THE GHOSTS OF CEMETERY ROAD: TWO FORGOTTEN INDIGENOUS WOMEN AND THE CRISIS OF ANALYTICAL JURISPRUDENCE

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Abstract. Taking an example of two indigenous women from my early 19th century family, this article examines why they were forgotten after their deaths. The article connects this forgotten phenomenon with the preoccupation of analytical jurisprudence and legal analysis with concepts. When the tradition of Analytical Jurisprudence has identified a law as if emptied of social relationships, experiential knowledge cannot be accessed. Experiential knowledge draws from experiential body's expectations as well as personal and collective memories. Rights, property jurisdiction, doctrines, rules and other legal standards risk being analyzed as emptied of such experiential knowledge. The indigenous women were forgotten because they were signified as empty concepts, better known as abstract, rather than concrete, persons.

When I was five years of age, I began weekly piano lessons at my teacher's home on a dark and lonely street in my village. My piano lessons were on Mondays from 4:30 until 5:30. Shortly thereafter, I also began violin lessons in another teacher's home around the corner from my piano teacher. My violin lessons were on Thursdays from 4:30 until 5:15. Now, I shared a common experience with the two sets of lessons other than my experience of listening to the beautiful music of my violin teacher and my piano teacher's idiosyncratic gestures and habits. The common experience was my having to return home in the pitch dark during much of the school year along a dirt road called Cemetery Road, ridden with pot holes and all. What was worse, Cemetery Road, which ran South to North, separated two cemeteries, an old one to the East and a new one to the West. The old cemetery, with foreboding weather-worn tombstones, was raised six feet above the Road. This old cemetery filled me with the dread of ghosts. I developed two methods to cope with the ghosts. The one was to run full speed, violin over my shoulder, from the one end to the other of Cemetery Road. This did not take long as the road was only about 100 meters long. I realized that the risk here was that I would trip over a pot hole in the dark and, low and behold, that squishy remains of the bodies would flow over the edge onto the Road while I lay on the ground or icy snow. The other way to cope was for me to close my eyes tight and to walk quickly so that I would not see the ghosts. Neither way seemed satisfactory as a coping mechanism. The bodies had long ago disintegrated into dust, as my mother had once explained to me about deceased bodies generally. And the ghosts were invisible after all.

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Now, the haunting of the ghosts reached their highest force when, one beautiful spring afternoon after school, now six or seven years of age, my mother announced that she was going to take me for a walk. This was the first occasion when my mother had ever taken me for a walk by ourselves and so, I asked her where we were going. She responded 'we are going to go to the old cemetery.' I left the kitchen, immersed in fear. When she followed me, I gestured and responded with a flood of questions, hoping to deter us from the ordeal. I asked her why on earth we had to go to the old cemetery. She replied that she wanted to show me something. She would not listen to my protestations. Of course, being raised in the culture, shared with my fellow male friends on my playground, it would have been un-boylike for me to admit to my mother that I feared ghosts. And so, on we went together, hand in hand, to Cemetery Road. During the trip, which seemed so long and yet, I must admit, could not have been more than five minutes from my home, my mother suddenly made me promise never to tell my father as to what we were going to see. 'Never!' she emphasized. This surprised me because I always told my Dad everything. In any case, how could I make such a promise without knowing the content of what I was promising? Of course, at this late date in our trip, I did not wish to disappoint my mother with a refusal to continue the great project.

Nearing the cemetery, my mother proceeded to explain that I had once had an ancestor named Jacob Conklin and another named Captain Young. This announcement too seemed abnormal since I found it hard to believe that I would have had an ancestor without my last name and I found it harder still to picture that I had an ancestor on the side of my paternal grandmother. In any case, soon we arrived at the old cemetery. And, once there, she pointed to a very tall pyramidal tombstone structure with the name 'Conklin' at its pinnacle. The giant stone had a series of names listed, with dates of birth and death, on each of the four sides of the structure. There was Jacob's name, his death being marked as 1860. Then, my mother showed me that, unlike many of the other ancestors of my name, there was an empty space beside his name. All the other names of the Conklin men had the names of the wives beside them, my mother pointed out. I thereupon ran around the old cemetery to check that this was so. Indeed, after checking all the tombstones, I agreed that this was so. I felt confused and mystified.

We then ventured across the dirt road to the new cemetery. I say 'new' although there were tombstones from the early 19th century since Captain Young died in 1833, his gravesite being in the new cemetery. There, she showed me Captain Young's tombstone. It was an enormous slab of gray stone, about 6 feet long, lying on a horizontal structure a few centimetres above the ground. It had Captain Young's name and title with the date of his birth and death. Next to his tombstone, there was a second slab of stone, exactly the length and colour of stone as Captain Young's. But this stone had nothing on it. No name. No date of birth or death. Just a slab of very heavy stone lying on a similar structure above the ground.

'Do you know why this second slab of stone lacks any name or dates,' my mother asked me? You see, she seemed to believe that I would be able to penetrate the heavy matters of the world rather than penetrate the skills of my first love, hockey. I pondered and squirmed. My mother then explained that Captain Young had driven a passenger boat many decades earlier from the mainland to Pelee Island, an island in the middle of Lake Erie, presently half-way between the territory owned by the United States and Canada. Captain Young, my mother

continued, had fallen in love with a lady who had lived on the island. My mother proceeded to authenticate all this from a story re-told to her from my paternal grand-mother. Well, to continue the story, the two of them came to live in my town, then a small village, and when Captain Young's wife died after Captain Young, the family did not inscribe her name on the tombstone. 'Why not?', I asked. My mother then recounted that 'the family' had been afraid that they would be shunned by the villagers — there were about 200–300 villagers at that time, I suppose — if her name and the dates of her life had been engraved on the stone. This would have been intolerable for family members, she explained. 'Why would they have been shunned?' I asked my mother. 'Well,' she responded, 'Captain Young's wife was an Indian.' At this point she turned our dialogue to the first tombstone which we had seen in the old cemetery. Jacob had had a vacant space beside his name too, she suggested, because his wife had also been an 'Indian'. I felt deeply saddened. I didn't know why.

I suppose my ancestors had been right — that is, they would have been shunned in the village if the names of my two ancestors had been engraved on the tombstones.[1] And I suppose the reader at this point might go on to the next article in this Journal and conclude that my mainland ancestors were just plain old racists and sexists. Antony Anghie has documented how deeply ingrained were the negative attitudes of the legal experts about indigenous peoples during the 19th century.[2] Indeed, the reader might even consider that I myself am a racist and sexist by virtue of my blood relation with the owners of the grave-sites of centuries past. The problem with such categorizations by the villagers and the reader her/himself is that the issues of racism and sexism are misdirected to the extent that race and sexuality are understood in terms of blood-relations. After all, an association of race with blood-relations would return me to a view of race as biological rather than as a significatory trace to a culturally constructed object.[3] As a cultural construction, the rich readings of Patricia Williams might well lead me to join the shunning of my ancestors of an earlier day to her metaphors of the legal 'sausage factory' and the like.[4] My concern, though, would be to ask 'why is legal education a sausage machine?' The absence of names and dates signifying two of my ancestors on their tomb-stones offers insight into the 'why?' question. In this regard, I wish to claim that there is something about the way we understand others which offers a culturally induced explanatory power to race and gender in the context-specific circumstance of my ancestors' grave-sites. The crisis of modern legal analysis and of analytical jurisprudence more generally is nested in this explanatory power. This is the point why I began my story about the ghosts of Cemetery Road.

