being applied; it may be less than helpful to allow ordinary people to participate in the interpretation and discussion of such topics as human rights. In response, I would argue that the context-dependant and fast rate at which

the global community is moving provide all the more reason why experts in the field of human right need the input of the ordinary folk to perfect laws and policies that pertain to each society, in light of that society's particular situation. As it will be argued later in this chapter, a theoretical understanding of such issues which is unaccompanied by a good grasp of the realities that ordinary citizens are living lacks insight. Later we'll consider the input of a Dr. who spoke of his experience of having to perform passive euthanasia on patients and the gap that he saw between that experience and his own theoretical and highly advanced training as a Dr. Likewise, while professionals in the field of law surely share valuable insight on topics such as human rights which may be invisible to the rest of ordinary folks; they still need the interpretation of ordinary citizens on subjects such as human rights: namely, how ordinary people feel disrespected, discriminated against or denied justice because the system has failed to recognize many of their struggles, perhaps not due to any inherent fault of the system. However, this does go to show that action and interpretation from our citizens are required in trying to improve the fairness and efficiency of our legal system.

The model I envision, and aim to justify, is the following: the purpose of law, and its content, are two separate entities sitting on the opposite sides of the balance of justice. What tips the balance to one side or the other is *interpretation* and *the kind of reasoning behind* that interpretation. I maintain that interpretation needs to come from both of the following parties: experts working within the government to form and implement laws and the ordinary people. Note that ordinary people could not provide their share of interpretation unless they have a basic knowledge of the

legal system of which they are a part. This is the point that has been emphasized since the beginning of this thesis and in this chapter, we shall see once again, how a basic knowledge of the relation between the content and purpose of law is required for citizens to participate in the central act of interpretation, within our legal system. Think of it in terms of the balance justice which was just described: the ideal situation would be one in which the content of law and its purpose are at the same level: representing the situation in which content of the law is serving the achievement of its purpose without either side of the balance overweighing or being pulled down by the other side. What follows should help make this abstract model more tangible.

3.1 Related Issues

To situate our debate, it's useful to consider some existing issues between the purpose of law and its content. Human rights have been much debated by different nations and people throughout history. Take gender equality as an example of a basic human right. A recent study on *Global Gender Gap* shows that, over the last six years, while 85% of countries have improved their gender equality ratios, for the rest of the world the situation is worsening: "The sixth annual World Economic Forum, *Global Gender Gap Report 2011*, shows a slight decline over the last year in gender equality rankings for New Zealand, South Africa, Spain, Sri Lanka and the United Kingdom this year, while gains are made in Brazil, Ethiopia, Qatar,

Tanzania and Turkey.”⁵⁴ The question is: why a *decline*? Slow improvement seems justifiable – a decline less so. While political as well as socio-economical issues and struggles within the government have certainly contributed to such a decline in some of these countries, civilians’ understanding of their rights has *also* - in my opinion - had an important effect on this phenomenon. The latter will be the focus of discussion, if only because it is a promising way through which change for the better can come about.

The global scene is not the only one that’s worrisome when it comes to human rights. There are many Canadian examples as well. In an article recently published in *Embassy*, the head of Amnesty International complained about Canadians’ positions (or lack thereof) on many important human rights issues, urging our government to take a stand in support of the international implementation of human rights. In his view, the issue of human rights must take a more prominent place within our voters’ criteria for assessing different political parties. And he has a point.⁵⁵ The Canadian government’s stance towards China’s human rights record is an instance that shows the values of our government and the importance of considering them. The Harper government, which was very critical of China’s human rights record at the outset in 2006, has since become silent on that important issue, using the importance of strengthening trade relations with China as

⁵⁴ Saadi Zahidi, “Global Gender Gap Report 2011,” *World Economic Forum*, accessed December 15th, 2011, <http://www.weforum.org/issues/global-gender-gap>.

⁵⁵ Avinash Gavai, “Canada ‘part of the problem’ when it comes to human rights: Amnesty,” *Embassy*, Published November 19th, 2011, http://embassymag.ca/dailyupdate/view/canada_part_of_the_problem_when_it_comes_to_human_rights_amnesty_03-31-2011

an explanation for its passive standpoint.⁵⁶ Harper has claimed that he has “raised these issues” during his latest visit, but human rights activists remain skeptical of this claim, pointing out that Harper has not discussed any details about human rights discussions with the Chinese government; instead he’s maintained that this subject was discussed in private conversations with the leaders of that country.⁵⁷ The government’s attitude towards human rights has great consequences for its people: if the Canadian government is turning the other cheek when it comes to human rights issues on the global scene, we may wonder about its *true* beliefs regarding issues of human rights here at home as well. China’s deplorable reaction to the current situation in Syria has still not moved the Canadian government to break its silence on China’s position regarding human rights. Thus, in this case we see a misuse, or overlooking, of important laws – such as those regarding human rights – in favour of economic growth. This is certainly an uncanny clash between the content and purpose of the law.

The issue of pay equity in Canada is another instance of an area that has needed change in the recent years.⁵⁸ This is one of the cases in which the government has had to intervene to implement change by asking people to state their case about pay inequalities in the workplace. While lawyers, professors, and the politically active have stated their case for and against issues relating to pay

⁵⁶ “Harper urged to talk human rights with China”, *CBC News*, Last updated December 1st, 2009, <http://www.cbc.ca/news/world/story/2009/12/01/harper-china-visit.html>

⁵⁷ “Harper’s China visit ends with panda pact”, *CBC News*, Last updated February 11th, 2012, <http://www.cbc.ca/news/world/story/2012/02/11/harper-china-saturday.html>

⁵⁸ Special thanks to Francis Ghanimé and Katt Mousavi for pointing out this issue in relation to the topic at hand.

equity, it is significant that the general public has been for the most part quiet or passive with regards to the issue. At first glance, it is surprising, if not strange, that the change has not come from the general public, seeing that they are the ones who are more immediately affected by problems of pay. I suspect that one reason for people's passivity vis-à-vis this issue - and similar ones - is their misunderstanding of what their rights are, and more importantly their failure to appreciate the important changes that legality brings to what would otherwise be seen merely as a moral right (more on this distinction later). What is the source of, and reason, for this lack of proper understanding? I believe that a look into the former will reveal the latter.

3.2 Misunderstanding Rights

Those sensitive to the way in which language is used have surely noticed the inadequate use of the word *right* that is performed on a daily basis by many people. The word does have a complicated history – owing to different philosophical and legal meanings – and not everyone can be an expert on rights. But it's important to point out some of the ways in which the word 'right' is misused since that can reveal the source of some problems that arise and, more importantly, because the wrong use of expressions like "legal rights" or "moral rights" has more than linguistically offensive consequences.

As a society, we have an implicit understanding of a right as something that we've become accustomed to having or receiving. Spending a short amount of time at a daycare centre will reveal that same kind of attitude in our children: kids will

act out if their *favorite* toy is not there to play with, or occasionally if they're asked to share. Similarly, a child may understand it to be 'his right' to go to the park on Wednesday afternoons, since he's been accustomed to going to the park every week at that time, for some time now. But most of us would be hesitant to accept that the child actually has a right to *demand* an outing to the park every single week. And any reasonable parent would, as they should, somehow clarify that going to the park every week is a privilege and not a right to be taken for granted. This much is obvious. Yet North American culture displays many instances of the childish "right-to-go-to-park-every-week." It's not always realized what kind of important and serious damage is brought about by this incorrect usage and understanding of what a right is: if, as a people, we call being served with extra care at a restaurant a "customer's right", or other trivial instances like that; it is no surprise that our legal system has become somewhat insensitive to the general use of the word. In fact, there is a general sense - displayed by this widespread yet questionable use of the word 'right' - that we all know what a 'right' is and need not reflect on it. It's little surprise that political debates surrounding *actual* rights are fuelled by controversies. Our vulnerable understanding of rights provides an opportunity for the state, media or any other group to sway our opinion and manipulate our views. Yet, the ambiguity surrounding the word 'right' is constantly overlooked in ordinary circumstances. In an attempt to remedy this situation, it's important for us to have a deeper discussion of what rights are and how they relate to a number of other concepts such as: obligations, privileges, and expectations, each of which often get confused with rights.

A brief overview of W.N. Hohfeld's account of rights highlights two points: the complexity of the notion of rights; and their potential in bringing about change or reform. Hohfeld's work presents an analytic classification of rights into different categories that establish various kinds of relationships between individuals and other parties. According to his view, rights could refer to any or some of the following categories: "claim-rights, liberties, powers and immunities"⁵⁹ Claim-rights basically define a claim that someone holds against others: for instance, if I owe someone money, that person has a claim against me to receive that money. A liberty, in the context of rights, is having the freedom to do or not do something. If an elderly family member asks me to be the legal executer of her wishes after she passes, I have the liberty to accept or decline her request because, as dear as she may be to me, she holds no legal *claim* against me to accept her request. Having a power to do something is self-explanatory in principle, but it is distinct from having a liberty: for instance, a manager may have the *liberty* to hire new employees every day but his *power* to hire new employees may be limited by, amongst other things, financial concerns for his company. Immunities in a way ensure that the government does not overpower individuals by setting certain limits. For example, if individuals have an immunity X against the government, there is nothing the government can do to change individuals' legal position with regards to X or any entitlement that is covered under X. 'Diplomatic immunity' is another instance of a legal immunity ensuring diplomats' safe passage through foreign countries: during their visit to other countries, diplomats are not susceptible to lawsuit or prosecution

⁵⁹ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays*, ed. Walter Wheeler Cook (New Haven: Yale University Press, 1919), Chapter I.

under the host country's laws (although they may be expelled). Ownership of private property gives property owners an immunity against other individuals to take away or make any legal claims about their property: correlatively, others have an inability to make any legal claims on one's private property.⁶⁰

The definition of rights in relational terms is a distinguishing characteristic of Hohfeld's account and a point that deserves emphasizing. Enforcement and protection of rights could be tricky because different categories of rights overlap and make conflicting demands in many cases, which makes the *relationship* between right-holders and other individuals a complex one. But the relational character of rights also provides an opportunity for change, as mentioned earlier: expectations could be recognized as rights through the due process, or some privileges can come to be enforced just like rights. However, all these require action from the people, the kind of action that wouldn't be successful without a correct understanding of rights. For instance, failing to distinguish the difference between a liberty and a power could cause problems in the ways in which people choose to go about making change. This conception of rights gets us far away from the simplistic understanding of rights as a guarantee that we'll continue to receive certain goods or services.

Let's explore the complexity of rights in more depth. Hohfeld points out: "Claim-rights, liberties, powers and immunities are distinguished by what they imply about the legal position of the other party."⁶¹ Thus, when an individual claims

⁶⁰ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays*, ed. Walter Wheeler Cook (New Haven: Yale University Press, 1919), Chapter I.

