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The Shock of the Old: Interpretivism in Obligations

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A NEW PHILOSOPHY is now being urged on those engaged in the study of the law of obligations. This 'interpretive' approach is said to represent a significant step forward in understanding, and to save the area from numerous errors—and, indeed, from the risk of intellectual collapse. While this approach is in one sense new, its proponents are clear that they are simply stating openly what a significant body of scholarship has long assumed to be the case. This essay considers the new interpretivism, and works towards an assessment of its products.[1]

The timing of this 'new' movement is important. The central areas of private law scholarship, if not exactly in crisis, nonetheless seem rather lacklustre today when compared with other legal research. The rise of public law has deprived them of the dominant status they had for most of the twentieth century. And it is no longer obvious—if it ever was—that the more specialised areas of private law pay much attention to the supposedly 'central' areas. So, for example, debate on the law of the sale of goods or of intellectual property is rather remote from debate on general contract law, and the proposition that the former is partly based on the latter seems increasingly doubtful. And some openly doubt whether the traditional conceptions of the core areas—contract as promise, tort as personal wrong—make much sense as constituents of the legal system in the early twenty-first century. Part of the impetus behind the new interpretivism is to shore up these traditional conceptions, and therefore (perhaps) to

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1 Written from an explicitly interpretivist standpoint are: S Smith, *Contract Theory* (Oxford, Clarendon Press, 2004) and A Beever and C Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *MLR* 320. Other relevant writings by the same authors include: A Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *Oxford Journal of Legal Studies* 87; A Beever, 'The Law's Function and the Judicial Function' (2003) 20 *New Zealand Universities Law Review* 299; S Smith, 'A Map of the Common Law?' (2004) 40 *Canadian Business Law Journal* 364.

salvage some of the prestige that central private law theory had in early years.

I INTERPRETIVISM: WHAT IS IT?

'Interpretive legal theory is nothing more (or less) than the attempt to understand legal concepts in terms of their meaning.'[2] In other words, it is an attempt to reveal an intelligible order or meaning in the law. By considering which theories might explain key features of the law in a particular area, the method seeks out the best explanation of that law, and thus to explain the significance and interrelation of key concepts within it. So, for example, an interpretive theorist investigating the law of negligent misrepresentation will ask which theory best explains it. Is it best explained, say, by the theory of reliance (that the defendant will be liable for losses caused by foreseeable reliance on the misrepresentation), or by the theory of consent (that the defendant will be liable for reliance losses where the defendant consented to that reliance)[3]? Asking such questions is said to be the core concern of interpretive theory.

The overall aim is therefore to go from a large and possibly confusing mass of legal information to a relatively tight and coherent theory which is thought to lie behind it or justify it. There is often considerable scope for argument over which theory is the best one. Interpretivists are deliberately vague on many aspects of what is thought to be the 'best' theory: they insist that the search for such theories is what legal theorists ought to engage in, but acknowledge that there are many different conceptions of the 'best'. There appears to be room for disagreement over precisely what is involved here. Smith proposes four matters to be considered in determining this: *fit* (consistency with the legal materials to be explained), *coherence* (non-self-contradiction), *morality* (the moral appeal of the theory) and *transparency* (consistency with the actual words used by the legal actors involved)[4]. Beever and Rickett prefer to talk more loosely about 'reflection',[5] and they pass over Smith's four criteria largely without comment.[6] But the general idea is clear.

Interpretivists are keen to argue that their theory is a broad church, and in giving examples of some controversies where they think the method is useful, they insist that many different theories are consistent with the method. And while the method obviously draws on Ronald Dworkin's

2 Beever and Rickett, *ibid*, 328.
3 This example is explained in detail in Beever and Rickett, *ibid*, 322–4.
4 Smith, *Contract Theory*, above n 1, 7–32.
5 Beever and Rickett, above n 1, 324.
6 For commentary see Beever and Rickett, above n 1, 325 note 21.

view of 'law as integrity',[7] they argue that any natural lawyer or positivist ought to be happy with it.[8] As to which accounts of particular aspects of law are compatible with it, Beever and Rickett say that all 'who attempt a conceptual understanding of the law' can be said to be interpretivists, and they explicitly include Birksian taxonomists, corrective justice theorists and 'at least some' law-and-economics scholars.[9]

A more interesting question is whether anyone making any kind of a study of law is excluded from this description. Most studies of law can be said to be looking for patterns—as the interpretivists themselves say, this is a general intellectual method by no means confined to law. No doubt there could be some individual legal case studies—by sociologists, journalists or legal historians—that are not meant to identify general patterns at all, and these would presumably be outside the method's scope. (Though even there, general patterns in the law are likely to be relevant to the enquiry.) Most other attempts to understand the legal systems of the world would seem, in principle, to be included. Looking for patterns is what academics do. So there appears to be a dilemma here: either the method is a mere statement of the obvious, or it is in fact less universal than it appears. The latter seems to be the intention. But which legal scholars are regarded as anti-interpretive?

