



UNIVERSITÀ  
DEGLI STUDI  
DI PADOVA

Head Office: Università degli Studi di Padova

Department of Public, International and Community Law

Ph.D. COURSE IN: LAW

**A NEW PROPOSAL FOR AN EVENT-BASED PERSPECTIVE OF LAW**

**Coordinator:** Prof. Roberto Kostoris

**Supervisor:** Prof. Paolo Sommaggio

**Ph.D. student:** Marco Mazzocca



*For Arianna and Alice, nieces and friends*



*Faith and philosophy are air, but events are brass*  
(Herman Melville)



## INDEX

<b>Index</b>	7
<b>Introduction</b>	9
I. <i>Issues</i>	9
II. <i>Approach</i>	11
III. <i>Structure</i>	13
IV. <i>Acknowledgements</i>	15
<b>1. What Happens</b>	17
1.1. <i>The two Worlds</i>	18
1.2. <i>The other World</i>	23
1.3. <i>Perspectives and Prejudice</i>	35
1.4. <i>Worlds, Events, Universals, and Particulars</i>	42
1.5. <i>Describing and Classifying</i>	50
1.6. <i>Things that (don't) happen</i>	60
1.7. <i>A Place for Facts</i>	67
<b>2. What Happened?</b>	71
2.1 <i>What are we playing at?</i>	72
2.2 <i>A Matter of Conventions</i>	77
2.3 <i>A Useful Fallacy</i>	83
2.4 <i>To Agree to Disagree</i>	90
2.5 <i>The Game of Courts</i>	95
2.6 <i>Peer-to-peer</i>	101
2.7 <i>... and Judges for All</i>	107
<b>Conclusion</b>	113
<b>Bibliography</b>	117





## INTRODUCTION

At the first establishment of judges there  
are no laws; every one trusts the natural  
feeling of justice he has in his own breast  
and expects to find in others.

(Adam Smith<sup>1</sup>)

### I. Issues

Philosophy of Law is widely considered a continually changing field of knowledge.<sup>2</sup> Its median character, always balancing philosophy and law; its freedom from strict normative schemes; and its genuine interest in all those legal aspects concerning social, scientific and technological innovations make studying this discipline dynamic.

What is the law? What is the nature of law? Who is the law for? How do lawyers reason? What is the rule of law? What are the criteria for legal validity? What is the relationship between law and morality? Are there any unfair laws? These are just some of the questions that have guided scholars in this fascinating spaceless and timeless discipline over the centuries.

«Principles of natural laws [...] have no history», wrote John Finnis,<sup>3</sup> while Joseph Raz pointed out how «It is easy to explain in what sense legal philosophy is universal. Its theses, if true, apply universally, that is, they speak of all law, of all legal systems; of those that exist, or what will exist, and even of those that can exist though they never will».<sup>4</sup> In this sense, this doctoral thesis is no exception. However, none of those above-mentioned issues are covered in this work.

---

<sup>1</sup> Adam Smith (1982), *Lectures on Jurisprudence*, edited by Ronald L. Meek, David D. Raphael and Peter G. Stein, Indianapolis: Liberty Found, p. 314.

<sup>2</sup> It is indeed a discipline that today has many different names, such as "philosophy of law", "legal theory", "legal philosophy", "jurisprudence" and "legal science". Each name corresponds to a distinct tradition of thought concerning the nature of law and the approach to the study of it. Hence, while for Davies and Holdcroft, «Jurisprudence is the philosophy of law» [Howard Davies and David Holdcroft (1991), *Jurisprudence: Text and Commentary*, London: Butterworths, p. v], for Pavlakos and Coyle it is necessary to distinguish between «a scientific approach which assumes that all legal phenomena possess universal characteristics [...] [and] a complex form of moral arrangement which can only be analysed from within a system of moral and political practice» [George Pavlakos and Sean Coyle (2005) *Jurisprudence or Legal Science?*, Oxford: Hart Publishing, p I]. Despite the differences, in this work, they are all considered part of a tremendously unique subject: the philosophy of law (in the broad sense).

<sup>3</sup> John Finnis (1980), *Natural Law and Natural Right*, Oxford: Clarendon Law Series, p. 24.

<sup>4</sup> Joseph Raz (2009), *Between Authority and Interpretation*, Oxford: Oxford University Press, p. 91-92.

One of the objectives of this dissertation is to incorporate the concept of the event within legal philosophy. The other goal is to provide an ontological and epistemological perspective based on that notion. In this sense, the event-based view that I construct focuses less on rules and more on legal events.