⁶¹ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays*, ed. Walter Wheeler Cook (New Haven: Yale University Press, 1919), Chapter I.

to have a right, they're referring to a series of actions that are permissible or impermissible for them as well as others. But we have to remember that, in practice, the bulk of their claim hinges on which actions they *believe* to be permissible and which impermissible; which is why it's so important to have a correct understanding of what each right entails and *also* what different people and institutions could mean by that claim. The latter necessarily requires an internal perspective in addition to a basic theoretical understanding of rights. But even when intentions and political agendas of people or institutions are pure, complications come up. Consider this: each category of rights creates a relationship between the right-holder, i.e. the person enjoying the privileges that the right provides and protects, and the people who need to take action (or refrain from some action) for that right to be fulfilled. Suppose that *that* relationship is clear and simple. Complications may arise at an individual level: many rights create conflicting duties for the same person. For instance, as a part of a company one may have the legal obligation, as articulated in their agreement contract, to not disclose certain information to competitors and yet, as a person entering into a business relationship with others, one may have the legal and *moral* obligation to be honest and provide that same information to certain others, say customers... who may well then disclose it to the competition. Which rights supersede which other rights? And what are we to do in these cases of conflict?

How people act in these, and other similar, situations of conflict largely depends on their understanding and beliefs about their rights. We can imagine the reaction of an employee who disregards their moral intuition or obligation lest they

would suffer legal consequences. Or conversely, we can imagine people who show blatant disrespect for a given law, or a particular manifestation of it, based on their moral convictions. It'll become clear in what follows that people will benefit from, or be disadvantaged by, law to the extent that they understand and put to practice the distinction between moral and legal rights: that, in turn, determines how much fairness and legal efficiency is seen in a given legal system.

In a nutshell, moral rights are rights that are held and accepted by most people in a society without necessarily having been written into laws whereas legal rights are derived from legislation. But there are important qualifications for that claim: for instance, many laws are formulated vaguely (as we saw before), which means that the same laws could enforce different rights or mean different things in various contexts: interpretation becomes key in those instances. Conversely, some moral rights could be defended and supported against some written laws. For example, the laws that support freedom of speech take different forms in various situations, as we've already discussed: in our education system, citizens' moral right of receiving a good education could form the grounds for them to fight certain content that they may consider inappropriate for their children. In other words, the moral right of receiving a good education gives parents the moral right to express their discontent with certain pedagogies. Yet, in other cases, the same laws of freedom of speech allow instructors to approach topics in a way that is controversial and beneficial, even if their approach is frowned upon by some members of the community. Thus, in practice, the line that separates the two kinds of rights is blurry, which could be good or bad for the general public depending on the level of

their understanding of each situation and the actions that they're willing to take to defend a right. My belief is that legal ignorance in such conflicted cases results in much disadvantage for people whereas a basic understanding of the nature of the conflict could allow them to gain a lot. An example should clarify this claim.

Let's reflect on the difference between the obligation for women to wear the hijab in a mosque and the citizens' obligation to not litter the street. Besides the monetary sanctions that ought to follow littering, what exactly distinguishes these two kinds of obligations? The first, of course, is an instance of a moral obligation: there are no written laws against going to a mosque without the hijab in countries like Canada. However, there is an *expectation* on the part of the community of mosque-goers that women entering the mosque will wear the hijab out of respect for the religion. But what distinguishes that from a society's desire not to have litter on the streets? The pragmatic individual will be quick to remind us of the environmental and health-related reasons why it is imperative for us to make sure that littering does not become an epidemic habit of people. The same individual would perhaps argue that many moral obligations, such as refraining from going to mosque without the hijab, do not have such concrete or harmful consequences and for that reason it is not as urgent or important to turn such obligations into laws in all cases. But, realistically, how seriously is the law against littering enforced? In terms of people's attitude, is the law against littering taken any more seriously than the custom of going to mosque "dressed modestly," as some would put it? It seems that forgoing both obligations would solicit some frowns in most cases. Thus, the formal enforcement of a law, and the informal policy at a mosque, are put on almost

equal grounds in terms of realization. In its simplicity, this example displays the similarity and fine line that exists between some laws and other customs, and in turn the kind of rights that they create. This is not surprising since laws are a reflection of the beliefs and desires of a society as a whole, at least in a democracy. And in fact, the beauty of living in a free and democratic society is that, if we woke up tomorrow morning to a city full of garbage and people who continued littering ferociously, we could and probably would demand that the law against littering be more seriously enforced. But what if the members of the mosque wanted the wearing of the hijab inside the mosque to become a law? The process would be longer and require more effort but it would certainly not be hopeless from the outset. Similarly, knowing the difference between a moral right and a legal right and what can be demanded from society in each situation - could benefit people in great ways.

A real and contemporary Canadian example of evolution and changes implanted to protect individual rights concerns pay equity in Canada. This is an instance in which both the government and the people have had to take steps to enforce women's, and minorities', rights to have equal pay as men or other groups for the same kind of work. However, pay issues are not totally fixed yet. According to a report published by the Canadian Labour Congress in May 2010: "Only Ontario and Quebec have proactive pay equity laws which cover both the public and private sector. Other provinces enacted pay equity legislation that covered only the public sector and didn't require pay equity to be maintained. Still other jurisdictions, including federal law, have provisions in their human rights laws, which depend on

an individual filing an official complaint against her employer.”⁶² The same report emphasizes the advantages of proactive legislation when it comes to issues such as pay equity. Proactive legislation requires the participation and voiced desire of the people for change. As the report states, legislation is a method that presents a more comprehensive way of dealing with such issues, while showing the systematic problems that exist and, at the same time, combining legislative direction, collective bargaining, and enforcement - with the option of neutral adjudication of any dispute. The government has thus encouraged the general population to come forth and report pay equity issues that they have witnessed or experienced: this step is an important one in fixing the problem of pay equity because it helps the government take faster and more directed action against employers who are neglecting the laws about pay equity. We can imagine that, without the right kind of education and knowledge, the majority of the population would not come forth with valuable information that would serve as the basis of solutions to these problems, especially if, as is often the case, they were dependent on their current jobs for their survival. Increasing education about this topic, specialized mediation assistance, and compliance monitoring are some steps that the government can take to remedy the situation.

We have seen some important ways in which knowledge - or lack thereof - about our rights could make opportunities for legal improvement or persistence of injustice. But is it enough to realize that, as individuals, we must take steps in

⁶² “A Quick Education in Pay Equity – Women’s Economic Equality,” *Canadian Labour Congress*, Last updated May 17th, 2010, <http://www.canadianlabour.ca/news-room/publications/quick-education-pay-equity-womens-economic-equality>.

reinforcing and defending our rights, even under a generally benevolent government such as that of Canada? In my opinion, it is not. Understanding that protection of rights – or fulfilling law’s purpose - is a process that requires action from ordinary people as well as the government is the first step towards achieving a more just society. A more substantial understanding of the content of the law and its purpose is needed to provide direction for people’s efforts in bringing about change. A correct understanding of the concept of rights and their role in the legal scene is a suitable place to start.

3.3 What are rights?

To exist and serve their purpose, rights need constant reinforcement. In that sense, they are very much like values that need to be taught and practiced to remain true and valid. But that reinforcement can only be carried out properly if governments and their people both have a theoretical understanding of rights and realize the practical implications of those rights for themselves and others. Such understanding need not, and does not, imply the knowledge of a full list of human rights; but it does require a basic legal literacy and understanding of the *language* of rights. Moreover, because the theoretical and practical consequences of rights and their understanding are so closely related, the most effective way of ensuring efficiency and fairness in this context is to equip ordinary people with the knowledge that would help them navigate the maze of rights. If people have the necessary knowledge of rights, much legal trouble could be prevented, as people would not make preventable mistakes; this, in turn, would allow our legal resources

to be focused on less avoidable issues. Without this knowledge, people's interaction with law would in many cases be a matter of trial and error.

Brian Orend provides an interesting account of what rights are in his book *Human Rights: Concept and Context*. He defines a right as "a high-priority entitlement, justified by sufficient reasons, to something one claims as one's due"⁶³ The two points that I'd like to focus on, in Orend's account of rights, are: a) the element of justification that is necessary for something to be recognized as a right; and b) the notion of entitlement. Orend argues that rights are *reasons*, not properties: we do not own or possess a right in the same way that we own a pair of jeans. Neither do we have rights like we have arms, legs or souls (as was Locke's view); rights can be forfeited, limited, or lost as a result of our own actions and behaviour. As Orend maintains, to claim something as a right, we must have good and sufficient reasons for doing so. Of course, what constitutes sufficient reasons is controversial and dependent on the context that presents itself. But the important point to take from Orend's view is that reasons are at the basis of human rights. The second point to focus on is the notion of entitlement: Orend reminds us that rights are not to be taken for granted. They can be, and often are, forfeited for different reasons. This brings us back to the idea of relationships that are created between right-holders and others through rights. Consider this: someone who's been known to cheat an established and respected system repeatedly forfeits the right to be recognized as a member of that system, or at least a member whose view should count in any significant way or be benefited in the same way as others by that

⁶³ Brian Orend, *Human Rights: Concept and Context* (Broadview Press, 2002), 24.

institution. Similarly, murderers forfeit the right to freely roam around in society once they've been convicted. At the basis of both of these examples is found the principle of reasons: the rights that we do enjoy are a result of good reasons; and the rights that we forfeit are a consequence, backed by *reasons*, of our actions or failure to act. By default every human being is entitled to basic human rights: it is only when an individual or government begins abusing those rights and infringing upon the rights of others that they begin to forfeit some of their rights.

The idea of rights as entitlements is clear and it makes good sense in the context of the Hohfeldian web of relationships that create obligations and duties, which then shape our rights. Pairing that notion with the idea that rights are reasons, the pressing question becomes: "what constitutes a good reason to serve as the basis of a right?" After all, to justify a right we need *good* reasons, not just any reasons at all. The answer to that question comes from two sources. First, potentially valid reasons for rights are determined by the desires of the people in a free and democratic society. The desire of French Canadians to preserve their language was and remains a reason for them to ask for laws that protect their culture and language. So, the legal rights relating to the French language in Quebec are based, at least partly, on the reasons that emanate from the people. The second source of good reasons that serve as the basis of rights is our conceptions of the purpose of rights and law more generally. What is thought to be the function of law greatly affects the way in which legislators decide legal issues; it is no surprise that they use the same kind of considerations in establishing legal right. It is therefore important to consider what's been thought to be the purpose of rights, in

establishing the reasons for their existence. There have been two major theories about rights' *raison d'être*. I'll argue that they both have a good point but must be taken in conjunction to form a complete conception of the function of rights.