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1 The irony in such a case would have been that, according to a register of slaves in Dublin, their own (and my own) ancestor — my namesake — had been expelled in 1736 from Ireland to New York.

2 Anthony Anghie *Imperialism, Sovereignty and the Making of International Law* Cambridge University Press Cambridge 2004

3 See Benjamin Isaac *The Invention of Racism in Classical Antiquity* University of Princeton Press Princeton 2004 pp 17–44.

4 Patricia J. Williams *The Alchemy of Race and Rights: diary of a law professor* Harvard University Press Cambridge 1991 pp 107–10, 115.

1.0 A LAW AS A CONCEPT

Something is taken for granted when we expert knowers — and here I include legal scholars, law teachers, judges, lawyers, law students, feminist and race theorists, law deans and even university administrators — identify a law.[5] Much of professional legal education and of submissions to courts and quasi-judicial tribunals identifies a law in terms of a rule, principle, doctrine, policy, value or other standard. Each such standard — and this is crucial to my argument — is a concept. Even values are recognized as legal concepts.[6] The rule of law is usually associated with the transcendence over human behaviour and thought by a network of concepts. And, as H.L.A. Hart and his disciples have claimed, assumed, rigorously analysed and defended, the theories about law privilege concepts.[7] We take for granted that one's analysis of 'the law' begins with such concept. We first identify the relevant concept and then apply the identified concept to 'the facts'.

A concept, the unit of the rule of law and of legal analysis, is intellectually constructed. Our identity of a concept passes through several hurdles.[8] First, we identify a concept by decomposing it into its features. Second, we seek out the common features as a criterion. The criterion transcends the concept and then becomes the core to a revised concept. Third, we ensure that the sign which represents the concept can be traced to an institutional source of the state. The source is of two forms. The one is a higher-ordered judicial, administrative or legislative body in the institutional structure of the state. The other is the situs of the concept in a higher-ordered hierarchy of a structure of precedential concepts. The objective in all this is to bring us closer to what we assume to be legal actuality.

Now, let us look closer at the concept as the unit of legal analysis. Each concept has a boundary much like a fence might encircle one's private property. The boundary, though, is territorial-like because it is constructed in our collective legal consciousness rather than being posited by nature. The boundary of a concept encircles a legal space. The space does not mark a spot on a map as we ordinarily think about space. The space exists in a metaphysical world, in a heaven of concepts. The boundary which defines a rule, right, property, jurisdiction or even a state protects the space inside the boundary. Once the boundary of the legal space is identified,

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5 As I argued in William E. Conklin *The Phenomenology of Modern Legal Discourse: the juridical production of suffering* Dartmouth Aldershot 1998, the expert knowers are knowers of the chains of signifier/signified relations, especially the relations to signifieds as concepts rather than as natural beings. Such signifying relations are important elements of a language although a language also includes acts of meaning, a term I discuss in a moment. I include law deans because law deans have been considered the leaders of the curriculum, the hiring and promotion of law faculty members and the allocation of budgetary priorities. I include senior university administrators because, aside from many invariably being lawyers and former law faculty members, they allocate or fail to allocate scarce resources to the hiring of law faculty with serious implications for class size and for the very possibility of approaching law other than the quest for the identity of concepts. I include law students because, by virtue of their demands for what is taught as consumers and of their reasons for grade appeals, they have had a critical role in many law schools in the chilling effect upon an instructor's effort to break from the boundaries of analytical thinking.

6 See e.g., Greenberg 'How Facts Make Law' (2004) 10 *Legal Theory* 157–98. Also see Joseph Raz 'The Nature of Law' in Raz *Ethics in the Public Domain* Clarendon Press Oxford 1995 p 195–209, at 203–08; David Dyzenhaus, 'Why Positivism is Authoritarian' (1996) 82 *American Journal of Jurisprudence* p 83–112, at 87.

7 H.L.A. Hart, 2nd ed. *Concept of Law* Clarendon Oxford 1994 [1961]. For his disciples see below note 13, 26 & 48.

8 Hart *Concept* above 15–17.

the concept can be applied to the social relationships of an individual being. The being falls either inside or outside the boundary: there is no in-between. Just like 'the wife of Jacob' and 'the wife of Captain Young', one may be excluded from consideration and respect if we expert knowers only focus on the boundary's locus as constitutive of legal knowledge. So, for example, a natural person may be recognized as a national by the state institutions. If one is not so categorized by some state, one is state-less. And the effect and even existence of rights of such a state-less person are moot.

There is another aspect to the boundary of a concept. The expert knower takes the identity of the concept as dependent upon the boundary of the concept/rule. This is so with jurisdiction and property as it is with a right or a rule. The boundaries of concepts may reinforce or contradict one another. The point that is important in this regard is that the object of legal analysis is the boundary of a concept. The actual social relationships presupposed in the content of the concept are 'off-limits' from legal analysis by expert knowers of the concept's identity. Such a content of the concept involves a context-specific experiential knowledge which an individual accepts.[9] Such an experiential knowledge differs radically from the decomposition of concepts so familiar with the world of the expert knowers.

The clue to understanding the difference between a focus upon the boundary of a concept and a focus upon experiential knowledge is exemplified in Selya Benhabib's distinction between an 'abstract' and 'concrete' person.[10] An abstract person is a general category. The category's boundary defines the abstract person. And so, 'everyone' can be considered a person equal before the law, as required by Article 16 of the *International Covenant of Civil and Political Rights*, because 'everyone' is an abstract person. A concrete person, Benhabib argues, exists in context-specific circumstances. A concrete person has a biography, an experiential body, a social history, a personal and collective memory, and context-specific experiences. Perhaps a concrete person is better understood as a being with addressive experiences.[11]

2.0 OUTSIDE AND INSIDE THE BOUNDARY OF A CONCEPT

We all are concrete persons in that we experience and construct objects in singularized acts. What the silent voices of my ancestors' gravestones represent, though, is that my ancestors were

[9] This notion of experiential knowledge is developed with examples from Anglo-American constitutional, commercial and banking legal doctrines in William E. Conklin, « Le savoir oublié de l'expérience des lois» (trans. Basil Kingstone; Laval University Press Quebec 2011. Also see Conklin, *Hegel's Laws* Stanford University Press Stanford 2008; 'A Phenomenological Theory of the Human Rights of the Alien (2006) 13 *Ethical Perspectives* 245–301. Also see Bernhard Waldenfels *Topographie des Fremden*. 4 vols. *Studien zur Phänomenologie des Fremden*. 2nd ed Suhrkamp Verlag Frankfurt am Main 1997 Vol. 1.

[10] Selya Benhabib 'The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory' *Praxis International* (1986), 38–60. Reprinted as 'Controversy and Feminist Theory' in Seyla Benhabib and Drucilla Cornell (eds) *Feminism as Critique: on the Politics of Gender* University of Minnesota Press Minneapolis 1987 p 77–95. A section is added in Benhabib *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* Routledge, New York 1992 pp 148–77.

[11] This concept of an addressive experience is elaborated in Conklin *Phenomenology* above note 5 esp. p 2, 130–31.

abstracted from their concrete experiences. They were categorized out of existence by being left without a name or dates when they had lived.