After all, if one asks a lawyer what happens in the legal world, he or she will likely hesitate in answering. Law is what jurists live by and work with every day, but most jurists have probably never questioned what is going on next to them because they probably take it for granted. For everyday operations, jurists do not need to define what a legal event is; they need to know that something has happened. But how do they know that something has happened? And how do they know that it is something legally relevant?

Questions on these matters are nothing more than a new way to reformulate the traditional problem of the philosophy of law: not what law is, but what legal events are. Thus, the problem is not new. What is different, however, is the approach.

Very often, those who today try to identify legal events are naturally inclined to turn to the rules (in a broad sense). Yet, rules certainly do not tell us what actually happened. Rules can, for example, provide a list of the characteristics of marriages, but they cannot tell us anything about the particular series of actions that my girlfriend and I performed, nor can they tell us if those actions count as marriage. Many of our activities can be judged or inspired by rules, but that does not mean that they are “envisaged” by them.

In this sense, therefore, the legal rules could be considered as keys to understanding part of what surrounds us: a way to account for that “social reality” of which the natural sciences, such as physics, chemistry, biology or cosmology, can tell us very little. Indeed, if the only possible representation of the world were the scientific one, how could we account for all those entities that are part of our daily experiences, such as weddings, contracts or murder?

Rules, in this sense, can shed light on what is happening in society; they can provide meaning to some of our actions and justify others. However, since almost everything that happens in the social reality comprises events, rules are not enough: it is first necessary to determine what happened. For this reason, it is important to introduce the concept of the event, even in the legal field. Indeed, as Donald Davidson has explained, events are particulars: unrepeatable entities located in a specific space and time that can be variously

described.<sup>5</sup> Therefore, just as we can designate an object through several descriptions, each of which relies on specific characteristics, we can identify an event through descriptions that may vary depending on the context of our discourse. Thus, if our field of interest is the legal one, why should we not discuss legal events?

The problems, as one may guess, are many and mainly concern the modalities of the description of legal events, the characteristics that make an event a legal event and the number of possible legal descriptions for each event. These are essential issues that seem to require an interdisciplinary approach, which, on the one hand, broadens the boundaries of the philosophy of law and, on the other hand, provides a different viewpoint on the law and its practice.

## II. Approach

Traditionally, the term “philosophy of law” has referred to that specific branch of philosophy that investigates the nature of law.<sup>6</sup> However, since the law itself can be considered as «an integral aspect of society» that can «assume different form and function in connection with levels of social complexity and surrounding economic, political, cultural, technological, ecological, and social factors»,<sup>7</sup> in a certain sense, to study philosophy of law is to explore the philosophy of society. This philosophy of society is what John Searle imagined in his *The Construction of Social Reality* (1995)<sup>8</sup> and is now a field of research in which scholars from various backgrounds carry out their daily work.

The multidisciplinary approach to the philosophy of law is certainly not a recent innovation: since its very beginnings, the philosophy of law has not spoken only to legal scholars. Consider, for example, Plato’s dialogue *Crito*<sup>9</sup> and its well-known storyline: Socrates has been convicted of the crimes of impiety against the pantheon of Athens and

---

<sup>5</sup> Cf. Donald Davidson (1970), *Events as Particulars*, *Noûs* 4: 25–32.

<sup>6</sup> Cf. Brian Leiter and Michael Sevel (2017), item 'Philosophy of Law', in *Encyclopedia Britannica*, <https://www.britannica.com/topic/philosophy-of-law>. On this point, Mario Jori and Anna Pintore have underlined how the very nature of the philosophy of law is a matter of debate since it is not possible to take a neutral approach to it. Cf. Mario Jori and Anna Pintore (2014) *Introduzione alla Filosofia del Diritto*, Torino: Giappichelli, pp. 1-18.

<sup>7</sup> Brian Z. Tamanaha (2017), *A Realistic Theory of Law*, Cambridge: Cambridge University Press, p. 1.

<sup>8</sup> Cf. John R. Searle (1995) *The Construction of Social Reality*, New York: Free Press.