There are numerous hints that the interpretivists do not regard themselves as using the same method as legal realists. But why would this be? After all, legal realists are also looking for patterns in how the legal system behaves, and welcome self-consistent accounts of the legal system's doings. And it is not clear how interpretivists can object in principle to accounts of legal processes which pay relatively little attention to what legal actors say they are doing, as they themselves feel free to reject particular judicial statements when they consider that this will enhance legal understanding.[10] It is far from clear whether the interpretivists' rejection of legal realism is a mere preference on their part or has some solid intellectual basis. Smith is certainly working toward the latter, insisting that his requirement of 'transparency' excludes most realist descriptions; but he has relatively little to say on why this criterion is a

[7] On which see especially Ronald Dworkin, *Law's Empire* (London, Fontana, 1986) ch 7. However, it seems to me (though this is not the place to consider it in detail) that there is a rather large difference between attempting to resolve hard cases (which is Dworkin's principal concern) and attempting to structure legal theories (which is the usual interpretivist project). Interpretivists are anxious not to be read as endorsing every aspect of Dworkin's theory: Smith, *Contract Theory*, above n 1, 5 note 5; Beever and Rickett, above n 1, 322 note 145.

[8] 'Our view is compatible with legal positivism (inclusive or exclusive), integrity theory, and natural law theory': Beever and Rickett, above n 1, 322 note 14.

[9] *Ibid*, 320 note 2.

[10] See, eg Beever and Rickett, above n 1, 324: 'The interpretive legal theorist does not try to interpret the judges' actual intentions, but to determine what their intentions should have been'; see also their comment on judges who refer to public policy: 328.

valuable one.[11] A methodological rule that judges must usually be assumed to mean exactly what they say seems rather dogmatic; the classic realist arguments for looking at what they do as well still seem to have weight. This aspect of the theory is so far poorly defended.

There must be a suspicion (based on the interpretivists' insistence on law as a discipline) that they are working towards a revival of the 'insider'/'outsider' distinction, arguing that the law's order can only be seen by those who, up to a point, share its values. So the patterns they seek can only be seen by 'insiders' who subscribe to the values of the legal system, whereas 'outsiders' will only see it as a meaningless, patternless blur.[12] If so, it seems a retrograde step, as it confuses knowledge with values. Understanding how the legal system works is very different from, and may or may not go along with, sympathy with its values. Many with an excellent understanding of the legal system withhold adherence to its values, either through fundamental disagreement with them or because a commitment of that sort seems incompatible with rational enquiry. To imply that such people are not really looking for coherence in the law is inaccurate (as well as libellous).[13]

II AN AMBIGUITY

While the descriptions of the interpretivist method itself are clear enough, crucial questions about its status arise. Interpretive methods do not look so very strange: indeed, we might be inclined to criticise the 'new' theory not for unwarranted novelty but, on the contrary, for simply dressing up what legal academics have been doing all along in a (quite unnecessary) theoretical package. Yet there is a crucial ambiguity here, as can be seen by contrasting the approach of Smith with that of Beever and Rickett. For Smith, while the method is valuable, it is simply one method and no more; and he expressly contrasts the interpretive method with other, no less valid, legal methods[14]. For Beever and Rickett, the interpretive method is more than that: it is *the* distinctively legal method. So Smith is simply describing a valuable tool which all who think about law can use, and some will want to use exclusively. Beever and Rickett doubt whether those not using the method belong in the law school at all, at least unless outnumbered by interpretivists: a failure to use the interpretive method 'is nothing less than a surrender of the notion that law is an academic discipline'.[15]

11 See generally Smith, *Contract Theory*, above n 1, 24–32.
12 For hints of this see *ibid*, 17 note 23.
13 See especially H Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999) 9.
14 See Smith, *Contract Theory*, above n 1, 4–5.
15 Beever and Rickett, above n 1, 336.

While Smith's view seems at first glance to be the more reasonable, in fact it turns out to be quite difficult to define the position or distinctiveness of interpretivism in relation to other methods. Looked at closely, it is very hard to distinguish the method from other intellectual approaches to law, and so the argument that the method is distinct does not convince. Smith argues that four types of method are available for understanding what the legal system does: (1) historical methods; (2) descriptive methods; (3) prescriptive methods; and (4) interpretive methods.[16] But this sequence looks odd. Historical analyses are usually understood to be about the law's past; descriptive analyses are about its present; and prescriptive analyses to be about how it should develop, and are thus about its future. It is not entirely clear how this sequence can be continued. And in fact the arguments used by interpretive theorists seem to be drawn from a variety of historical, descriptive and prescriptive sources. Rickett and Beever suggest that the method should be seen as a 'hybrid' of other types of method,[17] and this is true so far as it goes. What is also clear, however, is that certain commonly used methods are rejected: for example, appeals to public policy in legal reasoning 'must always be problematic' and are not regarded as capable of forming part of any sensible interpretivist account.[18] So we appear to have an unresolved dilemma: it is not clear at all how the method can really be distinct from legal methods generally, but it is clear that it will not do as a general description of how the law works, as it rejects important aspects of the legal system as misconceived.