“The will theory” and “the interest theory” of rights are the two theories to which I am referring. Traditionally, each of these theories has articulated a different conception of the purpose of rights. Whereas the interest theory conceives the primary and necessary goal of rights as the protection of people's interests; the will theory submits that rights are there to give the right-holder authority and control over others. In my view, while these theories raise good questions and points *about* rights, separately they do not form a complete and satisfying account of rights in terms of their function. For instance, it is imperative for us to consider who should hold the ultimate authority in a situation where some people's rights are denied and others' rights are conflicting. But it is equally true that, conceptually speaking, the whole discussion of human rights seems at best trivial were it not because those rights are there to help people's basic interests. Thus, the exclusion of either of the two theories may indicate ulterior motives, that is motives other than the amelioration and protection of rights.

Recent work on both theories seems to agree with that view. In a recent article titled *Debate: Taking Human Rights Seriously*, Christopher H. Wellman argues for external states' intervention in another sovereign state's affairs if that means

preventing just one human rights violation.⁶⁴ Compared to the traditional conceptions of the will theory of rights, this view may seem strange at first especially coming from a supposed proponent of that theory. Traditionally, the will theory of rights has conceived rights as what give authority to right-holders, be it individuals or states, to put duties on others, such as the duty not to interfere in their affairs. However, in Wellman's account, justified interference "mirrors the best analysis of our duty to obey the law, while also cohering nicely with our considered convictions regarding other functionally-justified rights like parental dominion over one's children."⁶⁵ The reasons why Wellman views similar interventions as justified are negligible for our purposes; instead, what I'd like to highlight is the position of some supporters of the will theory on the topic of the kind of authority that this theory bestows on right-holders. It is a mistake to view or use the will theory as giving absolute rights to any individual or states. Will theory, seen in this light, is completely congruent with the idea of rights as what can be forfeited. Also noteworthy is the context in which some overstepping of others' authority is seen as permissible by will theorists like Wellman: cases where authority is used to undermine the authority that *everyone*, in principle, is supposed to enjoy - for example, right to basic liberties and freedoms.

Joseph Raz, a supporter of the interest theory of rights, effectively holds the same position on the topic of states' interference in other states' affairs in times of need, which could in my opinion be extrapolated to individuals' rights and their

⁶⁴ Christopher H. Wellman, "Debate: Taking Human Rights Seriously," *The Journal of Political Philosophy* 20, no. 1, First published online September 8th, 2011, 129.

⁶⁵ Christopher H. Wellman, "Debate: Taking Human Rights Seriously," *The Journal of Political Philosophy* 20, no. 1, First published online September 8th, 2011, 130.

position vis-à-vis injustice done towards others' rights. In an article titled "Human Rights Without Foundations," Raz reiterates the reason for human rights as serving the good of the people. He worries that claims to universality or the importance of human rights have been associated with *apparently* infeasible accounts that *in practice* obstruct those very rights. In his view, "there is not enough discipline underpinning the use of the term 'human rights' to make it a useful analytical tool."⁶⁶ For that reason, Raz considers it crucial to focus on setting the correct state-transcending standards for ensuring that people's rights are respected; we ought not to allow complacency about the nature and importance of human rights to overshadow their function or become a reason for just anyone to interfere with others' rights. In other words, the blind acceptance of universality or importance of human rights could lead to political and social problems for the people in any given society.

This is where the idea of interpretation becomes most obviously relevant. Without interpretation, the balance of justice could not achieve equilibrium: states could manipulate and abuse people's lack of legal knowledge for their own benefit by distorting the purpose of law in various ways and using that to change its content. Meanwhile, basic abilities to see and interpret legal change and information for what they are would allow people to hold the balance of justice in check. For instance, by demanding changes in the content of law, citizens could ensure that prosaic accounts about the purpose or content of law do not rob them of what is

⁶⁶ Joseph Raz, "Human Rights Without Foundations," *University of Oxford Faculty of Law Legal Studies Research Paper Series*, accessed December 20th, 2011, <http://ssrn.com/abstract=999874>, 19.

rightly theirs. Thus, both governments and their citizens have a role and a contribution to make before the balance of justice could even approach the state of equilibrium. In other words, interpretation of legal ideas is the venue through which people and governments contribute to the overall legal well-being of a society. Too much interpretation from one side - or one group of people - risks tilting the balance to one side over the other, depending on the intentions and goals of that group. Of course, making good use of interpretation in this context, like any other, requires a proper understanding of interpretation and a suitable approach to it. The field of legal hermeneutics has actually gotten significant attention in recent years.⁶⁷ The next section presents an overview of some basic issues on the topic and how they affect our approach to legal interpretation. In short, the understanding of the content of law, such as our rights, remains unhelpful in many ways unless it is paired with an understanding of how that content is formed and how it can be made better.

3.4 Interpretation and The Balance of Justice

We return once again to the work of Ronald Dworkin: his analysis of interpretation and the role it plays within legal theory and practice provide valuable insight into why an understanding of the concept of interpretation is so crucial to anyone who wishes to make a contribution to the balance of justice. My view is that the role played by ordinary people has yet to get sufficient attention when it comes to the ways in which interpretation shapes and changes a legal system. I shall

⁶⁷ Legal hermeneutics is an emerging field that focuses on the ways in which interpretation is and ought to be used in legal matters. See *Legal Hermeneutics: History, Theory and Practice*, ed. Gregory Leyh (Berkeley: University of California Press, 1992).

defend the view that both the *constructive model of interpretation* and the *author's intent model of interpretation* - as presented by Dworkin - play a necessary role in our legal understanding. This view will be defended against an objection posed by Jeremy Waldron who sees any appeal to the "intent of the author" as futile in today's democratic society. My aim in presenting these ideas is to show how the structure of interpretation and an understanding of it help citizens' contribution to the balance of justice.

According to Dworkin: "roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."⁶⁸ He goes on to point out that this does not mean that constructive interpretation could become boundless because "the history or shape of a practice or object constrains the available interpretation of it, though that constraint needs careful accounting..."⁶⁹ Constructive interpretation is distinguished from creative interpretation, which is concerned with the relationship between purpose and the object. At first glance, this view of interpretation can seem intimidating; not so implicit in Dworkin's description of constructive interpretation is the idea that we need some level expertise to interpret any topic *constructively*. In fact, expertise seems to be a requirement to make something "the best possible example of the form or genre to which it is taken to belong." Applied to legal matters, the subject can seem untouchable to the ordinary citizen: that law is written in a kind of language that is

⁶⁸ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 52.

⁶⁹ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 52.

not fully comprehensible to most citizens is undeniable. However, I will argue that the expertise requirement suggested by Dworkin's account of constructive interpretation does not pose a fatal problem for citizens' participation in the shaping of their legal system. But first, we must consider other views of interpretation as they apply to legal matters.

Another account of interpretation, explained by Dworkin, is the "author's intent model". According to this view, to interpret an object properly we must appeal to the intentions of the maker of that object. For instance, to interpret a given statute we'd have to consider the intentions and purposes of the people who drafted that statute.⁷⁰ Dworkin makes a very important distinction between *interpreting* a social practice (or, we can say, any established law) and understanding *the members who participate in* that social practice.⁷¹ He does submit that appeals to the intent of the author as well as creative interpretation (even though they may vary in quality), do fall under constructive interpretation.

Already, we can see how different understandings of the act of interpretation alone can affect people's approach to legal matters. While these accounts could be seen as obstacles in the way of popular participation in the formation of laws; the matter could be seen in a completely different light. For instance, I submit that the kind of expertise that the constructive account of interpretation requires is unachievable without people's input into legal matters; similarly, even though the

⁷⁰ This is not Dworkin's own view about the role of the author's intent model in legal matters; I'm merely using his *definition* of that model.

⁷¹ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 55.

realization of legislators' intention in writing the laws may seem difficult or impossible at first, information which gives strong clues about those intentions is not too difficult to reach in a free and democratic country like Canada. Governments often explicitly state their aims in crafting legislation. If these claims are true, it is not only helpful but also necessary for the people of any given society to participate in legal matters and thereby contribute to the achievement of justice. But first these claims have to be substantiated.

In order to show the veracity of my first claim, about the essential character of people's contribution to the expertise that is needed for constructive interpretation, I take a controversial yet important case: an argument concerning the legality of active euthanasia. I believe that, in this case, like so many other social, political or medical cases, the insight of the individuals most directly involved with the topic that is being decided is crucial for making good laws or changing previous ones. Their input is necessary - although not sufficient - for achieving the expertise that constructive interpretation requires: it is obvious that the knowledge of lawmakers and their somewhat detached perspective is another essential part that precedes good laws. In an article discussing euthanasia, James Rachels aims to defend *active* euthanasia as a legal act, amongst other things, by appealing to a doctor's view on the topic. He quotes one thusly: "As a surgeon whose natural inclination is to use the scalpel to fight off death, standing by and watching a salvageable baby die is the most emotionally exhausting experience I know. It is easy at a conference, in a theoretical discussion to decide that such infants should be allowed to die. It is altogether different to stand by in the nursery and watch as

dehydration and infection wither a tiny being over hours and days.”⁷² I want to emphasize the discrepancy that exists between theoretical discussions and the actual experience of carrying out *passive* euthanasia, as experienced and described by this doctor, to point out the relevance and importance of including facts of experience in deciding laws. The statement adopted by the House of Delegates of the American Medical Association sees the “intentional termination of the life of one human being by another – mercy killing – [as] contrary to that for which the medical profession stands and contrary to the policy of the American Medical Association.”⁷³ However, to many the experience of the doctor forms strong reasons showing that mercy killing in some cases may be the most humane action – and consequently should be in accord with policies of the American Medical Association. In fact, this kind of insight is part and parcel of the expertise that is put to test in constructive interpretation. Thus, the old distinction between the internal and external perspective - as pointed out by Hart - becomes relevant once again. Legislators, as other citizens in a society, cannot achieve full understanding of law, and how it must be shaped, without having a basic knowledge about the real applications of different rules and their consequences upon people. In other words, left to their own devices, any assembly of legislators is unlikely to achieve optimal fairness in forming laws without both: a) the insight of the experts in each field; and b) insight of people most affected by the topic. Just like legislators cannot be experts without the relevant and sufficient amount of insight into the internal perspective, ordinary citizens cannot

⁷² James Rachels, “Euthanasia and Suicide: Active and Passive Euthanasia” in *Moral Issues*, ed. Jan Narveson (Toronto: Oxford University Press, 1983), 2.

⁷³ James Rachels, “Euthanasia and Suicide: Active and Passive Euthanasia” in *Moral Issues*, ed. Jan Narveson (Toronto: Oxford University Press, 1983), 1.

fully understand the law and its commands without an appreciation of the external perspective that legislators' exposure and qualified view can offer. The full picture is needed.