<sup>9</sup> Cf. Plato, *Crito*, In *Plato, Euthyphro; Apology; Crito; Phaedo; Phaedrus*, trans. Harold N. Fowler, Cambridge-London: Harvard University Press, 1914, pp. 147–192. For a brief legal-philosophical analysis of the *Crito*, see: Anthony D. Woozley (1979), *Law and Obedience: The Arguments of Plato's Crito*, Chapel Hill: University of North Carolina Press.

corruption of the youth of the polis.<sup>10</sup> For this reason, after renouncing the option of being sentenced to exile, he is sentenced to death. Thus, at the beginning of the dialogue, he is in prison awaiting the execution of the judgment. His friend Crito comes to visit him and explains that a “prison break” has been arranged. Socrates, however, refuses to escape and decides to meet his destiny. He does not flee because once he had accepted that «we ought neither to require wrong with wrong nor to do evil to anyone, no matter what he may have done to us»,<sup>11</sup> escaping from the city would mean betraying that principle. Indeed, Socrates imagines that the laws and the community of the city could ask him the following:

Tell me, Socrates, what have you in mind to do? Are you not intending by this thing you are trying to do, to destroy us, the laws, and the entire state, so far as in you lies? Or do you think that state can exist and not be overturned, in which the decision reached by the courts have no force but are made invalid and annulled by private person?<sup>12</sup>

As this short extract demonstrates, «the field of the philosophy of law overlaps other branches of philosophy. The *Crito* is not only one of the classics of legal philosophy; it is also one of the classics of ethics and political and social philosophy».<sup>13</sup>

Indeed, my purpose in reciting Socrates’ views is not to endorse his conception of law, state or society, though much of what he says is edifying. The main value of his account is its portrayal of his interdisciplinary approach to legal issues.

Likewise, even this doctoral thesis pursues an interdisciplinary approach to address the complex constellation of issues related to the role of events in the legal field. The general approach of this work, then, is not a focus on any school of thought or tradition in particular, but on some of the most relevant works relating to each issue addressed. Of course, as legal philosophy is an explanation of the nature of law, conceptual analysis is

---

<sup>10</sup> Socrates' judicial defense against such accusations is part of an earlier Platonic dialogue: the *Apology*. Cf. Plato, *Apology*, in *Plato, Euthyphro; Apology; Crito; Phaedo; Phaedrus*, trans. Harold N. Fowler, Cambridge-London: Harvard University Press, 1914, pp. 61–146. For a recent legal-philosophical analysis of the trial of Socrates, see: Francesco Cavalla (2017) *L'origine e il diritto*, Milano: Franco Angeli, pp. 202–208; Thomas C. Brickhouse and Nicholas D. Smith. (1989), *Socrates on Trial*, Princeton: Princeton University Press.

<sup>11</sup> Plato, *Crito*, cit., p. 173.

<sup>12</sup> *Ibidem*, p. 175.

<sup>13</sup> Martin P. Golding (1975), *Philosophy of Law*, Englewood Cliffs: Prentice-Hall, p.1.

an important part of it.<sup>14</sup> However, the conceptual analysis of events follows the works of authors apparently far from the philosophy of law. After all, given the importance of the legal experience and practice, it is not possible today to restrict discourses about the law only to the branches of knowledge traditionally considered close to it. For this reason, this thesis combines, when appropriate, consideration of philosophy of language, social ontology, metaphysics, philosophy of law and sociology. The complexity generated by the concept of event requires such a multidisciplinary approach.

Therefore, through mental experiments, conceptual analysis and phenomenological considerations, the research methodology adopted in this work aims to reach hypothetical conclusions with reliable explanatory power.

One might find this approach insufficiently rigorous and, perhaps, insufficiently convincing because of the confusion that a multidisciplinary approach might entail. No problem is more authentic, thornier or more urgent than that of law. Often our legal statements are cluttered with theoretical propositions, ethical precepts, practical rules and empirical observations.<sup>15</sup> In this sense, therefore, a multidisciplinary approach to the study of the concept of events in the philosophical-legal field could seemingly complicate the study of legal phenomena. However, this eclectic approach could also constitute a way to examine legal phenomena from a new perspective: an event-based perspective.

### III. Structure

Since this thesis aims to present a relatively new point of view on the law, it may appear confusing. The effort to reconstruct an ontological and epistemological perspective of law that takes events seriously comprises two parts: the first explains what generally happens, and the second discusses some epistemological aspects related to the belief that something happened.

In a way, this work resembles a box of suggestions and ideas related to a specific topic: legal events. The structure of this work partially reflects this idea, even if the *fil rouge* of

---

<sup>14</sup> On this point, Joseph Raz has written, «Concepts are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other. The law offers an easy illustration of the non-identity of concepts and (word) meanings». Joseph Raz (2005), *Can There Be a Theory of Law?*, in Martin P. Golding and William A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Oxford: Blackwell, pp 324–342, p. 325.

<sup>15</sup> Cf. Nicolás Gómez Dávila (1970), *De iure*, trans. Luigi Garofalo, Milano: La nave di Teseo, 2019, pp. 239–246.

this doctoral thesis might sometimes appear thin. However, even if it might sometimes be hard to find the crux of the matter, the objectives at least should be clear.