In a sense it may seem odd that a dead being can be categorized out of existence. After all, with death, one's physical existence dies. There is a different sense of death though. This is a living death. Sabine Grebe has explained how exile, for example, was a living death for Ovid.[12] The silence on my ancestors' tombstones represented the possibility that they had lived a living death in the mainland village to the extent that their biographies, memories and expectations were not recognized by others through their languages of my ancestors. They may have been recognized but it was as abstract persons, as Indians, as women from the island, as Aboriginals or some other legal category which we expert knowers claim to know today. What I am trying to emphasize in these brief pages is that what underlies the absence of names and dates on their gravesites is their being categorized as abstract persons. And this very categorization of my ancestors also manifests the crucial thing that characterizes the analytic method of knowing concepts and the legal theories about such a method.

When we expert knowers claim to know a legal person, the boundary of a known concept differentiates those inside and those outside the concept. The boundary defines the scope of the concept. An abstract person is universal, for example, because the content of the abstract personhood is empty. 'Everyone' is a 'person, guaranteed human rights in constitutional bills of rights and treaties because 'everyone' is an abstract or emptied person. The person is purged of all socially contingent biography, memories and expectations. In like vein, we categorize another by virtue of her/his race or gender by considering her/him as emptied of such biography, memories and expectations. It is this very role of a boundary to a concept which also characterizes our analysis of a legal concept. The point I wish to emphasize is that what happens to concrete persons inside or outside the legal space is immaterial to the question 'what is the identity of a law?' — at least so long as we assume that a law is a concept. The boundary of a concept, which we expert knowers claim to know and which knowledge warrants reputations and positions accordingly, intellectually transcends the context-specific contingent biography, memories and expectations of the concrete being.

In particular, we tend to exclude, as expert knowers, the inside and outside of the boundary of a right, property, rule, or jurisdiction as political or an 'ought' in contrast with a law. After all, we are preoccupied with identifying the right, rule, property or jurisdiction in terms of a boundary which defines the legal space. Our role, we have been led to believe, is to trace the bounded space to some institutional state-centric source. We take for granted such an institutional structure both as institutions, such as legislatures, administrative tribunals and courts, and as a hierarchy of concepts posited by such institutional sources. The crucial challenge in this search for the source of a concept, once the concept is traced to an institutional source, is to identify the rule/concept. Joseph Raz described this challenge as 'the sources thesis.'[13] Despite

12 Sabine Grebe 'Why did Ovid Associate His Exile with a Living Death?' (2010) 103 *Classical World p* 491–509.

13 See Joseph Raz, 'Authority, Law and Morality' in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* Clarendon Oxford 1994 p 210–37, at 215–20, 230–35; *Between Authority and Interpretation* Oxford University Press Oxford: 2009 p 380–90.

Ronald Dworkin's adversarial confrontation with Raz and others,[14] he too has taken the concept as the basic unit of legal analysis although, instead of tracing a concept to an institutional source for its authority, Dworkin has claimed that the identity of a rule/concept is shaped by its relations to other concepts and these, in turn, to a coherent structure of justificatory concepts.[15] The clarification, elucidation and differentiation of concepts have been the concerns of legal analysis in the classroom and appellate courts. A great deal of thought and insight has endeavoured to enlighten expert knowers as to what is the identity of a rule/concept. And the identity of a concept hangs upon the boundary of the concept.

There is something particular about the nameless gravestone, though, which is shared after death as well as during life. This is the sense of knowledge which one has of another. A name represents or signifies one's concrete being, a being with a biography, her/his own expectations and personal and collective memories. The reciprocal recognition of each other's concrete being constitutes what Hegel considered the basis of ethicality in laws.[16] After death, a namelessness on a tombstone represents the absence of such a concrete being. Without a name, as a consequence, it would have been difficult to think or know my two forgotten ancestors as concrete beings. And this would be so because, emptied of all context-specific particulars, they would have been legally unknowable. Each ancestor would have become an empty categorization without all the particulars by which surviving beings could remember her. And without such particulars — and, as I indicated above, I can only speculate in abstractions as to their context-specific experiences in our village, let alone in their traditional societies — it would have been difficult for each of them to have had a spirit which could live through the personal and collective memories of other living beings. Without such memories, quashed as possibilities by the abstractness of them as mere empty concepts, they would lack an after-life. Not an after-life as Albert Camus describes through M. Meursault as an inaccessible abstraction but as signified by the addressive experiences of my ancestors as concrete persons.[17] Just like the texts about the after-life as a heaven of empty concepts, so too the nameless grave-stones represented and left empty abstract persons for living beings to know. Only, in the cases of my two forgotten ancestors, it was not some intellectually transcendent and empty concept, such as the after-life, which the namelessness may have represented. This namelessness left it for living beings to define or even forget who each of my two ancestors were and thereby to exclude them as members of the village community. The namelessness thereby excluded my two ancestors as outside the boundary posited by the villagers. This very exclusionary character of knowledge, I suggest, also characterizes the method and presupposition of analytical jurisprudence. Their unsignifiable abstract personhood would have left them suffering when alive.[18] They would not have been subjects who could be known.[19]

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14 See Ronald Dworkin 'Thirty Years On' in *Justice in Robes* Harvard University Press Cambridge Mass. 2006 pp187–222.

15 Although Ronald Dworkin during recent years has allotted a place of beliefs in his theory of law, these beliefs quickly dissolve into arguments in support of justificatory concepts. See e.g. Dworkin *Justice in Robes* above pp 15, 76, 79, 223, 227. Even dying, for Dworkin, is understood as a concept: that is as a right. See Dworkin *Life's Dominion: an argument about abortion, euthanasia, and individual freedom* New York Vintage 1994 pp179–96.

16 See Conklin, *Hegel's Laws* above note 9, pp 162–87.

17 Albert Camus *The Outsider* (Joseph Laredo trans) Penguin London 1982 pp 114–116.

18 Julia Kristeva *Powers of Horror: an essay on Abjection* Columbia University Press New York 1982 p 154–55, 180; Kristeva 'Revolution in Poetic Language' in Kristeva (Toril Moi trans) *The Kristeva Reader* Basil Blackwell Oxford 1986 pp 89–136 at

3.0 THE EXCLUDED EXPERIENTIAL KNOWLEDGE

By not recognizing the names and dates of the birth and death of the women buried beside Jacob and Captain Young, my village ancestors had failed to consider the women as concrete persons with singular context-specific meanings. At best, after their deaths at least, they had to be known as the category, 'Jacob's wife' and 'Captain Young's wife'. Their experienced context-specific acts of meanings would have been forgotten.

By 'a meaning', I do not intend a signification: that is, a signification or representation of a signified object such as a conceptual or a natural object. Rather, a meaning draws from the assumptions and expectations of a concrete being. A meaning embodies texts, utterances, perceived objects and the face of another. This embodiment constitutes meant objects, better known as intuitions. A meaning is the product of the experiential body. The embodiment of a meant object is an act or event in contrast with a signification which intellectualizes about a categorized thing, a thing which is 'out there' separate from one's experiential body. Even socially experienced events are 'categorized facts', as Camus' M Meursault thinks about it.[20] The categorized facts are typified in that they abstract from the actual reciprocal recognitions of social beings.[21] What becomes crucial for the legal analysis is the boundary of the typification. That boundary defines the identity of a right, property, jurisdiction and law. And the scope of the space inside the boundary is identified *vis-a-vis* the boundary of another concept.[22] In contrast with such a focus upon the boundary of a concept and despite my own very different life or *Umwelten* than those of my nameless ancestors, we all share the phenomenon of the constitution of meant objects. Our acts of meaning have embodied how we perceived others, how we have heard or read the utterances and texts of others, and how we have relied upon or forgotten objects of nature.