The second point to address is the issue of the accessibility of lawmakers' intentions. Could we really discern the intentions of individuals in charge of approving or rejecting drafts of statutes?⁷⁴ I believe that we can, in a meaningful way, although some research will be required. In my case, for instance, conversations with a few lawyers helped build a decent picture of which laws potentially applied to my case and *why*. It was through the knowledge of the laws against misrepresentation and deceitful business conduct that I was able to situate my particular case within so many other laws that could be relevant to my case; and that would not have been possible without bringing into play the intentions behind the laws, and by extension those of the minds who wrote them. In his book titled *Interpretation and Legal Theory*, Andrei Marmor argues for the necessity of deference to the intentions of lawmakers, especially in the case of vague statutes. He justifies his claim with the help of Joseph Raz' theory of authority of law: if X is the legislator and has some kind of expertise, and in the case that X's expertise and position constitutes the authority of law; citizens must appeal to X's legislative intent in determining what they ought to do.⁷⁵ The bottom line is: it's important to go beyond the legal text or its portrayal by any one institution or group of individuals to discover its real meaning and aim; and doing so *requires* seeking out

⁷⁴ Intention, in this context, refers to the reasons motivating assemblies or other legal bodies to accept or reject a given draft for statutes.

⁷⁵ Andrei Marmor, *Interpretation and legal theory* (Oxford and Portland: Hart Publishing, 2005), Chapter III.

the intentions of those who approved those laws. I believe that this procedure could, and ought to, be more widely implemented in our society; and I shall suggest one way in which we could work towards that. But before that, it's important to address Jeremy Waldron's skepticism towards the intentionalist approach of Marmor.

Waldron rightly points out that, in modern society, laws are made by multi-member assemblies who hold authority; it is therefore impractical if not impossible to appeal to the intentions of the lawmakers. He states: "The modern situation...is not that of a person's having authority, but (at most) of a group's having authority, and of its having that authority only in virtue of the way in which it combines the interests and knowledge of its members in the act of legislation."⁷⁶ However, the multi-faceted character of modern legislation could be seen as a reason *for* a clear and explicit account of the reasons behind each statute or law. More diversity in a society calls for increased awareness about different cultures, views and other points that may support any given law. It is no reason for stopping conversation, or the request about the reasons behind origins of statutes. In the age of fast communication, and in a society that supports freedom of thought and expression, it is not difficult to seek out those reasons and the intentions of those who support those reasons. Therefore, it can't be correct that appeals to the intentionalist view are futile in today's society.

We have now seen some views of interpretation. Two points are worth highlighting: first, interpretation requires an *active* role from the people; and

⁷⁶ Jeremy Waldron, "Legislators' Intentions and Unintentional Legislation," in *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrei Marmor (Oxford: Oxford University Press, 1995), 331.

second, there are more ways than one to participate in interpretation (especially in a legal context) – which, if true, reduces the number of excuses that any citizen could have for failing to contribute to legal justice within their society. We saw that constructive interpretation, which includes forms of creative interpretation and the intent of the author model, offers different venues through which different voices could be heard. Needless to say, many if not all the interpretive steps described above are already being taken in our society by governmental bodies *to some extent*. The idea here is that increased awareness amongst the general public will further solidify these steps while helping the enforcement of justice.

Some may think that it's simply not feasible to implement widely such a critical outlook for a majority of people. However, the task may be less complicated than we think. For instance, the implementation of the interpretive *attitude* that Dworkin refers to is a solid first step towards achieving a more engaged society. Dworkin claims that the interpretive attitude is supported by two assumptions, which I believe should be more actively promoted through our education system: "The first assumption is that [any] practice...does not simply exist but has value, that it serves some interest or purpose or enforces some principle...the second is the further assumption that the requirements of [the practice] are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point."⁷⁷ The second assumption is even more important and worthy of emphasis than the first because it points to the stable yet malleable nature of certain laws and

⁷⁷ Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 47.

statutes. While this interpretive attitude is more or less engendered by various attempts to teach critical thinking in our schools; it could and should be taught more explicitly *in relation to law* and legal matters at early stages of education. The human instinct to protect what belongs to us naturally inspires the desire to be treated fairly; the interpretative attitude shows people a way to ensure our laws serve that instinct. Other considerations such as the political structure of the society in which we live, covered in the next chapter, provide more reasons for promoting and internalizing the interpretive attitude.

In fact as we've seen in this chapter interpretation runs through all three legal theories that were discussed, albeit in different ways. Natural law theory involved an interpretation of what is considered to be the source of law. Legal positivism also required interpretation of the 'black letter view' despite the fact that many proponents of legal positivism would reject the role of interpretation within legal positivism; we saw that the mere fact that legal positivism relies on people's acceptance of laws goes to show that interpretation, i.e. people's interpretation in the form of their beliefs and acceptance of laws, is indeed an integral part of legal positivism. Finally, interpretivism entirely focused on the crucial role of interpretation in law. The recognition of the central role of interpretation in law is vital in making changes within our legal system because interpretation presents many opportunities for the people to assume an active role vis-à-vis legal matters, as interpretation allows them to challenge, point out and bring under officials' attention different understandings of law.

Chapter Four

People's Role Within a Legal State

The functionality of the interpretive approach, as described in the previous chapter, is highly dependent on ordinary people's knowledge and recognition of their place within a legal state, a place that determines their role in society. Highlighting people's role and place within a political system reveals yet another reason why legal knowledge is so crucial for a healthy legal system, and that's what we'll consider in this chapter.

I strongly believe that legal matters are often made out to be more complicated and less hopeful for the general public than they really are. To correct that misconception - and in order to help more people reap the benefits of living under a legal state - we must reinstate and emphasize the underlying principles of our political system, as laid out by so many great thinkers in the past, while redefining those principles as they apply to *today's* society; that would then serve as a reminder of the role and place that ordinary citizens have in the modern world. Put simply, a merely historical and normative approach to this topic will not suffice in achieving a better and fairer legal state. The *actual* state of our government needs to be our starting point since it determines where we could hope to go from and, most importantly, what is the best way to get there.

My general aim is to highlight the power that ordinary citizens hold with regards to legal matters in a political democracy, by going back to the very basis of

our political system. An overview of some basic political principles that hold any society together gives us more reasons as to why we should be active in legal matters. The key is to understand, as a people, the dynamics of the legal-political system of which we are a part, and the best way to ensure that happens is through education. In the closing section of this chapter I will propose some changes to be applied to our social education to facilitate a better understanding of law amongst ordinary citizens, which would, in turn, improve their encounters with the law while preventing many legal issues from arising in the first place.

4.1 How People's Knowledge of Basic Principles Benefits a Legal State

At one time or the other, we've all consciously felt the constraint that law places upon us: having to obey traffic laws, having to pay taxes or having one's parental rights challenged are just a few examples of such instances. These constraints sometimes lead to feelings of frustration and helplessness. But, how are legitimate concerns about law, and how our society is run, distinguished from impatient complaints?

In the opening lines of *The Social Contract*, Rousseau states, referring to the social man: "One thinks himself the master of others, and still remains a greater slave than they. How did this change come about? I do not know. What can make it legitimate? That question I think I can answer."⁷⁸ Therein lies what justifies some of the frustrations that I was referring to earlier and more importantly their origin: if we understand the basis of a *legitimate* society, we can better evaluate where things

⁷⁸ Jean Jacques Rousseau, *The Social Contract* (New York: Hafner Publishing Company, 1947), 5.

have gone wrong and can seek remedies. We can identify irrational frustrations from legitimate concerns that we may have *vis-à-vis* the laws that govern our society. More importantly, it determines our place, as a people, within our existing legal system. Making that distinction is not very difficult, given one is equipped with a basic level of legal literacy; something that I'll argue could be implemented within our society through creating a culture that's more aware and interested in legal issues.

4.2 The Basis of a Legitimate Society

So, let's consider the basis of legitimate societies. Nature taught men that individual survival would not be possible, so we had to form societies. Rousseau rightly points out that the original coming together of people was based on need; we did not originally join others for sentimental reasons. Therefore, he claims that any binds that were formed or maintained beyond what was required to satisfy our basic needs and those of our offspring were out of convention. Thus, Rousseau draws an analogy between family and the human society:

“The most ancient of all societies, and the only one that is natural, is the family: and even so the children remain attached to the father only so long as they need him for their preservation. As soon as this need ceases, the natural bond is dissolved. The children, released from the obedience they owed to the father, and the father, released from the care he owed his children, return equally to independence. If they remain united, they continue so no longer naturally, but voluntarily; and the family itself is then maintained only by convention.”⁷⁹

The notions of ‘independence’ and ‘convention’, as Rousseau refers to them in this passage, require further consideration, as they are the pillars of all human

⁷⁹ Jean Jacques Rousseau, *The Social Contract* (New York: Hafner Publishing Company, 1947), 6.

societies. Convention generally refers to the usual and acceptable way in which things are done; but it also implies an agreement between the parties involved: i.e., those affected by the convention. The Oxford English Dictionary partly defines convention (in law) as: “A body constituted by statute to represent the people in their primary relations, and in some sense outside of the constitution, as e.g. for the framing or amending of the institution itself.”⁸⁰ This definition implies a potential active role for the people in deciding the form and nature of conventions that bind them together as it leaves room for issues “outside of the constitution.” Likewise, if primitive men came together and formed a society and subsequently remained as a society, it was through an agreement, however implicit. Similarly, we’ve agreed, by convention, that those qualified for each task will take care of that task because that arrangement works to the advantage of everyone. That much is obvious, but what is less often talked about is the following: by forming conventions we have not and do not *give up* our rights but simply *defer* some of them to those who are more qualified than us. There is a crucial distinction to be made between giving up a right and deferring that right. Giving up a right usually comes about as a result of some bad action or negligence: convicted criminals have, through their actions, given up some basic rights that they would otherwise enjoy. Deferring a right, by contrast, is giving someone else or another institution the permission to make decisions on our behalf and handle certain situations for us. What that distinction translates into in everyday life is the following: we each reserve the right to object to, and oversee the execution of, the rights that we have deferred; thus, the whole idea of helplessness

⁸⁰ Oxford English Dictionary, “Convention,” accessed February 10th, 2012, <http://www.oed.com.proxy.lib.uwaterloo.ca/view/Entry/40714?redirectedFrom=Convention>

with regards to laws becomes null. There are of course practical difficulties that give rise to the *feeling* of feebleness that overcomes us each time we find ourselves facing a legal dilemma, the dilemma being that attempting to stand up for our rights may end up costing and hurting us more on a personal level than remaining mute and suffering the consequences of others' unfair actions. However, there is a very important difference between feeling intimidated and actually being helpless. And that's what we need to remember as a people when it comes to legal matters. In fact, by deferring rights we are allowing others to make important decisions for us and it's only fair that we, as citizens of a lawful society, know the content of the decisions that have been set out to ensure the protection of the very rights that we have deferred. In other words, since we give up *some* of what may be called our 'natural rights', such as the right to defend ourselves and acquire property by all means possible, we have the right to know and oversee the rules and regulations that have been put in place to replace those natural rights. Thus, two points are worth emphasizing: first, we defer some rights, we do not give them up; second, the deference of rights creates a new right for us - to know and participate in the decisions that are being made on our behalf.