In this sense, the main objective of the first part is to explain what it means for a legal event to occur. For this reason, the first section introduces an essential distinction between the ordinary world and the legal world, based mainly on the difference between what is possible and what is lawful. Starting from the second section, the so-called “legal world” is then presented, discussed and analyzed. In particular, some of its main characteristics are highlighted, explaining how Searle’s *Social Ontology*<sup>16</sup> inspires the idea and how, in my opinion, it cannot be considered as a possible world.<sup>17</sup> After the introduction of the notion of the legal world, in the third section, we start to delve into the concept of the legal event, illustrating how the different schools of legal philosophy could consider it. In the fourth section, we start to analyze the concept of the event deeply, showing how it is a particular and unrepeatable entity that can be variously described. This last consideration introduces the main topic of the fifth section. Indeed, since these particular entities called events may be described in different ways, the issues regarding their legal description become crucial. In particular, the section stresses how the problem of legal description ultimately concerns the legal classification (universal) of a single event (particular). The topic of the classification and description of legal events is further investigated concerning so-called negative events (also called omissions) in the sixth section. Finally, the seventh and last section explains the difference between facts and events and the reason it is preferable to talk about events rather than facts.

The second part of the thesis, in contrast, addresses some epistemological issues regarding the law, the trial and legal disputes. In this regard, the first section introduces the law-game metaphor, showing its strengths, its peculiarities, and, above all, its explanatory power. Indeed, only once we know what this metaphor entails can we analyze its legal meaning. The second section is strictly related to the first, but it focuses on issues concerning conventionalism and collective acceptance. In this section, two serious problems are presented and addressed: “nihilistic drift” and the conceptual inconsistency of “legal ontology”. In the third section, the theme of abductive reasoning is then analyzed to provide some of the most important conceptual assumptions to avoid some of the risks

---

<sup>16</sup> In this regard, recent essays on social ontology by Searle are: John R. Searle (2010) *Making the Social World: The Structure of Human Civilization*, Oxford: Oxford University Press; ID. (2005), *What is an institution?*, *Journal of Institutional Economics*, 1: 1–22.

<sup>17</sup> For a brief introduction to possible worlds semantics, Cf. Christopher Menzel (2016) item "Possible Worlds", *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/possible-worlds/>.

mentioned in the previous section. From the fourth section, however, the disagreement on legal events is introduced. This is a disagreement that can be legally resolved through a judicial debate in a trial. In this sense, the fifth section is entirely dedicated to judicial debate, showing how it allows parties to become epistemic peers.

As a consequence of this, the sixth section explores possible strategies related to the condition of epistemic peers. In particular, it is illustrated how during the judicial debate in the courtroom parties might pass from formal judicial equality (the so-called "equality of arms") to substantive epistemic equality. Finally, the last section argues that since legal events may give rise to a persistent disagreement between the parties to the proceedings, the figure of the judge becomes extremely important. In particular, we will highlight the judge's decision-making powers and constraints. The goal, indeed, is to convincingly describe how the beliefs of those who judge can resolve the legal dispute and dissolve the epistemic peerhood.

In conclusion, after reviewing the main points of this work, and clarifying some of the conceptual tools used, a few arguments in favor of an event-based perspective of law are provided.

#### **IV. Acknowledgments**

Throughout the writing of this doctoral dissertation, I have received a great deal of support and assistance.

I would first like to express my sincere gratitude to my supervisor, Prof. Paolo Sommaggio, for the continuous support of my Ph.D. studies and for his patience, motivation and confidence in my work. Without his belief in my ideas, this work would never have been written.

In addition, I would also like to thank all the members of the Gustav Radbruch Institute of Theory of Law of the Pavol Jozef Šafárik University in Košice, especially Prof. Alexander Brörtl for his wise advice and suggestions and Prof. Marta Tóthová, Dr. Marta Breichová Lapčáková and Dr. Peter Čuroš for their insightful comments, encouragement and the opportunity to join their institute as not only a visiting student but also a friend.

I am also particularly grateful to Prof. Achille C. Varzi for his valuable guidance and for conveying his enthusiasm for events to me. Every discussion we had enriched me immeasurably.

My sincere thanks also go to Prof. Francesco Cavalla, Prof. Stefano Fuselli, Prof. Paolo Moro, Prof. Claudio Sarra, Dr. Federico Reggio and Dr. Letizia Mingardo for enlightening me with their works, lectures and helpful advice.

I would also like to express my great appreciation to Prof. Piero Longo and Dr. Anna Desiderio, who provided me with significant learning opportunities. Many of the ideas about how the courts really work are due only to them.