The pivotal point in all this is that the constitution of meaning is an act which analytically and experientially precedes a concept or categorized fact. Acts of meaning cannot be found as code words in some crib or head-note nor in some justificatory argument about a background concept.[23] Nor can they be found in the 'facts of the case'. Meanings draw from our bodies in context-specific experiences. The bodies to which I refer are not our biological but our experiential bodies. Such bodily experiences have led us to take assumptions and expectations for granted. We bring such assumptions and expectations *into* texts, perceived objects and natural objects as acts of meaning.

91, 117. Also see Elaine Scarry *The Body in Pain: the Making and Unmaking of the World* Oxford University Press Oxford 1985.

19 Kristeva *Powers of Horror* above p 140.

20 Camus *Outsider* above note 17 pp 9, 69.

21 See esp. Alfred Schutz *The Phenomenology of the Social World* Northwestern University Press Evanston 1967. Also see Alfred Schutz & Thomas Luckmann 'Levels of Anonymity' in *The Structures of the Life-World*, trans. By Richard M Zaner & H. Tristram Engelhardt Northwestern University Press Evanston 1973 pp 79–87, 105–11, 122–26, 261–87. Also see Alfred Schutz, 'The Problem of Social Reality' in *Collected Papers*, ed. by Helmut Wagner & George Psathas Kluwer Dordrecht 1996, vol 4, pp 71–72. Schutz, 'Scientific Model of the Social World' in *Collected Papers* above, vol 1, pp 40–43.

22 See Joel Feinberg *Social Philosophy* Prentice-Hall Englewood Cliffs 1973, pp 68–83.

23 This point is developed in Simmons, 'Justification and legitimacy' (1999) 109 *Ethics* p 739–71.

There is an objectivity. This objectivity, though, is not constituted from concepts but from acts of meaning. Meant objects, not being 'out there' in a posited objectivity, are products of our experiential body. The meant objectivity links our haphazard discrete memories, assumptions and expectations into a structure. When we analyse concepts, the concepts enter our reasoning about the identity of a law. But they enter our consciousness and language *after* we have experienced acts of meaning in singular addressive experiences.

Despite existing prior to such *ex post facto* intellectualization, the analytic method, so coveted in professional law schools and in analytical jurisprudence, excludes acts of meaning from the identity of a law. This extra-law has sometimes been described as non-law, an interregnum of law or pre-legality. Expert knowers invariably describe the excluded extra-law as 'political' or 'oughts' precisely because the identity of concepts is taken as legal reality. Just like the categorization of 'Jacob's wife' or 'Captain Young's wife' as 'Indians' or 'women', signified by the absence of names, the expert knower's identity of a concept excludes such acts of meaning as elements in 'a law'.

This same exclusionary character of the analysis of concepts dominates contemporary analytical jurisprudence. To be sure, theories of analytical jurisprudence are preoccupied with the question whether values are incorporated into legal analysis. But the values themselves are posited as 'given' concepts rather than as meant objects constituted from anthropologically and analytically preceding acts of meaning. H.L.A. Hart (1907–92) and Georg W. F. Hegel (1770–1831) denoted a term for the excluded acts of meaning: 'pre-legality'.[24] They considered traditional societies, to be sure, as exemplifying pre-legality. Indeed, pre-legal societies were described in the 19th century Anglo-American legal thought as 'savage', 'barbaric', and 'primitive' precisely because they allegedly lacked an analysis of concepts.[25] Aside from an alleged pre-legal social structure, though, pre-legality was said to represent the unknown experiential world which I have associated with acts of meaning.

Expert knowers just have to 'leap' or 'step', without more, from the pre-conceptual experiential world to concepts of law. The extra-legal acts of meaning have been considered anathema to law, according to contemporary analytical jurisprudence.[26] Hart goes so far as to describe the study of such extra-legality as a 'nightmare' which 'haunts' 'much legal thought.'[27]

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24 Hart *Concept of Law* above note 7 p 85–93; Hegel, *Philosophy of Fine Art*, trans. by F.B.P. Osmaston 4 vols. Hacker New York 1975, vol. 1, p.250.

25 Antony Anghie 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harv. Int'l L.J.* 22–34, *Imperialism, Sovereignty and the Making of International Law* Cambridge University Press Cambridge 2004 p 52–65.

26 See, e.g., Larry Alexander & Emily Sherwin, *Demystifying Legal Reasoning* Cambridge University Press Cambridge 2008 p 47, 75, 134, 125, 157; Matthew H. Kramer, *Objectivity and the Rule of Law* Cambridge University Press Cambridge 2008, p 34, 81; Brian Leiter 'Objectivity, Morality and Adjudication in Leiter (ed) *Objectivity in Law and Morals* Cambridge University Press Cambridge 2001, 66–98 at p 102, 109, 134, 137 110–111; Gerald J. Postema 'Objectivity Fit for Law' in Leiter (ed), *Objectivity* p 99–43, at 115; Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* Oxford University Press Oxford 2007 p 65, 107, 133, 123,171; Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* Oxford University Press Oxford 2001, p 70–72, 78, 82, 123, 190. Even Nigel Simmonds highlights experience as assumptions and expectations only to categorize legal theory as intellectualized "archetypes". See Simmonds *Law as a Moral Idea* Oxford University Press Oxford 2007.

27 Hart *Concept of Law* above note 7 p 87.

Despite it being extra-legal, the experiential world, particularly social bonding, remains 'buried' in the analysis of concepts. Hart continues that this concealed social bonding is 'a *chain* binding those who have obligations so that they are *not free to do what they want* [my emphasis].' Indeed, he acknowledges that the pre-conceptual acts of meaning explain his own philosophic debates with his adversaries.[28] Hart dreaded that legal officials might 'slip' back into such a pre-conceptual world.[29]

Hart has been followed by analytical jurisprudes who have shared such a fear of experiential knowledge. They have been quick to close off any such study by categorizing such an effort as 'half baked', 'superficial' and 'amateurish' (Brian Leiter),[30] and as 'shallow', 'philosophically naïve', 'sterile and philosophically uninformed skepticism' by 'motley schools of charlantry' (Matthew Kramer).[31] When studies of the pre-conceptual constitution of meant objects are addressed, historically contingent contexts have been ignored.[32] Some analytical jurisprudes have recognized the importance of unwritten social bonding but the bonding is excluded from the identity of a law.[33] More generally, the unwritten world has been disparagingly stereotyped as 'folk psychology', 'folk theory' and 'folk explanations'.[34]

This exclusion of the experiential world is not just peculiar to the claimants about the analytic tradition of legal theory.[35] The Canadian Supreme Court too has continually rejected inquiries into the 'extra-legal' experiential world because it is said to possess 'insufficient legal content', 'a socio-political discourse that is disconnected from reality', 'social policy', 'purely political in nature', insufficiently 'ripe' to be considered law, 'inappropriate to answer', and 'outside its [the judiciary's] area of expertise'.[36] The Court in the *Manitoba Language Rights* case, for example, described the experiential knowledge as 'legal chaos', a 'legal vacuum', 'chaos and anarchy', the absence of 'civilised life' and an 'interregnum of law'.[37] The very possibility of an

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28 See Hart 'American Jurisprudence Through English Eyes: the Nightmare and the Dream' (1977) 11 *Georgia L. Rev.* 969. Hart acknowledged that pre-theoretical differences might well have explained why Hart and Fuller saw the world so differently: 'I am haunted by the fear that our starting-points and interests in jurisprudence are so different that the author and I are fated never to understand each other's work.' Hart 'Lon L. Fuller: *The Morality of Law*' in Hart, *Essays in Jurisprudence and Philosophy* Clarendon Oxford 1983 p 343–64, 343.