To realize these points, we need to consider the notion of convention in conjunction with that of independence. As Rousseau points out, as soon as independence is achieved, the only remaining thing that keeps people together is convention; however, independence in many ways weakens the influence of conventions for certain parts of the population by bringing them power and more freedom as a consequence. In today's society, this freedom translates into, amongst

other things, having more options than some other portions of the population. Often, it also means being a part of the group or process that makes decisions that greatly affect other parts of the population. The question is: “how does independence affect the basic conventions (or, in other words, the social contract) that bind us together?” The social contract remains satisfactory as long as the decisions made by those enjoying power, be it political or economic, respect the basic rights and freedoms of others. But, as we’ve learned, power and independence create a threat to the balance of the social contract and the power of conventions: that creates upsetting consequences for a portion of the population. That’s when frustration - accompanied by feelings of helplessness - sets in amongst many of those affected by the power of the independent in society. It is my belief that how we feel towards legal issues is a reflection of how we perceive the balance between independence and convention: if people feel helpless against social policies, it is partly because they tend to underestimate the power and weight that basic conventions carry while overestimating the power that lies within the independence of any given individual or group in society.

It’s important to remember that independence and convention are interdependent, when it comes to the foundations of any society. Therefore, being optimistic or pessimistic towards legal issues is in some sense like looking at different sides of the same coin: the interdependence of convention and independence could be as much a blessing as a sad fact for the general population, depending on how they perceive and deal with this interdependence and its consequences. Convention is what gave rise to societies and unequal independence

came as a consequence. However, convention is what turns the wheels of our society; and, if there is any power for the general population who lack some independence which others enjoy, it lies within the definition and reinforcement of the conventions that underlie the very basis of each society. And it is our job, as a people, to ensure that those conventions are defined and reinforced properly. Montesquieu once wisely said: “The corruption of every government generally begins with that of its principles.”⁸¹ The underlying principles of each society are manifested in its conventions. Thus, through their compliance (or disagreement) the people play a crucial role in shaping and reinforcing these principles, and ultimately the conventions that make everything else possible. An important way in which these principles are formed and maintained is through our laws. Thus, we can see that by remaining passive towards laws that affect us and those around us, by giving in to feelings of intimidation we are in fact approving the very laws and policies that have ignited genuine concerns within us. Worse yet, we are setting bad conventions for our society and the generations to come.

Therefore, it’s worth our while to return to the original and basic principles that form the foundation of legitimate societies. By understanding them as they apply to *today’s* society, we can recognize deviations from them. That is an important step in becoming active citizens of a legal state, and in having a voice in the protection of our rights. By contrast, lack of reflection on such principles would make the population ignorant and insensitive to such matters. That, in turn, only

⁸¹ Baron de Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (New York: Hafner Publishing Company, 1949), 109.

bestows more power upon the already powerful in each society to run matters as it suits them best; in those cases, we are no longer deferring certain basic rights but willingly giving them up. In the next section, we'll consider some of these basic principles as they apply to our times.

This is all quite abstract. But these general truths form the bigger picture that we, as a society, have lost sight of (to a certain extent), which has been partly a consequence of our modern lifestyle and values.⁸² Many people (especially younger people) – such as my colleagues who refused to join my lawsuit even though I was offering to do all the work that was necessary - have an individualistic take on legal issues. Standing up for their rights is not a matter of being afraid for their life – which is a concern in some other countries in the world - but it is a matter of economical cost-benefit analysis. And that is an unsettling attitude towards legal matters because it results in giving up basic principles for the sake of short-term economic protection. For instance, many of my colleagues told me that “it wouldn't be worth the trouble to go against this company,” or that “they didn't want to spend any more money on the issue.” We will return to the fatal flaws that this kind of reasoning engenders when I consider the objections that could be raised against my view. For now, suffice to say that it is precisely because of, and perhaps despite, our individualistic approach as a society to legal matters that we ought to return to the basic principles, their meaning and implications in our modern society.

⁸² The last Canadian Federal Elections saw the lowest young voters' turnout in the history of Canada. Elections Canada has expressed great concern about the continuing decline in voters' turnout. Seeing little in politics that relates to the youth has been quoted as one of the reasons why the young people are failing to show up at the polls. See: Elections Canada, “Get Informed,” *Elections Canada*, August 16, 2011, <http://www.elections.ca/content.aspx?section=vot&dir=yth/bas&document=index&lang=e>.

4.3 Rousseau, The General Will, & Social Engagement

Rousseau explains that, in coming together and forming societies, “each person gives himself to all, and not so to any one individual.”⁸³ Thus: “Each of us places in common his person and all his power under the supreme direction of the general will; and as one body we all receive each member as an indivisible part of the whole.”⁸⁴ He explains that, despite our individual differences, it’s what’s common in our different interests that forms the social bond that keeps society together: that is what forms and moves what Rousseau calls *the general will*. As he points out, in any legitimate society, the general will is impartial. But individual wills are partial; and that’s why “it is of utmost importance for obtaining the expression of the general will, that no partial society should be formed in the State, and that every citizen should speak his opinion entirely from himself.”⁸⁵ It is therefore partial associations – which are distinct from *personal* interests that concern protection of basic rights, which in a general sense are the same for all people - that risk to taint the general will. So, two points are worth emphasizing: first, today’s society is arguably an aggregation of *partial* associations; and second, to keep the general will good we, citizens of our state, have the responsibility *to keep partial societies in check*. Conversely, I believe that it is through a focus on the general will – and its basic principles - that we are able to defend and correct different expressions of our rights. Without the participation of people, partial interests will enter the general will, mostly due to lack of resistance, and that’s how unfairness and corruption find

⁸³ Jean Jacques Rousseau, *The Social Contract*, (New York: Hafner Publishing Company, 1947), 15.

⁸⁴ *Ibid.*

⁸⁵ Jean Jacques Rousseau, *The Social Contract*, (New York: Hafner Publishing Company, 1947), 27.

their way through a legal and democratic state. To enable that kind of participation, we need to consider how different principles apply to our society and daily encounters with individuals and legal institutions.

The evolution and different applications of two basic principles - that of equality and privacy - provide us with two examples that demonstrate the importance of people's awareness, and their participation in keeping the general will good. In the previous chapter, we discussed the notion of rights as reasons and we concluded that rights were, in essence, valid reasons. The same kind of reasoning is applicable to the application of conventions or principles that underlie the general will. For instance, the notion of equality between genders has evolved through a constant redefinition, and valid reasoning, that have been offered and fought for throughout the past decades. Similarly, the definition of privacy and our right to it has evolved through social and technological changes which our society has undergone in the recent years. The preservation of these values requires the active involvement of people in their definition and enforcement.

Article fifteen of the *Canadian Constitution Act of 1982*, declares the following regarding equality: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."⁸⁶ How this law applies to different situations is changing, and dependent on the situation we find ourselves in.

⁸⁶ Department of Justice Canada, "Constitution Act 1982, Part 1, Canadian Charter of Rights and Freedoms" *Department of Justice Canada*, January 9th, 2012, <http://laws.justice.gc.ca/eng/Const/page-11.html#sc:7>.

For instance, the granting of equal rights to women, on many levels, has been a gradual and ongoing process. The entrance of women into the work force required new considerations of what it meant to be men's equals, and that discussion was different than, although related to, their equality at home. The point to note is that different expressions of equality for women had to be realized and discussed throughout the years: for example their equality as wives, workers and political agents.

Another set of laws that derive their value from basic principles that shape our society is that of privacy. The *Constitution Act* of 1982 did not make any explicit references to privacy; however, its eighth article did declare the following: "Everyone has the right to be secure against unreasonable search or seizure."⁸⁷ Throughout the years, the issue of privacy has been explicitly addressed and decided on in legal settings, to the point that the courts now recognize a reasonable personal expectation of privacy – and they cite this article. Clearly, the fast changing rate of technological advances and modes of communication have greatly affected access to our personal information. The extent to which privacy remains valuable and respected is largely dependent on how - as citizens of a democratic system - we deal with instances of issues that arise regarding privacy laws. Without the participation of the general population, such issues may go unnoticed. If, as an employee of a company, an individual comes across a misuse, or indecent use, of their personal information, the right thing to do is to address that issue in an official

⁸⁷ Department of Justice Canada, "Constitution Act 1982, Part 1, Canadian Charter of Rights and Freedoms" *Department of Justice Canada*, January 9th, 2012, <http://laws.justice.gc.ca/eng/Const/page-11.html#sc:7>.

manner. Similarly, the open access to information has created concerns and challenges regarding our education system: how much access, and in what form, should be allowed in our schools? Or alternatively, how are we to go about educating new generations in light of the changes that our society has witnessed in the recent years? For instance, one related discussion has been about ways in which the relation between the “virtual” and “real” world is to be handled and discussed in schools: while some are against free and unlimited use of virtual sources within our education system, others insist that such sources offer valuable opportunities for better education.⁸⁸ These are topics that need to be considered in light of our basic rights and the basic principles of our society, if we wish to preserve the values that keep the general will good.

These are only a few examples of changing domains in which the basic principles of our society, and our rights as persons, apply. There are institutions already in place that deal with individuals’ related concerns such as: the Better Business Bureau, The Medical Board; and The Education Board. However, for these institutions to fulfill their potential in preserving or reshaping basic principles according to the general will, people need to be making use of these resources and that requires a proactive attitude and a *recognition* of related issues as they come up. The best way to encourage and inform people about how they can become a part of the process that keeps our basic principles in check – and the general will good - is through education. The next section draws an analogy between the legal and the

⁸⁸ BC Campus, “Privacy and Cloud-Based Educational Technology Conference Final Report”, *BC Campus*, April 13, 2011, <http://fippa.bccampus.ca/>.

medical system in Canada: some recent changes in the latter have greatly transformed people's approach and attitude towards the medical field. I propose that a similar change in our legal education as it concerns the general public would bring about invaluable benefits for our society, just as increased awareness and education on health issues have led to better patient care and more effective medical care within our healthcare system.

4.4 Change Through Legal Literacy

The term *patient-centered care (PCC)* refers to a relatively new approach in the medical field regarding treatment.⁸⁹ This approach departs from the more traditional and paternalistic approaches to patient care: whereas before, the doctor or health-care professional were the only agents deciding on modes of treatment for patients, PCC involves the patient in the process of choosing their treatment through open communication and discussions.⁹⁰ In PCC, the patient is at the centre of decision-making and treatment is tailored to what suits the patient best: i.e., what best suits the patient's specific needs and lifestyle. Dr. Donald Berwick points out three maxims which are fundamental to PCC: "(1)'The needs of the patient come first;'(2)'Nothing about me without me;'(3)'Every patient is the only patient.'" ⁹¹ The first maxim refers to focusing attention to what the patient needs while considering what the patient wants. The second maxim aims to advocate transparency regarding

⁸⁹ Special thanks to pharmacist Sara Azad for providing valuable input on this method.