I would like to thank my fellow and colleague, Dr. Giovanni Comazzetto, Dr. Alessia Schiavon, Dr. Giulia Capitani and Dr. Alvise Schiavon, for the stimulating discussions, our joint research project and all the fun over the last three years.

I also thank my friends at the following institutions: the Kingston University of London; the Institute of Advanced Legal Studies of London; the McClay Library of the Queen's University of Belfast; the Faculty of Law of the Pavol Jozef Šafárik University in Košice; the Faculty of Law of the University of Trento; and, obviously, the Ph.D. School of Law of the Department of Public, International and Community Law of the University of Padua, which was a second home during my Ph.D. years. In particular, I am grateful to Prof. Lorenzo Pasculli for his advice and encouragement.

Last but not least, I would like to express my profound gratitude to my family, my friends, and everyone who loves me for providing me with unfailing support and continuous encouragement throughout my years of study and the process of researching and writing this thesis.

I like to think that the writing of this thesis was an event that we participated in together. Therefore, thank you for letting it happen exactly as it happened.



## 1. WHAT HAPPENS

Nonbeing must in some sense be,  
otherwise what is it that there is not?

(Willard V. O. Quine)<sup>18</sup>

Suppose that someone opens a newspaper and reads that her neighbor has been convicted. The article, which appears as a short piece in the local news section, is not clear: it reports only the name of the sentenced, his residence, the date of the sentencing and the court that sentenced him. If the reader is slightly curious, she will likely wonder what her neighbor has done and, more generally, what happened.

After all, actions and events,<sup>19</sup> of whatever type they may be, seem to constitute an indispensable reference point in our daily lives. This is because the world, however one parses it, is not only composed of the mere entirety of the persons and objects that inhabit it, but also includes events.<sup>20</sup>

Those who study law know very well that events are important. During the law school for instance, students learn to distinguish *what is the case* from *what ought to be the case*. *It is* the case that Peter's car is parked on the yellow line. However, according to the law, that *ought not to be* the case. Similarly, even if it *is not* the case that Loise has paid the rent, according to the law, she *ought to* have paid it.<sup>21</sup>

The two cases just mentioned – the parking on the yellow line and the non-payment of the rent – although apparently similar, are actually different. While the first is an event that the law forbids, the second is an event that the law prescribes. However, that is not all. As the careful reader has already noticed, in the first case the event

---

<sup>18</sup> Willard V.O. Quine (1948), *On What There Is*, Review of Metaphysics, 2, 21–38, p. 21.

<sup>19</sup> In this work, I use the term "event" in a general sense, considering actions as a particular type of event. This approach is not a philosophical choice, but a simple terminological convention, consistent with current practice.

<sup>20</sup> In this regard, starting from the work of Davidson, a long tradition in philosophical literature holds that the distinction between objects and events is central to our way of speaking. Cf. Donald Davidson (1980), *Essays on Actions and Events*, Oxford, Clarendon Press.

<sup>21</sup> The bibliography on the distinction between *is* and *ought to* is truly enormous. Since I cannot mention in this work even a small fraction of the fascinating works of all those authors who, starting from Hume's *Treatise of Human Nature*, have engaged in the study of the is/ought problem, I mention only the following works: David Hume (1738), *A Treatise of Human Nature*, Oxford, Clarendon Press, 1975; Surya P. Sinha (1976), *The Fission and Fusion of Is-Ought in Legal Philosophy*, Villanova Law Review 21: 839–859; Brian Bix (2000), *On the Dividing Line between Natural Law Theory and Legal Positivism*, Notre Dame Law Review 75: 1613–1624; Jonathan St. B. T. Evans and Shira Elqayam (2018), *How and why we reason from is to ought*, Synthese, <https://doi.org/10.1007/s11229-018-02041-4>.

(1) Jessica's parking of the car on the yellow line

seems to have actually happened. In the second case, the event

(2) Louise's payment of the rent

did not happen. It should have happened, but it did not. On closer inspection, unlike the first case, where one is dealing with an event that happened (the car parked on a yellow line), in this second case, one is dealing with what appears as an event that did not happen (the rent, in truth, was not paid).

This is not the place to deepen this distinction – which is addressed in the continuation of this chapter. However, it is important, even at this stage, to note how in both (1) and (2) something does not go as the law would like: in the first case, the forbidden event occurs; in the second, the prescribed event does not occur. Actually, it is precisely the circumstance of something not going as it ought to – or of something going as it ought not to – that seems to attract jurists.

In other words, it is the discrepancy between the vast world of all possible events and the small world of events prescribed or prohibited by law that seems to move the interest of legal practitioners. Here, we have two separate and interconnected worlds.