29 Hart *Concept of Law* above note 7 p 170. Nicola Lacey describes how Hart dreaded the intervention of experience into rationality in his day-to-day life.Nicola Lacey, *A Life of H.L.A. Hart: the Nightmare and the Noble Dream* Oxford University Press Oxford 2004.

30 Leiter, *Naturalizing Jurisprudence* above note 26 p, 99, 101.

31 Kramer, *Objectivity* above note 26 16, 80, 81.

32 See, e.g., Leiter's references in *Naturalizing Jurisprudence* above note 26 at 11n7, 11n9, 18n18, 20n28. Also see Kramer's references in *Objectivity supra* note 26, 234–35.

33 See, e.g.,Joseph Raz, 'Government by Consent' in *Ethics in the Public Domain* (Oxford: Clarendon, 1994), 355–69; and 'The Politics of the Rule of Law' in *ibid.* 370–78.

34 See, e.g., Coleman, *Practice of Principles supra* note 26, 146, 200; Leiter, *Naturalizing Jurisprudence supra* note 26, 55–6, 176–77, 217; Kramer, *Objectivity in Law supra* note 26.

35 Peter Hogg, *Constitutional Law of Canada* 5th edn. Supplemented Thomson/Carswell Scarborough 2007, vol. 1, 1.10(e).

36 See esp. *Chaoulli v Quebec (Attorney General),* [2005] 1 SCR 791 para 85–89 per Deschamps & paras. 183 per Binnie & Lebel dissenting; *Ref re Same-sex Marriage*, [2004] 3 SCR 698 at para 10, 62, 64 (unanimous); *Ref re Secession of Quebec* [1998] 2 SCR 217, 161 DLR (4th) 385 at para. 25–30; *Ref re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at p. 545.

37 *Ref re Manitoba Language Rights* [1985] 1 SCR 721 at 766a, 767c, 753a, 760d, 164a, 758b–c, 765j, 749a, para 46; 19 DLR (4th) 1.

extra-legality has justified the judiciary from refusing to respond to questions.[38] Again and again, the utility or propriety of the social content of a concept has been considered irrelevant to the constitutionality of a state-authored concept.[39] Chief Justice Bora Laskin of the Canadian Supreme Court once wrote in one of the leading Anglo-American judgements of the 20th century that, the extra-legality being unknowable, officials must make a 'formal leap' from the extra-legality (of experiential knowledge) to the legality (of empty concepts).[40] The Court has also recently affirmed, notwithstanding Iacobucci's call for a consideration of 'the perspective of the claimant',[41] that '[t]t must be possible to base the criteria for judicial intervention upon legal principles and not on socio-political discourse that is disconnected from reality.'[42]

To take one example and only as an example of the exclusionary character of the study of law and the theory about the nature of law, the First Ministers of Canada met in 1987 and seriously considered having the *Constitution Act, 1867–present* amended to include a preamble respecting Quebec as a 'distinct society' and a further clause which expressed respect for the provincial autonomy in the context of the federal government's use of the spending power. The Deputy Minister of Justice responsible for the federal proposal has recently expressed that the two clauses were mere political aspirations rather than binding concepts. [43] Concepts are said to constitute 'reality'. He considered the proposed distinct society and spending clauses as extra-law.[44] Indeed, the Deputy Minister has emphasized that it would be 'dangerous' to think about the 'distinct society' and provincial spending clauses as legally binding. Why is the quest for the identity of the boundary of a concept 'the reality' when a study of the experiential content inside and outside the boundary is 'dangerous' or 'socio-political'?

At this point, something very strange characterizes the silence about the names and dates of life of my two ancestors. This strangeness also characterizes the tradition of analytical jurisprudence and legal analysis. I did not know nor experience my ancestors. After all, they had lived two centuries ago in their complex, ever-changing and meant objectivity in their traditional societies. Nor did I nor do I know much about Jacob and Captain Young. All their addressive experiences had constituted meaning. My ancestors no doubt could have represented their context-specific experiences as signifying relations *through* their own languages.[45] A language confined to signifying relations, let alone semantics as in Raz's case, could not access my ancestors' languages as the constitution of meaning. They, not I, embodied their acts of meaning.

38 See *Patriation Reference*, [1981] 1 SCR 753, at 875–76; 125 DLR (3rd) 1.

39 See eg *Harvard College v Canada (Commissioner of Patents)*, [2002] 4 SCR 45, para. 153 per Bastarche.

40 *Patriation Reference*, [1981] 1 SCR 753 at 784, 125 DLR (3rd) 1.

41 See *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 170 DLR (4th) 1.

42 *Chaoulli v Quebec (Attorney General),* [2005] 1 SCR 791 para 85 per Deschamps.

43 The transcript of the interview with Frank Iacobucci (9 June 2006) is inaccessible to the public. However, see the quotation in Choudhry & Gaudreault-DesBiens "Frank Iacobucci as Constitution Maker: From the *Quebec Veto Reference* to the Meech Lake Accord and the *Quebec Secession Reference* (2007) 57 *University of Toronto L J* 165–93 at 181.

44 Iacobucci Interview above at 15, as quoted in Choudhry & Gaudreault-DesBiens, 'Frank Iacobucci as Constitution Maker above at 184.

45 And I do not signify by a 'language' Joseph Raz's view that a language is a matter of semantics. See Joseph Raz, 'The Problem about the Nature of Law' in *Ethics in the Public Domain supra* note 25, at 195–98; 'Two Views of the Nature of the Theory of Law: a Partial Comparison' in Jules Coleman (ed.) *Hart's Postscript*: Essays on the Postscript to the *Concept of Law*, Oxford: oxford University Press, 2001, 1–37, at 3–6.

I can only read or perceive their social relationships through my own language as the constitution of meaning. My analysis as an expert knower of 'the core' of such concepts as 'Aboriginal rights' or 'Indianness' render the singularized acts of meaning of my voiceless ancestors as 'categorized facts', to refer to Camus again,[46] or to the 'singl[ing] out' of 'Indianness' in laws (*sc.* concepts) of "general application", as the Canadian Supreme Court has put it.[47] So too, today, as an expert knower of constitutional and international human rights law, I might well intellectualize about my ancestors' acts of meaning by uplifting them from their context-specific addressive experiences and then locating them in my own cohesive narratives about human rights as well as my own constitution of meanings which embody such narratives. 'If only they had a written constitution with an entrenched bill of rights to protect them,' I might surmise, they might have been recognized on their gravestones. What we expert knowers have taken as constitutional analysis, however, is a conceptualization anthropologically and analytically *after* the constitution of meaning. As some scholars of analytical jurisprudence would put it, the rules (*sc.* concepts) are content-independent.[48] Our analysis thereby idealizes and reifies others in the name of the rule by laws.