⁹⁰ Pioneers of this approach include, amongst others, Debra Roter, John Ware, Michael Barry, Jack Fowler and others. See Donald M. Berwick, "What 'Patient-Centered' Should Mean: Confessions of an Extremist," *Health Affairs* 28, no. 4, (2009), 559.

⁹¹ Donald M. Berwick, "What 'Patient-Centered' Should Mean: Confessions of an Extremist," *Health Affairs* 28, no. 4, (2009): 560.

modes of treatment and medication, and the participation of the patient in forming decisions about their treatment. The third maxim highlights the importance of customizing treatment to each patient's needs. In light of these maxims, Dr. Berwick posits the following definition of PCC:

“The experience (to the extent the informed, individual patient desires it) of transparency, individualization, recognition, respect, dignity, and choice in all matters, without exception, related to one's person, circumstances, and relationships in health care.”⁹²

This approach has been, and is continuing to be, implemented through different venues - from doctors having the obligation to explain patients' options of treatment to them, to educational programs on health and nutrition. There are two valuable advantages to this approach: first, it is a way of matching the patient's specific needs while keeping in mind the patient's history; and second - and more importantly for our purposes - this approach has created an interest and curiosity on the part of the patients and the population at large to inform themselves on various treatments and learn more about their health condition. Thanks to this approach, the medical system has become much more interactive in terms of communication between experts and ordinary people who are using the health care system. In fact, Dr. Berwick refers to this approach as a “dimension of quality in its own right.”⁹³ That statement highlights not only more effective results that follow PCC, it also draws attention to its virtue as a *process* which gives rise to higher awareness. By increasing the patient's involvement in treatment, health care professionals have succeeded in increasing the level of care and attention that

⁹² Ibid.

⁹³ Donald M. Berwick, “What ‘Patient-Centered’ Should Mean: Confessions of an Extremist,” *Health Affairs* 28, no. 4, (2009): 563.

patients, and to a great extent the general population, allot to issues of health: that's partly because increased awareness has made people realize the importance of health-related topics in their lives. Educating patients has proven to be much more effective than just giving the patient a prescription of drugs and sending them home. In fact, a study done on the effects of PCC on medical outcomes found that: "Patient-centered practice was associated with improved health status (less discomfort, less concern, and better mental health) and increased efficiency of care (fewer diagnostic tests and referrals)."⁹⁴

This change has come about through a collaboration of health organizations and health care professionals who have displayed a readiness and willingness to help patients and direct them towards the correct information. It marks a big change from some earlier practices in medicine where talking about subjects like the side effects of medication was almost considered taboo because the doctors worried about scaring the patient away from treatment. Nowadays, asking about the short and long-term effects of treatments has become a practiced right and general habit for most people.

In fact, there has been a revolution in our cultural perspective on health and nutrition matters, in the last fifteen years. The coverage that the media allocates to these matters has largely increased in the past decade. Easy access to information, paired with people's genuine concern for their health, has led them to seek

⁹⁴ Moira Stewart, PhD, *et al.* "The Impact of Patient-Centered Care on Outcomes", *The Journal of Family Practice* 49, no. 9 (2000), accessed January 13, 2012, <http://www.jfponline.com/Pages.asp?AID=2601>

assistance from the professionals in separating the good information from the bad. Hence, what was once fear and uncertainty about different methods of treatment has now transformed into curiosity and an interest, on the part of the general public, in learning more. Popular bookstores are now filled with health-related books: a sure sign of the existing market for these subjects. In short, people are more interested than ever to learn about health and that, in turn, has established the right for them to know how they are being treated by the professionals in the field.

It's important to mention that one downside of this approach has been confusion amongst some people: with so much (often contradictory) information, it is hard to know what one should trust; and, undoubtedly, some pharmaceutical companies have benefited from the controversies surrounding certain treatments. Nevertheless, we must remember that the support of health professionals is present and accessible to a great majority of Canadians – just as this support is an integral part of PCC. Moreover, it is conceivable that the same level of confusion, if not more confusion, would have come about *without* PCC or other similar approaches, due to the rapid spread of information and pharmaceutical companies' interest in selling their products using different marketing skills. In fact, the existence of PCC is a helpful resource in guiding and educating people about their options when it comes to matters concerning healthcare.

I propose that it is very important to develop and promote an analogous system with regards to our laws and legal system. We often hear that seeking legal advice is expensive and that's true to some extent. Yet, people don't often enough

take advantage of legal aid services offered by the government or other institutions like our universities. Within many universities like McGill University, legal advice is offered to students by law students holding legal clinic hours. One major aim of legal aid clinics in universities is to guide students in their search for legal advice while also offering them some general information about their case. Similarly, in Quebec there are legal aid offices that are funded by the government and run by lawyers to offer legal advice to citizens. I used both of these resources in preparation for court. Both offices were rather empty when I visited them, a fact that I found quite surprising considering the large number of civil cases that are filed at the small claims court in Quebec each year. What we must do is add to, and promote, these kinds of services through different venues: mandatory courses in our secondary education, organizations that offer legal guidance to citizens (run by law students), and media coverage are just a few ways to realize this project. We must increase awareness about the law and legal resources that are available to people. The media is a great venue for educating people on such matters. Why not have legal experts commenting on legal news as often as doctors commenting on health news? This kind of openness about legal matters will then create an interest amongst people to seek out answers on their own. It is an unfortunate fact that basic legal matters are foreign concepts for most ordinary people. Meanwhile, big companies, or other powerful agents, capitalize on the ignorance of the general public in legal matters to make them believe what serves the company's, or institution's interests best.

What we need is a basic legal literacy. We need to have courses that teach our children from a young age about such concepts as rights and law, and what those

mean in our society. The topic needs to be addressed explicitly, and not just in passing, in economic, business, and history classes. Basic legal education must become a mandatory part of our secondary curriculum. Such awareness would prevent many civil legal issues from arising in the first place, as people would make more informed decisions. That, in turn, would eliminate at least a portion of questionable policies designed by different agents and institutions, as legal literacy would keep many people from getting involved with such policies, which would then force legal agents to form better policies.

There is another reference to be made to the medical field and a shift in paradigm that has already been made there: *evidence-based medicine* is now being paired with *the expert opinion* approach to treatment. The latter involves using the education and expertise of doctors or other health care professionals to evaluate the merits of any treatment. Meanwhile, evidence-based medicine heavily relies on clinical trials and what has been learned from them. The two methods complement each other and lead to better patient-care. Similarly, the public must learn about different outcomes of legal proceedings *in conjunction* with the opinion of experts in legal matters. The role of professionals in the legal field is crucial as they have the expertise to interpret different legal outcomes. So for change to come about, we need willingness on the part of legal professionals to offer help, and perhaps incentives that would push these professionals to help implement a basic legal literacy amongst people. Moreover, the pairing of legal expertise with legal evidence reduces any kind of bias that may be present in each one of these sources considered alone. This method would familiarize people with how law is enforced

while providing additional incentive for law enforcement to pay extra attention to legal proceedings, as bad rulings and bad policies would upset a population largely literate in legal matters.

Of course a major concern that has been raised with regards to PCC concerns the shift in power from professionals to patients: a worry that's also relevant in the legal reform being presented here. Is it really wise to give so much power to the patients when most of them lack the expertise and education of health care professionals? In other words, do patients know what's best for them and will they really make the choice that's in their best interest? What are the consequences of patients' increased power in that sense? Many, including Dr. Berwick, have argued that it is not clear that this shift in power will indeed lead to undesirable results for the patients, or society at large. A major concern has been that patients' increased influence could lead to misuse of the medical system, the worry being: "do you grant every demand for a CT scan, just because the patient demands it?"⁹⁵ Others have argued that not including patients in the process of choosing their treatment is failing to fulfill the main objectives of medicine.⁹⁶

But the worry about this shift in power is much more serious for the legal field because, often, consequences of legal matters stretch beyond the life and needs of the individual who's directly involved in the legal matter, for which they are seeking advice. By contrast, in the context of health-care, the patient is making a

⁹⁵ Donald M. Berwick, "What 'Patient-Centered' Should Mean: Confessions of an Extremist," *Health Affairs* 28, no. 4, (2009): 563.

⁹⁶ Christine Bechtel, Debra L. Ness, "If You Build it, Will They Come? Designing Truly Patient-Centered Health Care," *Health Affairs* 29, no. 5, May 2010.

rather personal choice in choosing one mode of treatment over the other options. The consequences of medical decisions in that sense, rarely touch other members of society in lasting ways – barring, of course, the emotional strains that these decisions could have for those close to the patient. Therefore, it is my belief that in legal matters, the weight given to expert knowledge should be somewhat more dominating than is the case in PCC. In the health-care domain, the main job of professionals is to lay out the existing options along with their foreseeable consequences for the patients – in addition to their expert recommendation – whereas lawyers and other professionals in the legal field should, as many believe they do, have a responsibility towards the population at large to encourage and sustain justice. While many legal decisions are analogous to the choice of a dying patient who has to decide between a risky surgery or a guaranteed but limited time with their family, other legal choices affect other families, employees, our environment, or social well-being in general. There are many ways to balance the power that this legal approach gives to different individuals and institutions, without taking away the freedom of choice from these entities. For instance, legal choices that could be costly to a portion of the population should be accompanied by a notice that warns against the consequences of becoming involved with those choices: we are well aware of the function of the ‘fine print’ that is used in pharmaceutical advertising. Alternatively, legal institutions or lawyers should have an obligation to report questionable, albeit legal, decisions by big companies or other powerful agents to the government. An accumulation of such reports should

have consequences for the party that made deceitful legal choices, while making the general population aware of these choices through public awareness.

For this reform to come about, we need to take a different approach towards training our lawyers and other professionals in the legal field: while skills in logical thinking are a requirement for working in the legal system, training emotions and personal values are just as important. Our professionals in the legal field need to look beyond mere facts and regulations to help build a more fair and efficient legal system. Robin Wellford Slocum, a professor of law at Chapman University, agrees:

“The dominant presumption within legal education, that we can teach students to “think like lawyers” with a nearly singular focus on training the analytical mind, is a fiction based on a 19th Century understanding of the human brain that is inherently flawed. Modern neuroscience reveals that the ideal of a dispassionate analytical mind untainted by emotions and personal biases is a fallacy. Nonetheless, this fallacy has spawned an equally faulty premise that still dominates legal education today - that we can train students to be effective lawyers by virtually ignoring students’ emotions and by marginalizing the development of the emotional competencies. These presumptions impose a significant cost on our students and on the legal profession. By marginalizing the importance of emotional competence, we ill-prepare our students to work effectively with the complex interpersonal legal problems they will encounter in the practice of law.”⁹⁷

Therefore, the legal reform that is being suggested would require change in the way of educating the general public as well as professionals in the legal field.

Undoubtedly, the implementation of this legal reform would generate questions for people, as different manifestations of laws could create some confusion at first: however, this confusion would be beneficial in the long run as it

⁹⁷ Robin W. Slocum, “An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers,” *Social Science Research Network*, Last updated December 1st, 2011, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889756##

would create curiosity and interest amongst people to learn more about the legal system.