In fact, it is no great criticism of interpretivism to say that it makes a mixture of historical, descriptive and prescriptive claims—the same could be said of most approaches to the law. And the same argument can often be stated in either descriptive or prescriptive terms, as the arguer wishes. The real danger is that, by building up interpretivism as a supposed approach or methodology, its proponents create a massive distraction for their colleagues. Some will be 'for' interpretivism, others 'against'. Yet in fact the interpretivists make a variety of claims, some of which are more reasonable than others, and some of which are more novel than others. Treating it as a coherent intellectual movement does everyone a disservice, because it directs attention away from the particular claims it makes in particular situations and inhibits rational discussion of those claims. There is a real danger that interpretivism's claim to be looking for coherent patterns in the law will be treated as something remarkable, and somehow in opposition to the endeavours of other jurists, rather than a statement of the obvious about all intellectual activity. Yet most of what separates interpretivists from other legal theorists lies in the realm of mere preference, such as a reluctance to base oneself too firmly on views of

16 Smith, *Contract Theory*, above n 1, 4–5.
17 Beever and Rickett, above n 1, 322 note 14.
18 *Ibid*, 335.

what the purpose of a particular law is, or of what policy the law should be pursuing in that area. Different preferences about what questions to ask are healthy enough; but what is needed is to subject supposed answers to close and careful scrutiny. Anything that gets in the way of that process, by diverting real differences about the law into discussions of methodology, is a distraction.

It needs to be borne in mind, therefore, that there are two very different approaches to interpretivism's status: the *methodological* approach (exemplified by Smith), which proposes that interpretivism should be recognised as a legitimate method in legal studies, and the *imperialistic* approach (exemplified by Beever and Rickett), which would deny legitimacy to non-interpretive approaches. Obviously the two approaches have much in common; indeed, they appear to be proposing the same method though they differ as to its utility. I will, however, return to the distinction below in evaluating the interpretive approach to date.

III THE METHOD AND LEGAL HISTORY

Is the interpretivist method incompatible with legal history? There is no immediate reason to think so. Nonetheless, there are points of tension between the two. One of the first lessons that trainee historians (legal or other) learn is that they should not view the past through the eyes of the present. The past is a foreign country, with different values, and set in very different circumstances. To evaluate historical cases by modern standards is very probably to misconceive them. And so it has often been said that legal history is subversive: it reminds lawyers of inconvenient facts about the origins of their laws, and disrupts cosy consensuses about what law is 'for', by reminding us that the past circumstances out of which it arose were as conflicted and conflict-laden as the present.

It is elementary that history is the study of both continuity and change. Since interpretivists tend to emphasise continuity, it will often fall to the legal historians to remind them about change. It is therefore easy to see how a historical account, searching for the attitudes which led to particular legal developments, can clash with an interpretivist account, which attempts to see coherent values (our values, not last century's values) in those materials. It is also clear that this conflict will be all the worse if the interpretivists are not sensitive to these concerns.

This seems to be behind the recent (extraordinarily fierce) interpretivist attack on Stephen Waddams's *Dimensions of Private Law.*[19] To Rickett

[19] S Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge, Cambridge University Press, 2003). See also the same S Waddams, 'Classification of Private Law in Relation to Historical Evidence' (2003) 6 *Current Legal Issues* 265.

and Beever, *Dimensions* is 'a sustained critique' of interpretivist theory, making a number of claims against it, most of which misunderstand their target. All of them fail:

> In the end, *Dimensions of Private Law* fails to achieve its task because it refuses to understand interpretive legal theory in its own light.[20]

So *Dimensions* is thought valuable for giving the interpretive theorists the opportunity to restate their theory, but in other respects is pernicious.

All of this must come as something of a surprise to those who have actually read the book. If *Dimensions* is an attack of any sort on interpretive theory, this has escaped others who have reviewed it.[21] It also seems to have escaped its author, who does not mention interpretive theory, under that name or otherwise. On the evidence of the book alone, it appears that Waddams has either never heard of interpretive theory or did not regard it as worthy of special mention when he wrote *Dimensions*. His concern is to decry the misuse of legal history to support doctrinal theories (*any* doctrinal theories). In fact, Waddams is noticeably reluctant to criticise particular theories as such. Some of us might have been very pleased if, for example, he had attacked Birks's general claims as to a broad taxonomy said to underlie the law. Consistently with the theme he set himself, he did no such thing, confining himself to criticism of Birks's historical claims.[22] He now finds himself criticised for views he was very careful not to affirm, and finds his actual views distorted or ignored.