Thus, my ancestors are and will remain strangers to myself, to my ancestral family, to the villagers, to the contemporary expert knowers with titles like 'Judge' or "Professor', and to analytical jurisprudes.[49] The question which the silence of my ancestors' voices on the tombstones poses, then, is whether there is something about the signifying relations, familiar to the family, villagers and expert knowers (including analytical jurisprudes) today, which offers one insight into the nature of law.

In particular, the analyzable legal issue might be framed as 'what is the rule in the last Supreme Court case?' or, for analytical jurisprudence, might be 'does legality incorporate values as concepts?' These issues, I am trying to emphasize, exclude the singularity of my ancestors' context-specific acts of meaning as even relevant to the nature of a binding law. This has been so despite the discursive claims of the Supreme Court of Canada that the competent expert knower must interpret and apply concepts 'from the perspective of aboriginal peoples' as 'the appropriate perspective' in understanding discrimination against indigenous claimants today.[50] Is it possible

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46 The sign 'Aboriginal Rights', of course, is taken from the Canadian *Constitutional Act*, sect. 35(1) and the term 'Indianness' is taken from a series of Supreme Court of Canada judgements. See, e.g., *Delgamuukw v. British Columbia*, [1991] 5 C.N.L.R. 1, para 177; *R. v. van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289, para.20. The Supreme Court of Canada has taken for granted that Aboriginal Rights and indigenous cultures in Canada have had a single conceptual "core". *R. v. Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289, para 71. Bastarache for the Supreme Court adopts this essentialist view of the aboriginal in *R. v. Sappier* [2006] 2 SCR 686; 274 DLR (4th) 75, para. 22. Also see *Dick v. The Queen* [1985] 2 SCR 309, 23 DLR (4th) 33, per Beetz, p 323h–324a, 327j–328b. Aboriginal Rights are said to have a "defining and central attribute. *R. v. Van der Peet* [1996] 2 SCR 507; 137 DLR (4th) 289, para 56–58. Also see *R v Sappier* [2006] 2 SCR 686, 274 DLR (4th) 75, para 55.

47 *Dick v. The Queen* [1985] 2 SCR 309, 23 DLR (4th) 33, per Beetz, p 323h–324a, 327j–328b.

48 See Scott J. Shapiro 'Authority' in *Oxford Handbook of Jurisprudence and Philosophy of Law*, Jules Coleman and Scott Schapiro (eds), Oxford University Press Oxford 2002 pp 382–439 at 390–91; Hart 'Commands and Authoritative Legal Reasons' in Joseph Raz (ed), *Authority* Oxford University Press New York 1990 pp 92–114; Raz, *Practical Reason and Norms* 2nd ed. Princeton University Press Princeton 1990 pp 36–45, 69–71.

49 Shunning being the archetypical way which other expert knowers have silenced my own acts of meaning where I work.

50 *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 170 DLR (4th) 1, para 59.

that the analysis of concepts could ever consider the perspective of an individual without addressing pre-conceptual phenomena in order to explain why a law is binding. Would not any meant objects remain nameless in a discourse which is preoccupied with the identity of the boundaries of concepts? How is it possible for a legal discourse to consider the perspective of the singularity of any experienced event? How is this possible if the singularized event is typified as a categorized fact as if the categorized fact were real? Will not the singularity of an act of meaning remain unrecognized in the legal discourse? My ancestors had experienced social relationships, rewarding and unrewarding to them no doubt, with their families and social groups. How could such social relationships be recognized in a discourse which typifies social relationships as classified facts? And if a right, rule or other concept could not and cannot access meant objects, how could an inhabitant even possess legal personhood as guaranteed in constitutional bills of rights and human rights treaties? Is there something about the quest of the identity of a law, as opposed to the binding nature of a law, which excludes a consideration of the constitution of meant objects by my two forgotten ancestors?

Here, we face the problem which generates the crisis of both legal analysis and analytical jurisprudence. Singular context-specific acts of meaning draw from the very collective memories and collectively shared expectations, amongst other things, which analytical jurisprudence, as much as legal analysis, exclude from the identity of laws.[51] Professional legal education itself is to a great extent an exercise in the production (and concealment) of such collective memories and expectations. Collective memories are not personally experienced. They are taken for granted by group members when one finds oneself in the group. Such a group may be a family, ethnic group, social group, ethnic nation or even a secularized state (sometimes called a 'civic nation'). Collective memories cannot be retrieved with therapy. Such would only be possible if one had personally experienced my ancestors and their social relationships at the time. My two silenced ancestors were members of groups which shared collective memories and collective expectations in their singularized acts of meaning. The crisis of analytical jurisprudence and legal analysis, as represented in treatises, judicial reasoning and teaching materials, share a framework of thinking which cannot access the singularized acts of meaning as constitutive of the binding character of a law. Such thinking in terms of the boundary of concepts adds to Jacques Derrida's concern that an inaccessibility to singularized experienced acts rule out the possibility of justice.[52] We analyze the boundary of a concept without having to consider the social relationships presupposed in the content of the bounded concept.

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51 See generally, Paul Ricoeur *Memory, History, Forgetting*, trans. by Kathleen Blamey & David Pellauer University of Chicago Press Chicago 2004 esp. 93–132. Also see Karl Jung, 'The Concept of the Collective Unconscious' in Walter K. Gordon (ed) *Literature in Critical Perspective* Appleton-Crofts New York 1968 pp. 504–8; Maurice Halbwachs, *The Collective Memory*, trans. by Francis J. Ditter Jr. & Vida Yazdi Ditter, Intro. by Mary Douglas Harper Colophon Books (New York 1980 [1950] pp 78–84; Pierra Nora *Realms of Memory* (Arthur Goldhammer trans & ed. with Lawrence D. Kritzman (forew) Columbia University Press New York 1996; Nora, 'Between Memory and History: *Les Lieux de Mémorie*', trans. by Marc Roudebush (Spring 1989) 26 *Representations* 7–12 (Special Issue: Memory and Counter-Memory).

52 See Jacques Derrida 'Force of Law: The "Mystical Foundation of Authority"' in Derrida, *Acts of Religion (Gil Anidjar* ed & trans) Routledge New York 2002 pp 230–58 at 235 244–45 248 274; Jacques Derrida 'Before the Law' in Derek Attridge, ed. *Acts of Literature* Routledge London 1992 pp 181–220 at 190–92 197–98.

4.0 THE `IS' AND THE `OUGHT'

Such meant objects have heretofore been excluded from the quest for the identity (as opposed to the binding character) of a law because the excluded acts of meaning are considered subjective, 'political', 'philosophy' or 'oughts'. The concepts, we are reminded by our students and the judiciary again and again, constitute what is practical and real. Even the effort to explain why identifiable laws are binding excludes the acts of meaning as extra-law. One effort, for example, traces the bounded concept to an institutional state source (what Joseph Raz calls the 'sources' thesis'). Another traces the concept to a rationally coherent system of higher-level justificatory concepts (as Ronald Dworkin has argued). This search for higher-ordered concepts, posited by an institution or in a narrative, lops off acts of meaning as politics, morality, philosophy, 'oughts' rather than as identifiable law. As a consequence, 'the law', which we have taken as practical, has really been an idealized and reified rhetoric estranged from experiential knowledge.[53]

What is important to appreciate in this context is that 'the wife of Jacob Conklin' and 'the wife of Captain Young' were social beings who had lived through singular acts of meaning in context-specific circumstances. They constituted meant objects. The most important meant objects would appear to have been their traditional societies. Their meant objects were also lived as infants, children, mothers, friends, lovers and members of their communities. Most certainly they would have had experiences with other members of my ancestral families and, I suspect, with the mainland villagers with whom they later lived.