Legal literacy involves a theoretical and practical side. The *theoretical* part involves, amongst other things, a basic knowledge of, and reflection on, our principles and how they're embodied in law. The *practical* side involves knowing the basic structure of our political and legal system: i.e., how the laws are decided, what resources are available for the general population, and how we, as citizens of a free society, influence the formation and reinforcement of rules and regulations. It is through an understanding of the theoretical side of legal matters as they apply to our times that we can bring about changes in practical matters.

4.5 Some Objections: Social and Personal Considerations

I'd like to close this chapter by considering some objections that may be raised to the points discussed herein, and more generally to the point that I've been advocating all along: that to improve our legal system, we need to increase the knowledge and participation of people in our legal system. Important objections could be raised against these points on two levels: social and personal.

In my opinion, the first and most preoccupying challenge that some may raise against my view is the following: the reason why many people are passive vis-à-vis legal issues when they could, in theory, opt for legal action is a result of a risk-benefit analysis; that is to say, most people - in calculating the personal benefits that

they could reap from procedures such as a lawsuit - realize that the costs are generally heavier, and the potential benefits are not worth those costs.⁹⁸ It's undeniable that this is, in fact, what happens in many cases. Some even claim that it's unrealistic to expect most people to have the zeal and determination that procedures such as a lawsuit require. In response, I would bring up two points: that the kind of calculating mentality that is portrayed by this kind of reasoning is problematic and flawed; second, increased legal literacy would allow people to recognize their real chances of success and that, in turn, would modify their cost-benefit analysis, which would then allow them to see that remaining silent in the face of injustice may be in fact the more costly option.

In such contexts, what may be considered personal benefit is, in fact, personal cost in the long run: we realize this when we consider the bigger picture and how our legal issues fit in that picture. Consider the injustice that is being done to thousands of Canadian teens who are offered or pressured into taking drugs. The adverse long term effects of drug use is an undeniable fact that's been confirmed by hundreds of studies.⁹⁹ Amongst other factors, parents' involvement in enforcing anti-drug laws is crucial. For instance, it is parents' responsibility to ensure that their kids' school includes education on drugs. Many parents mistakenly believe that

⁹⁸ Costs, in this context, include: time and money as well as psychological and emotional involvement.

⁹⁹ For two examples of such studies, please see: Martinez L. Contreras et al., "Drug abuse in adolescent offenders: analysis of psychosocial variables involved," *Pubmed.gov*. accessed March 23rd, 2012, <http://www.ncbi.nlm.nih.gov/pubmed/22508015> and also Louisa Degenhardt et al. "Extent of illicit drug use and dependence, and their contribution to the global burden of disease." *The Lancet*, 379, no. 98010 (2012): 55-70.

their kids are somehow immune to this issue and other pervasive problems that grip thousands of Canadian teens year after year. Consequently, they fail to become involved on a familial and social level in helping fight the war against drugs. Thus, even though they save themselves the trouble of going to meetings or working with other parents to help solve the issue of drug abuse in teens, in the long run they are doing themselves and their children a disservice. That is because even if their own kid escapes the nightmare of drug addiction, they may lose a dear friend to that cause. Worse yet, passive parents are contributing to a society filled with corruption, and even if they won't be around to live in that society; that will be the world that their kids and grandchildren will have to live in.

Therefore, short-term calculative thinking, while necessary in some cases (e.g. pursuing a debtor for a small amount of money may not be worth the trouble of filing a lawsuit, especially if one has more important social and familial responsibilities to attend to), is poisonous for a healthy general will. It is our actions and reactions to the law that determine the general will. These actions and reactions include what we do or fail to do in reinforcing of laws such as the one discussed above. So, clearly, if most of us are only thinking of our personal short-term benefit, we cannot have a healthy general will. We must remember that the general will sets the boundaries of what can and cannot be counted as acceptable in each society: so each society is only as good as the thinking and the actions of its individuals. This is why it's important for us as a people to look beyond what is most convenient for us in each case and actually consider the consequences which our decisions and actions bring about in such circumstances.

This brings me to the second point regarding the cost/benefit analysis that supposedly leads people to refrain from becoming involved in legal issues or react to bad law in different contexts. I believe that a correct medium - to long-term cost-benefit analysis reveals that taking steps towards improving our system involves more benefits than costs for everyone because, even if legal procedures don't achieve our ultimate goal (like winning a lawsuit), they will set an example and a record of the issue that was worrying us. An accumulation of this kind of action would push the legal system to consider the issue. For instance, many complaints against one company would be much more effective, in legal terms, than one complaint from one unhappy individual. Moreover, another benefit of acting as a group is that it would cost each individual much less in time, money, and troubles to voice their view and problems. Thus, in many cases there are really more potential benefits in taking action than in remaining silent.

Others would still argue that it is simply not feasible or realistic to expect a majority of the population to be active in their dealings with the law. Time and resources present huge impediments to assuming an active role in our legal state, even when there is a willingness to act. This is indeed a legitimate and real concern, but one for which there are certainly solutions. In response, I would say that a greater focus on facilitating activism is part of our social responsibility. We need to advertise and implement more systems through which ordinary people, be they rich or poor, could express their concerns without having to go through the whole legal process of making a complaint. One way to do this is having organizations that are specifically designed to receive such complaints and to have experts who evaluate

these complaints and pass on legitimate concerns to higher governmental organizations. This kind of change can even start at a private level: individual professional practices could join and offer such services. Their success would be evidence for the benefits that this kind of structural change could bring about.

The second major objection to this view is met at a social level. Some may rightly object to this reform by pointing out the many meticulous changes that it requires at different levels of education and our institutions while also noting the many, ironically, legal approvals that would have to precede it. In response, I would remind them that this reform could, and should realistically, come about according to a bottom-up scheme: that is to say, small changes in small communities should lead to big changes at higher levels of our society. Expecting this kind of change to *start* at the governmental level is simply unrealistic. One of the big advantages of living in a country like Canada is that information could be accessed fairly easily, which means that change through education need not be very costly at all: teachers' willingness alone to educate their students on this topic would go a long way.

Moreover, the foundation of this legal reform is made up of social and cultural awareness: and that's something that our population could achieve if we succeed in creating an interest for it. Furthermore, from an economical point of view, it would be in lawyers' interest to applaud a legally aware population since that kind of culture would increase their clientele, as people's increased interest would encourage them to consult lawyers as they discovered the possibilities that a legal democratic system has to offer them. It would be in every sense a win-win

situation as our legal resources would be better spent on more inevitable cases and as legal corruption would decrease.

Active involvement from the people would thus take care of concerns that may be raised against this view, on individual and social levels.

4.6 How to Operationalize This Proposal¹⁰⁰

The most attractive aspect of my proposal is that once the appropriate authorities accept its implementation, it would take a very small portion of our resources to implement. Here are the bullet point of some the way in which I believe this proposal can be integrated within our secondary curriculum:

- Seminars
- Replacing one of the two computer classes
- In Quebec, the material could be covered in what is called 'moral' classes
- Each course (history, economics, etc) could dedicate a few hours to discussing legal issues, specifically and explicitly

Let us begin with the first suggestion regarding seminars. Our high schools can invite speakers who are knowledgeable on the topic to talk to the students about legal issues. The speakers would have to have communication, teaching and speaking skills – which are often characteristics of Professors and to some extent lawyers. These skills are required so that the speaker can manage the material in a

¹⁰⁰ Many thanks to Dr. Shannon Dea and Dr. Mathieu Doucet for stressing the importance of providing further details for this proposal. Their comments have been truly helpful in forming the suggestions that follow in this section.

way that can be appealing and interesting to teenagers. Attending such seminars would be mandatory for students – adding only a couple of hours to the school day once every month or once every two months. The students would have to write some kind of opinion or summary piece about these seminars. With this option, expenditure would be minimal as only two hours would have to be added each month, and the other part of the expense would consist of paying the speaker to present and paying the staff who would have to stay in order to keep students in school for these seminars. Moreover, the cost of paying the speaker could be zero, as many eager law students may be interested in rendering that service without charge. It's something that could look good on one's resumé while it would not even take a lot of hours to prepare for.

Another option would be to incorporate some courses together to make room for legal studies. For instance, Canadian history and Canadian geography could be incorporated into one course to make space for legal studies. Alternatively, the time allotted to health and physical education could be combined with arts education to free some time for legal studies.¹⁰¹ Bottom line is that our current curriculum could be changed to make the incorporation of legal studies a possibility in terms of time. In terms of other resources, this option would require hiring new teachers for legal studies. These teachers would not necessarily have to be an expert on the topic: remember that the extent of legal literacy that I am suggesting doesn't exceed what has been presented in this thesis. Therefore, many candidates would be

¹⁰¹ For a list of required courses in high school, please see "What do I need to graduate?" *Ontario Ministry of Education*, accessed March 20th, 2012, <http://www.edu.gov.on.ca/eng/students/curriculum.html>.

suitable for this position : those holding PhD's in philosophy of law, retired or retiring lawyers, law students. Alternatively, high school teachers could undergo a short training on the topic to teach this class.

Similarly, in Quebec there is a course in high school called Morals : the aim of this class is mostly to teach etiquette to the students and discuss social mannerism (previously some religious studies were also incorporated in this class until objections of parents forced the school board to eject religious studies from the secondary curriculum).¹⁰² I see this class a fitting place to talk about legal issues. Learning about legal matters does not have to completely replace that material which is taught in the Moral classes, but it could definitely become part of the material covered in that class.

Again, I must emphasize the importance of teaching this topic in an explicit manner – and not just in conjunction with some economic theory that is being taught alongside the legal issue, which often ends up being mentioned in a format of a footnote. This option, like the previous one would only require a short training and overview of the general points to be presented : which is not something that would exceed the capabilities of any good high school teachers.

Another alternative, would be for each class to dedicate a few hours to covering legal issues, perhaps even in relation to, even if separate from, that class. For instance, the history class could dedicate a few hours each month to discussing these issues or having a speaker come in to talk about legal issues. If each class

¹⁰² Please see "Secondary Education," *Education, Loisir et Sport Québec*, accessed March 20th, 2012, <http://www.mels.gouv.qc.ca/gr-pub/menu-curricu-a.htm#second>.

succeeded in making that time allotment, I believe that the level of legal éducation which I'm aiming for could be achieved.

The bigger hurdle on the way of realizing this project is – as you may have guest – its first step, i.e. getting government officials and the appropriate governmental bodies to approve this project. Studies would have to be done to persuade the people in charge that this vision would be beneficial for our youth, as well as our society at large. Overcoming that obstacle would require action from parents, teachers and other citizens to ask for such a change. I grant that getting this proposal to pass through our governmental bodies is perhaps the most difficult and consuming part of the project. However, once in motion the benefits of having more educated and aware young adults would surely outweigh the comparatively minimal cost that it would place on our budget.