Smith is more measured here than Beever and Rickett, complaining only of Waddams's treatment of Birks's views rather than any supposed assault on interpretivist theory. It may be questioned, however, whether the result is fair either to Waddams or to Birks. Birks was engaged in a strictly descriptive exercise, or so he said. He assumed that no theory was needed to see plain facts, and he thought he was describing plain facts; the clarity of his written style was the greater as a result. When he spoke of maps or of analogies with the natural world, it does not appear that any abstruse theoretical reference was intended;[23] and a subsequent Festschrift for Birks was happily entitled *Mapping the Law*, again without (apparently) committing its diverse contributors to any particular theoretical position.[24] Smith's judgment of Birks is, implicitly, a deeply negative one: that the

20 Beever and Rickett, above n 1, 335.

21 See reviews by D Capper (2003) 54 *Northern Ireland Legal Quarterly* 450; G McMeel (2004) 24 *Legal Studies* 647; G Samuel 'Can the Common Law be Mapped?' (2005) 55 *University of Toronto Law Journal* 271. In this and other respects, it is very hard to recognise *Dimensions* in the comments made against it by the interpretivists; and many views ascribed to Waddams are either inaccurately footnoted or not footnoted at all.

22 Eg Waddams, *Dimensions*, above n 19, 110.

23 For Birks on maps see especially *Unjust Enrichment* (2nd edn, Oxford, Clarendon Press, 2005), ch 2.

24 A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law—Essays in Memory of Peter Birks* (Oxford, Oxford University Press, 2006).

actual reasons Birks gave were not enough, and that those of his critics who protested against his jurisprudential assumptions were right. Smith is suggesting that Birks's work, as it stands, is hard to defend without abstruse jurisprudential argumentation, which Birks himself did not make and which would have been unlikely to have achieved assent from the general legal community. The result is not Birks but an intrepretivised Birks, a 'best explanation' of those writings of Birks which Smith thinks are worth preserving. The rest, which presumably includes most of the clearer pieces, now need calling back for burning.

is this a word?

At the root of the controversy is not, I suggest, any real difference of method. There is nothing implicit in interpretive method that would deny that values change, or that the purposes embodied in law change. An interpretivist can argue for a particular view of what the law is today without necessarily claiming that this was always the law. Nonetheless, because interpretivists tend to cut themselves off from other disciplines, they may frequently be unaware of other changes. They may attempt to read precedents from the last century (or even the century before that) without much awareness that they are historical documents, and to read their own modern views into these documents. They may even be so misled as to claim to identify 'timeless' values or 'fundamental and enduring structures' of law, all the while showing no knowledge of any century but the present. To some minds, a claim to be describing eternal verities is a very exalted and worthy thing to be doing; but those with any real knowledge of other historical periods know how problematic such claims are, and so tend to avoid making them.

IV METHODOLOGICAL INTERPRETIVISM: AN ASSESSMENT

As I noted earlier, there is an essential ambiguity of approach amongst interpretivists: is the method being proposed as simply one possible tool for those engaged in the study of the law or is it seen as essential? In this section, I evaluate the method on the first assumption, and in the following section I evaluate it on the second.

Intrepretivism is a very particular type of legal enquiry. It approaches its subject matter not with a methodologically open mind but with very definite views of what it will find and how it will find it. It looks for order in legal materials, in their own terms: it tries to make sense of them in their own terms. We would therefore expect it to be better at some tasks than others. If there is an order to be found in the legal materials at the very high level of abstraction at which it works, we would expect interpretivism to find it. But equally, we would expect it to be poor at recognising or acknowledging disorder: it tends to treat disorder as a mere appearance, as showing merely that we have not reached the end of the enquiry yet. It is

also not very good at recognising when the important decisions have been delegated down to judges beyond the theorists' purview (a not uncommon situation). To return to Beever and Rickett's example of negligent misstatement,[25] it is apparent that perfectly good arguments can be put for both the 'reliance' explanation and the 'consent' explanation. A theorist who insists that one solution is correct to the exclusion of the other has not understood what is going on: a full understanding has to include the realisation that either view can be held by competent legal theorists. If one of the two is to be ruled out, it can only be by official fiat, whether judicial or statutory. On that sort of issue, interpretivism hinders more than it helps.[26]

Interpretivism is therefore better at some things than others, and if it is to become an accepted part of legal theory its proponents need a better understanding of what it is good at and what it is not. Various points are in order here, with the general theme that intrepretivists should do what they are good at and leave other types of theorist to do likewise.