### 1.1. The two worlds

When, in 1921, Ludwig Wittgenstein's *Tractatus Logico-Philosophicus* was first published, it certainly did not go unnoticed. This is because, among other things, the Austrian philosopher «sees the world as consisting of facts [...], rather than the traditional, atomistic conception of a world made up of objects».<sup>22</sup>

This way of seeing the world, however, would not have upset pragmatic jurists, who are used to reasoning through *facts*. In truth, a self-respecting jurist would probably add a consideration according to which once one accepts that

---

<sup>22</sup> Anat Biletzki and Anat Matar (2018), item "*Ludwig Wittgenstein*", *The Stanford Encyclopedia of Philosophy*, URL = <https://plato.stanford.edu/archives/sum2018/entries/wittgenstein/>.

1\*. The world is all that is the case<sup>23</sup>

one should also accept that

⊥1\*. Not all that is the case ought to be the case.

Of course, in the world, there are events such as a phone ringing or a sneeze for which no one would consider establishing how they ought to be – they are, so to speak, irrelevant, or at least legally irrelevant. However, there are also events, such as the stab inflicted by Brutus to Caesar which ought not to happen at all. They surely could happen and actually do happen. However, it is precisely because events like these happen that those who govern the community enact rules that ban those events whenever they think that those events should no longer happen.<sup>24</sup>

Moreover, alongside rules that prohibit something, rules often impose something to realize a specific legal effect. Consider, for example, the rules governing the transfer of ownership. If a Martian arrived in Rome 2,000 years ago, he would have seen eight men (one of them holding scales) and a very strange scene. One of those men, in fact, would have taken something, said something, hit the scales with a piece of bronze, and finally given that piece of bronze to another man.<sup>25</sup> But if the same Martian landed in Rome today, he would probably see one individual propose something to another individual, who would accept the proposal.<sup>26</sup> In both cases, if the Martian were to ask a passerby from that place – and that time – what he were seeing, he would be told that he was

---

<sup>23</sup> Ludwig Wittgenstein (1921), *Tractatus Logico-Philosophicus*, trans. David F. Pears and Bernard F. McGuinness, London, New York, Routledge, 2001, p. 5. It is interesting, and certainly not irrelevant, to note how one of the most essential (Italian) translations of Wittgenstein's work was made by a philosopher with an important legal background: professor Amedeo G. Conte. In this sense, Cf. Ludwig Wittgenstein (1921), *Tractatus Logico-Philosophicus e Quaderni 1914–1916*, trans. Amedeo G. Conte, Torino, Einaudi, 2009.

<sup>24</sup> This is a particularly exciting topic. However, since the goal of this work is certainly not to propose a theory concerning the notion of power, I can only admit that I wish to deal with these issues in future work.

<sup>25</sup> The event described is nothing but a careless reformulation of the *mancipatio* – which, according to Roman law, was the solemn act of transfer of ownership of things called *res mancipi* – described by Gaius in this way: «There are brought together not less than five witnesses, adult Roman citizens, together with another of the same status, who holds bronze scales and is called the ‘scale-holder’. The person who is taking by mancipation, while holding the object says the following words: ‘I declare that this man is mine by quiritary right and let him be bought to me with this bronze and bronze scales’. Then he strikes the scales with the bronze, and gives it to him from whom he is taking by mancipation by way of price». Gaius (168–180) *The Institutes of Gaius*, trans. William M. Gordon and Olivia F. Robinson, London, Duckworth, 1988, pp. 79–81. For the original Latin text, Cf. Gaius 1.119

<sup>26</sup> The Martian could also have seen other scenes, such as a person in front of a cashbox exchanging some small rectangles of colored paper with another person behind the cashbox for fruit, vegetables or meat.

witnessing a transfer of ownership. The Martian would be slightly confused since the witnessed events would seem very different to him – and indeed they are. Nonetheless, both actions would have been suitable to transfer the ownership of an object in Rome – in two different periods of time.

Therefore, once told how the law prohibits certain actions and prescribes other actions, a jurist could conclude that the law has a particular dual function: on the one hand, it removes something (such as murder, theft, etc.) from the world by prohibiting certain behaviors, and on the other hand, it adds something to the world (such as the transfer of ownership, rent, etc.) that otherwise would not exist. To be precise, not the law, but the will of those who produce it adds or removes something from the universal catalog.<sup>27</sup> In any case, the question is whether a rule of any kind can add or remove anything from the catalog of all that there is in the world.

To answer this question, suppose that one day the Italian Parliament enacts a law that prohibits bathing in Lake Garda. A I formulation of this rule could be the following:

R<sub>1</sub>: Bathing in Lake Garda is prohibited.<sup>28</sup>

Could this rule make it impossible to bathe in Lake Garda? In other words, Could R<sub>1</sub> remove events like

(3) Marco takes a bath in Lake Garda

from the universal catalog?