Now, a judicial concern for a retrieval of such acts of meaning is not unknown in Canadian constitutional discourse. Judge Iacobucci, for example, (perhaps unknowingly) highlights acts of meaning when he writes in the Canadian Supreme Court judgement of *Law* that a perspective of any complainant "concerns the manner in which a person legitimately *feels* when confronted with a particular law."[54] In order to understand such a felt experience, he advises, the expert knower must retrieve 'the biological, historical and sociological similarities and dissimilarities' of individuals.[55] Collective memories and collective expectations help to recognize such similarities and dissimilarities. Collective memories and collective expectations, aside from personal experiences, also embody acts of meaning in experiential knowledge.

5.0 THE INNER DISCOURSE

The voices of concrete persons are transformed into reified discourses about empty or abstract persons, we have seen.[56] Drawing from Mikhail Bakhtin, this transformation is monologic.[57] It is

53 This notion of experiential knowledge is developed with examples from Anglo-American constitutional, commercial and banking legal doctrines in Conklin, « Le savoir oublié above note 9. Also see William E Conklin *Hegel's Laws* above note 9; 'A Phenomenological Theory of the Human Rights of the Alien in (2006) 13 *Ethical Perspectives* 245–301.

54 *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 170 DLR (4th) 1, para 53.

55 *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 170 DLR (4th) 1, para 57.

56 I have explained the transformation in more detail in *Hegel's Laws* above note 9, esp. at 51–52. Also see Conklin, *Phenomenology of Modern Legal Discourse supra* note 5, 51–68.

monologic *vis-a-vis* the non-knowers of the signifying relations of the expert knowers. And it is monologic precisely because the acts of constituting pre-conceptual meant objects, as opposed to the intellectualizing about such signifying relations, are excluded from the analysis of the concepts. The boundaries of empty or content-independent concepts become the object of analysis.

And so, 'Jacob's wife' and 'Captain Young's wife' could be buried nameless and without dates. They lived acts of meanings excluded from the boundaries of the concepts signified by official discourses of my family, as well as of legal and legal theory discourses today. The problem is that the appeal to ever more general and higher-ordered justificatory concepts — such as 'emergency' or 'the right to fish' — opens the door to what the Supreme Court has feared as 'rigid test[s] which might risk being mechanically applied.'[58] Important signs, such as 'equality' or 'discrimination', in the official discourse become 'elusive', lacking in a 'precise definition'.[59] What is excluded from law is the very possibility that singularized, context-specific events have actually been experienced by my ancestors. An objectivity remains in the constitution of meaning. This objectivity, though, would not have been posited by some constitutional expert or judge or villager. The objectivity would have been constituted from their own experiential knowledge. The meant objectivity would have drawn from bodily experiences rather than from a heaven of empty concepts. Perhaps most important, such an objectivity would have been embodied from collective memories and expectations which 'hauntingly' (Hart's term) bonded them. The irony is that without addressing such an experiential knowledge, the expert knowers still implicitly know what is outside law by so confidently asserting that extra-legality differs from legality. There is another irony: namely that the structure of identifiable and typifying concepts becomes ever more reified *vis-à-vis* the context-specific social relationships which constitute determinate social actuality, all in the name of 'practicality and reality'. The tragedy of contemporary legal pedagogy and analytic legal theory is that such experiential knowledge is so easily dismissed as extra-legal.

It is too easy for an expert knower to say that the experiential knowledge cannot be unconcealed. Although we cannot retrieve the personal memories of my two forgotten ancestors, collective memories can be unconcealed. Instead of 'the law' being considered an identifiable unit in an objectivity of posited rules and values, an objectivity of meant objects is drawn from such collective memories and expectations. The objectivity is pre-conceptual. The objectivity is constituted from acts of meaning. Acts of meaning, again, embody (that is, bring the experiential body *into*) perceived natural things, texts, utterances, clothes and the face of another. The objectivity of meant objects contrasts with the objectivity of concepts and classified facts posited by state institutions such as courts. The meant objects are alive precisely because they draw from

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57 Mikhail M Bakhtin *Dialogic Imagination: Four Essays* (trans. Caryl Emerson & Michael Holquist; ed. Michael Holquist) University of Texas Press Austin 1987; 'The Problem of Speech Genres' in *Speech Genres and other Essays* (Vern W. McGee trans; Caryl Emerson & Michael Holquist eds) University of Texas Press Austin 1986; V N Volosinov *Marxism and the Philosophy of Language* (Ladislov Matejka & I R Titunik trans) Seminar Press New York/London 1973.

58 *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 170 DLR (4th) 1 at para 6.

59 *Andrews v Law Society of British Columbia* , [1989] 1 SCR 143 at 164, as quoted in *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 170 DLR (4th) 1 at para 2.

an experiential body rather than from some metaphysical structure of concepts which I can learn from a text book in a professional law school.

The big issue, then, is this: how can the expert knower of law or of the theory about law differentiate between law and extra-law without wondering what is excluded from what we have taken as law? How can a being be recognized as a legal person if her/his collective memories, for example, are excluded from the study of law? Even if a law/concept is identifiable as the determinant of the boundary between law and extra-law, can we know why the law/concept is binding without also inquiring into what is extra-law?

The first point to appreciate about the recovery of the extra-legality in our knowledge about the nature of law is that the differentiation between law and extra-law exists *inside* the legal discourses. This is so in no small way because it has been the expert knowers and the analytical jurisprudences who have posited the distinction. Because the differentiation is inside legal discourses, the extra-legality can no longer be posited as 'oughts', 'political' or 'philosophy', let alone 'dangerous' 'oughts'. Indeed, an inquiry into the objectivity of meant objects helps to understand why identifiable concepts may or may not be binding for the state as much as for concrete beings. The extra-legality is no longer unknowable for the expert knowers and theorists.

The Supreme Court of Canada has, indeed, realized that just such an extra-legality is nested inside 'the reality' of the constitutional discourse. In the famous *Patriation Reference* of 1981, the majority of the Court self-consciously asserted that a 'theory' as opposed to a written text 'operate[d] in the political realm, in political science studies. They do not engage the law, save as they might have some peripheral relevance to some actual provisions' of a written text.[60] More generally, unwritten customs — the stuff of collective memories — were not legally binding even though the customs were said to found the constitution. When the Court faced the exclusion of such silenced collective memories some years later (1998) in the *Secession Reference*, unwritten conventions were considered binding upon the various institutions of the state.[61] In a rigorous study of Canadian social history, the Court retrieved important features of the unwritten collective memories of society as the foundation of the Constitution. Without addressing the collective memories, 'the Canadian legal order' would be 'violated.'[62] The collective memories structured an 'internal architecture'.[63] The Court has reaffirmed how collective memories constitute the framework for analysing texts and social relationships.[64] If the pre-conceptual meant structure of experiential knowledge explains why laws are binding, can expert knowers and theorists about law in my country remain content to exclude the same from the study of law in all its facets?