1. *Intrepretivists prize order and system above all; it is unreasonable to expect everyone to share this preoccupation.* The demands on modern legal systems are many and various. In fact, the demand that judges show consistency is very high up the list of concerns; as interpretivists rightly say, a certain amount of respect for this is a necessary part of the rule of law. And of course it is always valuable when a departure from an earlier approach is pointed out, so that its value can be assessed. But there is a risk that a thorough-going interpretivism will simply degenerate into criticism of any judicial innovation at all. A case in point is Beever and Rickett's attack on *White v Jones*, which is condemned as 'incoherent'; if the case is to be regarded as properly reasoned, 'then law as a discipline must be regarded, in our view, as intellectually bankrupt'.[27] Yet the very concerns Beever and Rickett raise were put to the court which decided it[28]; the Law Lords did not ignore them.[29] What the case shows clearly is that the arguments which the interpretivists take to be the essential ones often turn out to be not so important in actual cases. The interpretivists have mistaken part of the range of possible legal arguments for the whole. It is good that the interpretivists are watching for where we have gone and can identify an innovation when they see one, but not all innovations are wrong. If the past deserves its shout in legal dialogue, so does the present—and the future. We

25 Above, text at n 3.
26 For fuller discussion of the point see J Dietrich, 'What is "Lawyering"? The Challenge of Taxonomy' (2006) 65 *CLJ* 549, 556–60.
27 Beever and Rickett, above n 1, 333.
28 [1995] 2 AC 207, 242 (argument of JA Jolowicz QC) (HL).
29 See especially [1995] 2 AC 207, 293 (Lord Nolan).

must look out for the interests of posterity even though posterity has, so far, done nothing for us.

2. *Empirical work is vital for understanding what the legal system does. If interpretivists are determined to ignore it, it is all the more vital that others do not.* The stress that interpretivists place on 'law's self-understanding', on what lawyers and judges in the higher courts *think* they are doing, creates a very real danger if not balanced by empirical work on the actual effects of the legal system. And when interpretivists stress the logical comprehensiveness of the solutions they advocate, they need to be reminded that astrologists and phrenologists could say the same.[30] The search for coherence is one tool, but it cannot be the only one; some connection with empirical reality is essential. Whether a sharp division of labour is really advisable—some researchers assume that logical consistency is all, others question it—may be doubted, but there can be no real dispute that intellectual upbringing and temperament cause real divisions. Many in the legal academy simply will not do empirical work whatever the incentives. It is another question, however, whether they can argue as if that work has not been done, or as if were improper to refer to it.

This division of intellectual labour here has actually resulted in a rather curious situation, though its full dimensions are not always appreciated. There are really only two significant parts of the legal system today which come close to the ideal the interpretivists seek, namely the general law of contract and the theory of unjust enrichment.[31] In both instances there is relatively little relevant empirical work. Why is that? It is certainly not because it is impossible to frame or answer empirical questions about their subject matter. Rather, it is because the doctrinal theories are stated at such abstract levels that their relevance to the real world is impossible to demonstrate. Indeed, the one empirical study of contract law which most theorists have heard of says pretty much that: that the matters which contract law regards as important are not so regarded by the people to whom the law applies.[32] None of this proves the interpretivists wrong, or even comes close to doing so. What it does do, however, is questions their claim to be describing anything of importance. If actual contracting parties do not care about contract law, why should anyone else? Should the focus of the subject not shift back to the law of individual types of contracts (sale of goods, employment, etc)? What, indeed, is the point of a 'law of contract' (as opposed to a law of contracts)? Interpretive work which

30 Compare P Schlag, 'Law and Phrenology' (1997) 110 *Harvard Law Review* 877.

31 The omission of tort from this list is deliberate. For a review of conflicting approaches see *eg* S Deakin, 'The Evolution of Tort' (1999) 19 *Oxford Journal of Legal Studies* 537. See also C Robinette, 'Can There be a Unified Theory of Torts?' (2005) 43 *Brandeis Law Journal* 369.

32 S Macaulay, 'Non-contractual Relations in Business' (1963) 28 *American Sociological Review* 45.

simply assumes that 'contract' is the unit of study does not advance the matter any further. Empirical questions are not the only ones to be asked here, but they are a vital part of our understanding of the law, and if interpretivists mean to ignore them then others must take up the burden.

3. Evaluative work is vital for understanding what the legal system does. If interpretivists are determined to ignore it, it is all the more vital that others do not. This proposition, I would hope, will meet with less opposition. While it is understandable that interpretivists will for now concentrate on the difficulties of their method, broader questions of whether their results are actually desirable will no doubt re-surface in time. However, there is a real difficulty, because some evaluative elements are in fact implicit in the interpretivist scheme. Indeed, they expressly advocate that theorists should use their 'raw moral intuitions' as a guide to the correct view.[33] In response to Waddams's criticism that this is likely to prioritise matters of no importance either to the parties or to the public, Smith responds that '[t]here is no external perspective from which claims of importance can be made'[34]: public views are irrelevant, because the public either do not have the intrepretivists' map before them or do not understand it. Such disregard for the public's view, however, seems undemocratic; the undoubted fact that few members of the public understand the more abstruse legal theories seems insufficient excuse for neglecting their public concerns. And if Smith has ever been puzzled by the common criticism that lawyers are remote from common sense, let him ponder his own words.