---

<sup>27</sup> In this work, "universal catalog" refers to a list of what is around us and to which we usually refer when we speak or when we plan our actions. It is, in other words, a catalog of everything that exists, has existed and perhaps may exist in the future. For a more in-depth description of the universal catalog, Cf. Achille C. Varzi (2001), *Parole, Oggetti, Eventi e altri argomenti di metafisica*, Roma, Carocci, 13–19. As far as I know, the first author to use this metaphor was likely Charlie Broad. Cf. Charlie D. Broad (1923), *Scientific Thought*, London, Routledge & Kegan Paul, p. 242.

<sup>28</sup> This rule is not only naive, but it could be an example of what John Austin called "imperfect laws" – laws prescribing or prohibiting action but without sanctions [Cf. John Austin (1832), *The Province of Jurisprudence Determined*, London, John Murray, pp. 23–24]. In this regard, one must note how the relationship between rules and sanctions was – and in a certain sense remains – a much-debated topic. In this sense, on the one hand, Kelsen criticized Austin's fervent emphasis on command and sanction, preferring to focus on the fact that, in his opinion, legal norms are addressed primarily to officials [Cf. Hans Kelsen (1960), *Pure Theory of Law 2nd Ed.*, Max Knight (ed.), Clark, The Lawbook Exchange LTD, 2005]. On the other hand, Hart criticized both Kelsen and Austin, stating that coercion is not a central feature of law [Cf. Herbert L. A. Hart (1994), *The Concept of Law 2nd Ed.*, Oxford, Clarendon Press]. This last idea is also accepted by today's Kelsenian scholars, provided that what matters most is not whether particular legal norms are coercive but whether, by containing coercive norms, the legal order as a whole is coercive.

If the answer to these questions were yes, it would be natural to raise some other questions such as how this ban makes it impossible to bathe in Lake Garda. If no one knew of the existence of this rule – or if someone confused Lake Garda with Lake Como – would  $R_1$  still prevent anyone from bathing in Lake Garda?

If one believes that a rule can physically prevent the occurrence of an event, he or she could have some trouble demonstrating the direct physical influence of a rule on the flow of events. Of course,  $R_1$  could influence people's behavior and prevent them from bathing in Lake Garda, but it is not the rule in itself that makes it impossible to bathe in Lake Garda; it is the rule's observance. In this sense, then, it would make no sense to assume that just because a certain rule prohibiting a certain action exists, that this action will not occur. The prohibited action could still occur: it would "only" be unlawful. The law, indeed, does not act in the domain of what is possible (*posse*) but in the domain of what is lawful (*licere*).<sup>29</sup> In this sense, then, events such as murders, robberies or theft will continue to happen even if prohibited by law. They do not disappear, so to speak, from the list of everything that happens in the world. On the contrary, it is perfectly possible for them to happen. However, since according to the law they are unlawful, they could be – and should be – included in another catalog as well: the catalog of everything that happens in the legal world.

On closer inspection, there is no guarantee that the best strategy to prevent the occurrence of an event involves legislation. Sometimes, the best strategy is to physically prevent the occurrence of an event (e.g., road bumps to ensure that no vehicles travel at high speed in town) or make it economically unfavorable (e.g., increasing the price of the products from which synthetic drugs derive to discourage their use).<sup>30</sup>

---

<sup>29</sup> On this issue, Cf. Francesco Zanetti (2017), *I limiti del diritto. Aspetti del dibattito contemporaneo*, Rivista di filosofia del diritto, VI, numero speciale, 25–40.

<sup>30</sup> According to Lessig's pathetic dot theory, there is more than one way to constrain our actions. In this sense, he has identified four modalities that constrain our actions: the law, social norms, the market and architecture: «These modalities function together. Some might undercut others, meaning that the sum of protections might seem to be less significant than the parts. The 'right' to promote the decriminalization of drugs in the present context of the war on drugs is an example. The law protects your right to advocate the decriminalization of drugs [...] But that legal protection does not mean that I would suffer no consequences for promoting legalization of drugs. My hometown neighbors would be appalled at the idea, and some no doubt would shun me. Nor would the market necessarily support me [...] and even if I were permitted to advertise, I am not George Soros. I do not have millions to spend on such a campaign. [...] Finally, architecture wouldn't protect my speech very well either. In the United States at least, there are few places where you can stand before the public and address them about some matter of public import without most people thinking you a nut or a nuisance». Lawrence Lessig (2006), *Code: version 2.0*, New York, Basic Books, pp. 234–235. This theory may also apply in the opposite direction. Indeed, it is also possible to promote certain types of behaviors through the law, social norms, the market or architecture.