Of course, one might exclaim that these questions themselves are the very sorts of issues which deserve to be classified as anthropology or political science or even a philosophy department (whatever they do). Our role, as legal scholars, judges and other officials, one might

60 *Re Resolution to Amend the Constitution of Canada*, [1981] 1 SCR 753 at 803; 125 DLR (3d) 1 at 44–45.
61 *Ref re Secession of Quebec* [1998] 2 SCR 217, 161 DLR (4th) 385 para 98, 100.
62 *Ref re Secession of Quebec* [1998] 2 SCR 217, 161 DLR (4th) 385 para 104.
63 *Ref re Secession of Quebec* [1998] 2 SCR 217, 161 DLR (4th) 385 para 153.
64 See e.g. *Ref re Provincial Judges* [1997] 1 SCR 3, para 92, 87, 89, 95, 99, 103, 107; *R v Power* [1994] 1 SCR 601; *Law Society of Upper Canada v Skapinker* [1984] 1 SCR 357; *Ref re Manitoba Language Rights* [1985] 1 SCR 721.

insist, is to identify laws, not to ask what is non-law? If we inquired about the content of extra-legality, we would be making subjective opinions alien to 'the law', we have been reminded again and again. We would be inviting philosophy, not law; 'folk law', not practical law; the idiosyncrasy of the subject, not the objectivity of law; arbitrariness, not the rule of law. Put more forcefully in the words of my student of a few months ago and after 74 hours of teaching constitutional law, 'How do you justify to yourself, Mr. Conklin, asking these questions [about 'extra-legality] that you do?' When I responded, 'Please throw that one by me again,' the student replied 'my other law classes and the other constitutional classes (I have been attending the other constitutional classes rather than yours) are always preoccupied with rules and tests and your class is very different. How do you justify to *yourself* [her emphasis] asking the questions you do?' This question itself is not unfamiliar, representing as it does years and years of anonymously authored student evaluations and crystallizing as it did in my own trial on a grade appeal, charged as I was for 'teaching philosophy instead of law' and 'teaching critically instead of practically'.[65]

The strange thing about my unrecognized ancestors is that we expert knowers of 'the law' would assume today that what has been taken as law (that is, as structures of empty concepts) excludes from analysis and analytical jurisprudence the pre-conceptual, singular acts of meaning. The latter, again, were drawn from addressive experiences of my silenced ancestors. We would assume that, in terms of finding the identity of a rule or principle or other concept, my two ancestors had no biography, personal or collective memories, expectations as women from traditional societies, strangers to presumably a new family and village, with a language which neither of their new families could understand. The context-specific meant objects of their experiential knowledge would be excluded from the legal discourses and legal theory as extra-legal, as pre-intellectual. This has recently and especially been so, the less important have the humanities become in the Anglo-American academy, let alone in the professional law faculties, where the quest for identifiable concepts has been sought in the dark labyrinth of Patricia Williams' "saussage machines". Experiential knowledge, lying concealed inside such a labyrinth, has been rejected, as 'oughts'. My recent student reaffirmed her belief, now a collective memory of our profession, that asking questions about the content of concepts is extra-legal. Ironically, the love of wisdom, which one would have thought as important in a university (a product of the Enlightenment one might not forget), would beg that we expert knowers ask the question 'what are presupposed reciprocal social relationships of this extra-legality upon which the quest of the binding laws is dependent?' If we fail to ask such a question, we bring closure to the asking of questions and undermine any claim as a lover of wisdom. By inference, we undermine any claim to remain a member of a university community.

The thrust of this challenge is that the extra-legality, so important a presupposition to the identity of a law/concept, becomes unconcealed if and when officials address 'why is an identifiable concept binding?' The 'why is a law binding?' question especially protrudes in a democracy. A democracy, after all, presupposes that each individual is a thinking subject who can reflect upon her/his own, independent of meant objects as well as independent of the content of posited objects. Why would such a thinking subject accept the external constraints of

[65] As recounted in William E Conklin, 'The Trap' (2002) 13 *Law and Critique* 1–28 at 2–3.

differentiating empty concepts if s/he could decide things for her/himself without having to acknowledge her/his own shared experiential knowledge? The crux of this issue is that by excluding the 'why is a law binding?' question from the knowable world of the professional knowers, we fail to address the subject's context-specific experiential knowledge which renders identifiable laws determinate and binding. The consequences of our failure to inquire as to the role of such experiential knowledge "miss out [of] a whole dimension of the social life of those he is watching", as Hart wrote about his own peers and predecessors.[66] This forgotten dimension of legal knowledge constitutes the crisis of analytical jurisprudence. The consequence of its having been missed is, I suggest, that the forgotten individuality of experiential knowledge does raise the prospect of 'a substandard, abnormal case containing within it the threat that the legal system will dissolve,' again quoting from Hart.[67]

6.0 CONCLUSION

This being the case, I am left with the conclusion that there were ghosts on Cemetery Road after all. They were the ghosts of my two nameless ancestors. In searching for the boundaries of concepts, the modern world of 'thinking' about laws had forgotten that my two ancestors had had voices which expressed experiential knowledge. Like Edvard Munch's 'Scream', they were crying out for recognition in a human world where they had been left as remainders, left-overs, strangers to the dominant discourses of their time and of ours today.

My ancestors' stories are my story, immersed as I have found myself as a professional expert knower of constitutional and international human rights discourses as well as of analytical jurisprudence. As a professional knower in such a discourse, I claim to identify the objects of my constitutional discourse from chains of familiar signifying relations whose signified concepts I differentiate the one from the other. Such a differentiation amongst empty concepts — what Hegel described as *Verstand*[68] — forgets the individuality of context-specific acts of meaning in discrete circumstances. Such acts of meaning are the remainder of an expert knower's quest for the identity of a law. The consequence is that in such a quest, we knowers can only picture the singularity of acts of meaning of another. A mirror blocks our picture from understanding the stranger as a stranger.

My nameless ancestors, if alive today, may well have shared such a paradox with contemporary expert knowers who claim to represent the perspective of indigenous inhabitants. So too, my nameless ancestors may also have shared such a paradox with officials who claim the authority (and power), in a culture of universal human rights, to adjudicate disputes which silence the nameless strangers of the modern legal discourses: nationals who are diplomatically unprotected with the consequence of their biological bodies are tortured, stateless beings who lack recognition as legal persons, migrant workers without legal rights, insurgents who lack the

66 Hart, *Concept of Law* above note 7, 90.
67 Hart, *Concept of Law* above note 7, 123.
68 Conklin, *Hegel's Laws* above note 9, 95–108.

protections of the laws of war, 'peoples' whose collective memories lack the recognition of statehood, and, more generally, all strangers to the modern constitutional and international law discourses by virtue of their context-specific meant objects being excluded from the officials' discourses. Yes, as a boy of six, I had reason to dread the ghosts of Cemetery Road after all. And these very ghosts haunt the modern discourses about law and theories of law just as they haunted me as I ran down the rough, pot-holed Cemetery Road, eyes closed, the symbol (and rightly so) of European civilization on my shoulders, and my soul burdened. ●