As will be apparent, the claim that interpretivism can tell us anything about the importance of particular legal concepts clearly shows that the exercise is at least in part evaluative—indeed, this is not denied. And it is also clear the theory does not prevent the theorists from feeding their own ideas of what a legal system should look like into their analysis. The question is how they can keep out other views in the way they seem to want to. If their map or scheme of the law determines significant features of the law, then in a democracy we would expect public values to have an influence. Public ignorance of the law's inner working cannot be the whole point. Few people can, say, repair a damaged tank or plan a military campaign, but it does not follow that their views on whether a particular war should be fought should be ignored. So equally it is with law. The theorists' judgements of which aspects of the legal system are important are heavily influenced by their own views on logical consistency within the law: if they cannot keep these ideas in perspective, then others in the legal academy must help them to do so.

[33] Beever and Rickett, above n 1, 324.
[34] S Smith, 'A Map', above n 1, 380.

4. *Even at the conceptual level, law does not in practice work in the way that the interpretivists argue for. Its relevance needs more careful argument.* In fact, interpretivists have not claimed that the legal system is staffed by conceptual thinkers continually seeking the 'best explanation' of the legal materials they have before them. While their theory captures some aspects of work in the very highest courts (though even there it ignores other aspects), it is acknowledged that the bulk of the work of the legal system is not carried on in this spirit at all. Rather, it is said that this more routine work consists of the application of rules and standards laid down by higher authorities: this application is not a simple process, but it is not a sham either. The fact that the principles which the interpretivists promote can be interpreted in many different ways does not make them meaningless. The interpretivist view of the legal system is accurate even though few of those involved in its day-to-day work can be said to believe it.[35]

The difficulty with this is that it is an apparently factual claim about how the lower courts work, yet it is very hard to see what sort of facts could prove it or disprove it. How, precisely, does a researcher distinguish between a judge who is 'merely' applying interpretivistically determined law and one who has taken into account other values? Judges are always saying things which one would not have expected from an interpretive point of view. How do we determine which of those things are permitted by interpretive theory and which are not? At the moment, we are given no clue. Smith suggests that the interpretivists' maps of the law are as yet incomplete, and more detail is needed to resolve such issues.[36] Beever and Rickett say that detailed application of the law is a matter of 'judgment', which they feel unable to define further.[37] The obvious alternative argument, that detailed study of the lower courts' judgments would very likely reveal value judgements that are quite impossible to reconcile with the interpretivists' schemes, is not considered. As things stand, the interpretivists are on the horns of a dilemma. Either they leave their principles vague, in which case their theories will have no noticeable influence on particular cases; or they try to make them more specific, in which case they will be led to criticise significant numbers of decided cases as wrongly decided. This latter approach can only hope to be significant if they can add non-interpretivist criticism too.

It is clear, therefore, that interpretive theory may sometimes produce valuable insights. It is also clear that those insights must be scrutinised with some suspicion by others precisely because of interpretivism's lack of perspective. Since interpretivism treats the consistency and integrity of the

35 Beever and Rickett, above n 1, 332.

36 S Smith, 'A Map', above n 1, 379.

37 Though there is a footnote citing I Kant, *Critique of the Power of Judgement*, trans P Guyer and E Matthews (New York, Cambridge University Press, 2000): Beever and Rickett, above n 1, 332.

legal process as the main criterion, those who regard other values as equally, if not more, important may have to question the results. Smith does not question this; indeed, many of his observations on Waddams can be read as seeking the right balance here, teasing out which sorts of questions interpretivism is good for and which not. Long may this process continue.

V IMPERIALISTIC INTERPRETIVISM: ASSESSMENT

Very different is the approach of Beever and Rickett. Taking interpretivism to be a largely accurate statement of what actually happens both in the superior courts and in legal academic discussion, they insist that non-interpretivist legal arguments are actually non-legal. In consequence, they deny validity to certain common types of legal argument (particularly, most appeals to public policy or to the purpose of particular legal rules). And university researchers who decline to respect the limits Beever and Rickett now lay down are said to have forfeited any right to call themselves legal academics, as 'they will have abandoned the primary task of the academic lawyer, which is to treat the law as an academic discipline'.[38] For Beever and Rickett, the integrity of the discipline of law is at stake.