I must note that the suggestions that I've presented here are not a complete nor exhaustive list of all the ways in which this change could or should come about. These are just some – what I consider to be promising – starting points.

At this point, it is worth returning to a concern that some may have regarding the tension that may be seen between the difficulty of teaching people about legal issues – especially in light of the complex role that interpretation plays in law, as seen in the second chapter. The question may be: “how could be expect to successfully teach such a complex topic to students who are so young and inexperienced?”

We must remember that secondary schools are mandated to help form well-rounded young adults. I consider a basic legal education a necessary part of that formation for reasons that have been discussed throughout this thesis. Moreover, I would point out that economics, mathematics and other sciences are still being taught in our high schools, even though they are also complex subjects that are difficult to perfect. Yet, we teach them in high school because the *general culture* that the teaching of these subjects leaves for the students is one that can be applied in day to day life. For instance, a basic knowledge of how the taxes and interest rates work and the ability to read and understand those concepts in daily news is essential for young adults entering college, university or the job market.

The same kind of general knowledge is necessary in the field of law, as corporations and other entities target our youth in different ways: be it through internships, job contracts or different campaigns that try to influence young people for what is usually private benefits. In fact, legal literacy is crucial for young people graduating from high school, as they become young adults who are part of a changing society. The end of high school, as far as the law is concerned, marks the start of adulthood. As we know, being an adult has many connotations in today's world, in the present context, the most important being that post-high school, individuals are held responsible for their actions. Thus, the depth of the change in environment and social responsibility that takes place once students graduate from high school cannot be overstated: whereas in high school, students are still part a semi-artificial environment, the real world where companies chase eighteen year-olds to give them credit cards is one in which teenagers are treated as adults. It

seems only fair that we equip our youth with the basic knowledge that will help them navigate the adult world, without harming themselves significantly. Overseeing a legal education would have negative and sometimes lasting effects on our youth and by extension on our society, as a whole.

Moreover, the judiciary system is a branch of our government whose influence is tremendous on our social and political system. We saw how this is the case in chapter three where we considered some basic structures of our political society. As we discussed, the actions of the people within the judiciary system play a major role in keeping our government in check by adding precision to what may otherwise be very general laws. In that sense, the political and judiciary system check and balance one another. Since the legal system is major branch of our government and our political system and if we recognize the importance of teaching our youth about our political system, it seems – at best – arbitrary that we would leave out an education about the basics of our legal system.

In sum, my theory does not expect citizens to understand the details of complicated legal theories but I do believe it's both reasonable and advantageous to expect a basic level of legal literacy amongst our citizens. Think of the general awareness about the use of drugs in the medical field: most people today recognize that they ought not to mix different drugs together, and that encourages anyone who cares about their own health to seek advice on such matters. Thus, while people know that they ought not to mix medications, most don't know what the exact consequences of mixing medication X with medication Y would be. I believe a

similar change is needed in our legal system: we need as much literacy as will help most people recognize what could be dangerous to their basic interests and fundamental rights.¹⁰³

For these reasons, I maintain that it is unjustifiable, and in some sense, surprising that we do not already have legal education as part of our secondary curriculum. I will end this chapter by pointing out that while many benefits could be reaped from the implementation of such education, its disadvantages – besides the monetary cost which we would probably recover by having better adjusted citizens who make better decisions - are difficult to fathom. That is not to say that getting the program going does not require time and efforts of people who believe in this program: it is only to say that once implemented, we as a society stand to gain much from it.

Further institutional changes could come through subsidized governmental programs that provide legal information for those who could not afford it otherwise. Of course, such system would require a mechanism to filter the demand for legal advice based on need: for instance, governmental help would go to those with lower income first and then to others who could afford seeking legal advice through other mediums that have been proposed in this chapter. Evidently, to implement such institutional changes some evidence regarding the efficacy of these programs would be needed. Therefore, one of the first steps in achieving this goal would perhaps be to conduct studies on the effectiveness of the changes proposed earlier in this

¹⁰³ Special thanks to Dr. Shannon Dea and Dr. Mathieu Doucet for pointing out the tension that may be seen between the complexity of legal concepts – especially in light of what has been discussed in previous chapter – and my proposal to educate the population at large on such difficult matters.

chapter. This seems like a realistic goal as the previous suggestions – such as the cooperation of lawyers or the help of law students – would cost less in money while also providing an opportunity to conduct research that would hopefully help support more fundamental institutional changes supported by our government.

Conclusion

The main objective of this thesis has been to underline a source for legal improvement that has been long overlooked - the role of ordinary citizens. While it is common knowledge that great changes *could* come about through solidarity of the people, we often forget about the small daily changes that can transform our legal state in significant ways. I have aimed to show the ways in which ordinary people could contribute to the fairness and efficiency of their state, by demanding and taking part in such changes.

In my opinion, there are two main reasons why this topic has been overlooked, or dismissed, for so long : first, ordinary people generally lack the kind of knowledge and education that is required to play their part as truly active citizens in a legal democratic state, and second, there seems to be a prevalent cultural belief in our society that the more powerful are the ones who decide and control legal, as well as other related, matters. That belief has given rise to the misconception of ordinary people's lack of real influence in such matters, leading many to view any efforts in that direction as futile. I have argued that that misconception stands to be corrected and one of the most promising ways of correcting it is through legal education.

I maintain that, to be a truly active citizen of a legal state, one needs to have some considerable knowledge about its legal system and the possibilities that it offers its people. That's why it is crucial to educate our citizens on the structure of law and the general ways in which our legal system operates. Without that kind of

knowledge, people are deprived of the chance to practice choices that are rightly theirs. As a way of achieving that knowledge, I've proposed, as one possible method, a basic overview of the basis, structure, content and purpose of law.

Chapter two presented an overview of some major legal theories which set the foundations of a legal state, its boundaries and power. It was concluded that divine natural law theory has important flaws that prevent it from forming a suitable foundation for a fair legal state, partly because it obstructs basic human rights such as freedom of association. And our citizens need to be mindful of that. We also saw that rational natural law could possibly be a good model for a fair state, given that a way is found to consider and evaluate different forms of rationality. Hart's conception of legal positivism pointed us towards an essential characteristic of law: its dependence on people's acceptance of it. That realization led us through a discussion about the role of morality in law. It was concluded that morality does in fact have a central place in law: to the point that legal theories that dismiss the prevalent moral convictions of the people are doomed.

The recognition of the place of morality in law raised the following question: how is morality incorporated in law? The multitude of moral convictions in each society poses a pragmatic difficulty for the evaluation and selection of the right ideals that should form the basis of our laws. Some answers were found in Dworkin's theory of interpretation in law. His analysis of interpretation as a method consists of three steps: identifying the main elements of the topic, determining the purpose of the topic and applying changes that allow the main elements of the topic

to achieve its purpose. It was pointed out that without the input of the general public, this process of interpretation could not be completed; at least not in a proper manner, which then leads to what we consider to be bad laws. Chapter two ended with an important observation: that all three theories that were considered included some form of interpretation. It was noted that the realization of the omnipresent role of interpretation in different conceptions of legal theory presents an opportunity for people to aim for change and to understand legal issues in a better way.

The third chapter focused on the purpose and content of law, as two other aspects of law that need to be well understood before people can fully participate in forming and changing their legal state. I claimed that it was crucial to understand how the content and purpose of law influence one another. Because it is through interpretation that people can keep their legal state in check and interpretation could not be carried out properly without a basic understanding of the main elements of our legal state: namely, its content and purpose. For instance, it was pointed out how a *relational* understanding of rights differs from the view of rights simply as what people are owed. Understanding rights as 'valid reasons' that bestow responsibilities on all of us, regardless of our position in society, changes the dynamics of people's reaction to law. This understanding translates into an obligation for the people to actively take part in shaping and reinforcement of social values, which are portrayed through our laws. Without their voice, what I called the 'balance of justice' could not approach equilibrium, as the content of law could be misused by governments or other entities to achieve purposes which deviate from

the original objectives of law. Similarly, a lack of knowledge and understanding of other elements that make up the content of our laws can transform them into venues for different kinds of exploitation. This chapter thus underlined the importance of having a basic understanding of the content of law and its aim because the interaction between the two affects the lives of all citizens. Chapter three also showed some of the ways in which interpretation and active participation could bring about positive changes for the people and, more importantly, maintain social fairness through a fast changing world.

Chapter four provided additional reasons for people's active involvement in legal matters. It was shown that the very structure of any legitimate political society formed a strong reason for people's involvement in it. The main argument was that, since by virtue of living in a political society, some of what used to be considered our 'natural rights' are taken away from us – such as the right to protect ourselves by all means possible – and since we transfer some fundamental aspects of our basic rights to authority, it is crucial that we remain aware of how our lives are changed and affected by the decisions that are made on our behalf. Consideration of some basic facts of political philosophy revealed the following truths: society is kept together through convention: it is our interdependence on each other that keeps us together in the first place, then come sentimental reasons. Yet, living according to convention has also meant attributing different roles and levels of power to various parts of the population which, in turn, has created unequal degrees of independence for different people. I argued that the pull of convention is what makes up for what some portions of the population are missing in terms of independence. What that

means is that, contrary to popular belief, important decisions can be influenced by the desires of the general population, if they manage to take action, on large and small scales.

Quite naturally, this view may be confronted with the objections of some people who may accuse it of being too idealistic. In response to them, I have proposed what I consider to be a first, and substantial, step towards achieving a legal state within which all people feel empowered; regardless of their financial standing. I maintain that it is quite possible to imagine how that kind of change could be brought about through a legal education. It's easy to imagine because we can already see a very similar change within the medical field: a relatively new approach that has been labeled as 'patient-centered care' (PCC) has revolutionized people's health as well as their approach towards their health.

Whereas traditional approaches to treatment only involved the health care professional in making decisions, PCC gives an important role to the patient in deciding what kind of treatment would best suit their lifestyle and needs. The result has been an increased interest on the part of the patients to learn about different alternatives and what each involves. The open communication that's been made possible thanks to PCC has not only improved patients' health but it's also provided valuable information for doctors and researchers that was less easily accessible before the implementation of this approach. I have proposed a similar reform for our legal system. The first step in achieving that reform should be to make mandatory a basic legal education for all: that education would come in the form of

courses that are taught in our secondary schools and colleges. The next step would be making legal advice more accessible to a greater number of people. I suggested the collaboration of private practices to offer that kind of advice at an affordable rate: this change would work in the advantage of these practices because people's increased interest in legal matters would create a good market for such services as people would need help in sorting out different kinds of information. Other changes and programs supported by the government would help this process in the long run. In the meanwhile, the media would be an excellent source for providing and popularizing legal education for the population at large, much like we've seen happen with the media coverage of matters of human health.

Together, these changes would make people aware of the differences that they could make in helping justice. The rather low costs of implementing this reform pale in comparison to the potential gain that we can achieve through it on social, political, and especially humanitarian fronts.

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