Yet the arguments employed seem rather broad-brush, and tend to oversimplify the choices on offer. It is surely not the case, for example, that we must choose between interpretivist judges and judges who simply act according to their own idiosyncratic tastes. The need to give public reasons always constrains judges, whether or not it constrains them in quite the way Beever and Rickett want, and it is hard to see how interpretivism prevents any judge from secretly acting on his or her private values. The argument also badly needs to distinguish between judges and academics: many of the reasons why judges are not well placed to be policy-makers simply do not apply to academics. Indeed, given the academics' access to large research libraries and to the many relevant experts amongst his or her colleagues, one could argue that legal academics are ideally placed to answer the sort of questions which Beever and Rickett say that they should not touch. Why, then, do Beever and Rickett suggest otherwise?

1. *Order versus chaos.* It is claimed that an interpretivist approach is more predictable, and therefore makes the law easier to apply.[39] But this is an empirical claim if anything, and no empirical evidence has been provided. It is not obvious that adoption of interpretivist modes of argument will result in a clearer statement of the law, or that such a clearer statement will result in quicker dispute resolution. Lack of predictability in

[38] Beever and Rickett, above n 1, 336.
[39] Beever, 'The Law's Function', above n 1, 310–11.

dispute resolution has many roots. Beever talks in horrified tones of the notion that the law might be applied by each judge in his or her own individual way[40]; yet any barrister can tell you of cases that were impossible to resolve when stated abstractly in the pleadings, but which were settled the instant the identity of the trial judge became known. If predictability is really a concern of the interpretivists, then their brusque dismissal of others modes of argument cannot be the whole story.

2. *Suspicion of instrumentalism.* Another argument for interpretivism is that judges and legal academics are ill-equipped to tackle matters of social policy. By training lawyers' attention on questions of the law's internal consistency, interpretivism turns them away from social questions which they have no expertise in.[41] How much merit there is in this must depend on the context. A mere inscrutable appeal to 'public policy' is, of course, hopeless as a justification for judicial action, but that may only mean that the relevant policy should be explained more clearly; and on matters of technical law, it seems strange to argue that judges are not well placed to discuss the purposes behind the law, which in many cases they may understand better than the parliamentarians who voted for them. The moral is not that the judges should avoid policy, but that they should avoid tasks which they cannot do properly but others can; it is hard to see that instrumentalist arguments will always, or even usually, fall into this category.

Where the interpretivist argument falls down is its reluctance to admit that the purposes of law are many and various. For example, Beever argues that interpretivism rules out the existence of exemplary damages in tort, as the purpose of such damages is plainly to punish the defendant, whereas an interpretivist analysis of tort clearly shows that tort is not about punishing defendants but about compensating claimants.[42] It is however difficult to accept that such a complex artefact as the law of tort has only one purpose or function. It is as if Beever notes that cars are generally designed to be as quiet as possible (and indeed are regarded as defective if noise-reduction components, such as the silencer, are broken), and therefore concludes that no car should have a hooter. Yet cars and the social purposes they serve are not so simple, and neither is tort. Given the wide variety of defendants against whom tort law may be invoked, it seems plain that some of them may require some special badge of opprobrium, even though most do not. The problem here may not be interpretivism but the attitude that so often seems to lie behind it: a pulling-away from the difficulties of the real world, a reluctance to allow

40 *Ibid*, 313.
41 *Ibid*, 308.
42 A Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *Oxford Journal of Legal Studies* 87.

law to deal with complex problems even where they plainly call for a solution and even where the law seems the best agency to effect it. Where this attitude means that we baulk at the idea that something as broad as the law of tort may have more than one function, it is time to call a halt.

In our over-lawyered world, it is on the whole quite healthy if even legal academics begin to question whether law can solve every problem. But more discrimination is needed. For many problems, law very often is the best solution available. And a refusal to discuss the purposes which may lead to the application of the law is not in itself a helpful contribution to the debate.

3. Lawyers' self-image. Beever and Rickett also suggest that interpretivism is needed to preserve law as an academic discipline. Without interpretivist rigour, we will lose sight of which arguments are distinctively 'legal'. If interpretivism is not part of the mainstream of legal thought,

> … then law will cease to hold any position as a discipline in its own right. It will become, at best, the handmaid of some other discipline or series of disciplines, and legal academics will be replaced by academic economists, political philosophers, and the like, who merely interpret case law and other legal material through the lenses of their own disciplines.[43]

It might be easier to take this (apparently rather alarmist) position more seriously if the interpretivists themselves avoided reference to other disciplines in making their argument. Their constant drawings on both philosophy and science make it hard to believe that they are serious about maintaining subject boundaries in the way they suggest. As it is, their view seems misleadingly essentialist. What does or does not count as a properly 'legal' argument has changed historically. Given that the law's scope and functions have grown so much over the last century, it is not too surprising if what counts as a legal argument has also expanded; and, as Fiona Cownie observes, the view that legal materials must be seen in their social context can be regarded as the dominant one amongst modern law teachers.[44] If Beever and Rickett wish to oppose this, they must do a lot more than simply point out that this expansion constitutes a change. It would be interesting, for example, to hear more of their contention that 'contract, say, is more central to the discipline of law than is, say, family law'.[45] (It would also be interesting to hear what family lawyers have to say on that question.) As it is, Beever and Rickett seem determined to shut the law away from the influence of other disciplines, believing that this will enhance its status and independence. There must be a suspicion that it will

[43] Beever and Rickett, above n 1, 337.

[44] F Cownie, *Legal Academics—Culture and Identities* (Oxford, Hart Publishing, 2004) esp 54–8 and 197–9. Compare R Collier, '"We're All Socio-legal Now?": Legal Education, Scholarship and the "Global Knowledge Economy"' (2004) 26 *Sydney Law Review* 503.

[45] Beever and Rickett, above n 1, 336 note 64.

have precisely the opposite effect. By neglecting matters of social policy as practised today, its irrelevance to modern concerns seems assured. Barring the Law Faculty door to all but accredited interpretivists does not sound likely a policy which will win friends and/or influence people.

4. *Constitutional objections*. Finally, it is said that embracing interpretivism will keep the judiciary within its proper constitutional bounds, rather than using a supposedly illegitimate, legislative model of decision-making.[46]

Again, the dangers of an overly broad argument are plain enough. Judges are not (as a rule) elected. This fact imposes sharp limits on what constitutes acceptable behaviour from them. Any judge who does not appreciate this is unlikely to enjoy a long tenure. It is surprising to hear, however, that these facts are not already very well appreciated, or that a major change in legal philosophy is required to drive them home, or that democracy is threatened by anything other than a rigid adherence to interpretivism. It must also be said that, coming after the abstruse theorising that preceded it, the argument sounds rather frivolous. 'The constitution's in danger!' is never an argument to be made lightly; it must be made fully and seriously, or not at all.

Complaints that the courts have been exceeding their proper function, either in general or specifically in relation to private law, have been made in a number of quarters, and are highly context-specific. The charge that the judges are interfering in matters properly left to the legislature can only be made on the basis of some understanding of what the legislature has done and could do in the area: if it is said that judges should not get involved with 'policy', the answer is that they need to know more about policy, not least so that they do not ignorantly blunder into areas they should stay out of. The proper bounds of constitutional adjudication cannot be known by pure intuition or 'reflection': and the cure for ignorance is more knowledge, not less. To the extent that interpretivism attempts to dissuade lawyers from acquiring that knowledge, it is misguided.

VI THE BIG PICTURE

Mark Twain once eloquently explained why land is such a valuable commodity: 'they're not making it anymore'. Those who study the central areas of obligations have noticed a similar phenomenon, for no one is making much common law these days either. The great days of common law creativity are gone. Yet, strangely enough, this does not lead to its

[46] Beever, 'The Law's Function', above n 1, 313.

being valued. In the legislature, the regular torrents of legislation either marginalise it or nibble away at it: if the island of the common law is not actually shrinking very much, certainly the statutory waters around it are becoming ever vaster and deeper. In the courts, judgments in obligations cases become ever more lengthy and technical, and inevitably advert to more and more factors which did not exist a century ago. And in the academy, both public law and the more specialised areas of private law gnaw at the supposed importance of central private law theory. Private law is increasingly dismissed as dull, antiquated and rule-bound, when contrasted with the shiny and sophisticated public law.[47] Increasingly, it seems that contract and tort retain their place at the core of law degrees simply because they got there first; the argument that they are actually any more important or basic to law than other legal subdisciplines is harder and harder to make.

Faced with such a threat, the interpretivists have chosen to look inward, returning to traditional ideas both as to theories of liability and as to legal methodology, and spurning modern developments, whether legal or political. They think, and sometimes even say, that they are on the verge of capturing some timeless entity that lies behind private law reasoning; some secret source of order behind the apparent chaos of the modern law. The claim to esoteric knowledge, which lies beyond ordinary comprehension yet breathes order into the universe, is often a powerful one emotionally; but for precisely that reason, it needs to be examined very closely indeed before its bona fides can be accepted.

Distaste for disorder is understandable enough, but that is not sufficient reason to accept extraordinary claims made on weak evidence. The claim that any one theory behind obligations is *the* right one truly is extraordinary, for argument in the area is unceasing. And where argument has temporarily or locally ceased, it is rarely because the 'right' answer has apparently been discovered by rational process. A far more common reason is that it has been imposed despite it: by a particularly important case or statute, or a particularly charismatic law teacher. Arguments about the 'true basis' or 'structure' of particular areas of case law rarely achieve unanimity, and are often little more than disputes over whether particular glasses are half full or half empty. The idea that the future of obligations should consist mainly of disputes of that sort strikes this writer as deeply depressing.

[47] See especially M Loughlin, *The Idea of Public Law* (Oxford, Oxford University Press, 2003).