On the other hand, with regard to rules that impose some behavior, since events such as the transfer of property or a wedding can be described without any legal terminology, someone could say that those events should not be added to the universal catalog for the simple reason that they are already there. In other words, adding such an event would not be an addition of some new event, but rather the inclusion for the second time of the same event. I personally do not agree with this last point of view. I admit that an event such as

(4) The conclusion of a contract between John and Jack

seems to be the same event as that described below:

(5) John says something to Jack, and then Jack says something to John.

And in truth it is. However, in this case, one may reasonably wonder what, in a sense, comes first – conceptually, not chronologically – between event (4) and the actions described in (5). Let me explain: event (4) would not have occurred if event (5) were not possible. At the same time, John and Jack are free to propose and accept everything they want, even without any provision legally governing the conclusion of a contract. It is true that event (4) and event (5) are exactly the same event described differently. Yet, it seems reasonable to wonder whether event (4) would have happened without a legal rule governing the conclusion of the contract. Perhaps event (5) would have happened anyway. Perhaps John still would have proposed something that Jack would have accepted. But certainly, without a rule able to establish what a contract is and how to conclude it, event (5) could not have existed – notwithstanding event (4).

I hence believe that, at least in some cases, although prescribed actions – imposed by legal rules – may not add anything to the universal catalog because they are actions that could still occur even if not imposed by any law, they certainly add something new in the legal catalog. That something, as we shall see, produces its effects even here, in this world.

In this sense, then, events prescribed or prohibited by law are neither removed from nor added to our universal catalog because when a legal rule prescribes or forbids something, it is simply operating in the catalog of another world: the legal world.

## 1.2. The other world

Some readers might be confused to hear about the existence of a legal world. After all, events such as my best friend's wedding or my payment of taxes occur right here, in this world. This raises the question of why we must talk about a mysterious legal world.

In this regard, let me be clear: when I talk about the legal world, I certainly do not mean a world inhabited by mysterious entities and discovered by someone. It is not, in fact, through the use of a telescope, however great and mighty, that the legal world is discovered.<sup>31</sup> On the contrary, legal events often happen not far from us. The aforementioned marriage of my best friend, for example, took place two days ago in the city hall of my town of residence. Therefore, where is this legal world? The answer is very simple: it is right here.

Let us return to event (5). This is certainly an event that provides some information. The event occurred in the "ordinary world",<sup>32</sup> and it involved two persons: John, who proposed something to Jack, and Jack, who accepted precisely that something. However, even those who have little knowledge of the law know that (5) could be a rough description of legal event (4).<sup>33</sup>

What, then, distinguishes event (4) from event (5)? Are they the same event? Of course, we can be sure that event (5) happened. In other words, it exists or, rather, has existed. However, what can be said of (4)? Has it happened, too? And, if it happened, is it identical to event (5)?

The very notion of existence, indeed, is deeply connected with the notion of identity. Actually, one might even think of characterizing the first notion through the second notion: the existence of a certain entity A is equivalent to asserting that something is identical to A.<sup>34</sup> Of course, in the previous section, I wrote that event (5) may have

---

<sup>31</sup> In this case, explicit reference is made to the Kripke's work titled *Naming and Necessity*. In that work, he writes, «'Possible worlds' are *stipulated* not *discovered* by powerful telescopes». Saul Kripke (1980), *Naming and Necessity*, Cambridge, Harvard University Press, p. 44.

<sup>32</sup> In this work, I opt to use the term "ordinary world" to refer to everything that makes up reality around us – a world in which events may be described in terms of "thing-language" or "brute regularity". On this point, Cf. Rudolf Carnap (1936), *Testability and Meaning*, Philosophy of Science, 3, 419–471, p. 466; John R. Searle (1969), *Speech Acts. An Essay in the Philosophy of Language*, Cambridge, Cambridge University Press, pp. 50–53.

<sup>33</sup> According to contract law, that something cannot be, so to speak, anything. However, for the sake of this work, I take for granted that something is something legitimately according to contract law. For a general introduction to contract law, Cf. Jan M. Smits (2017), *Contract law: a comparative introduction 2<sup>nd</sup> Ed.*, Cheltenham, Edward Elgar. For a more specific introduction to Italian contract law, Cf. Francesco Galgano (2011) *Il contratto 2<sup>nd</sup> Ed.*, Padova, CEDAM.

<sup>34</sup> Cf. Achille C. Varzi (2008), *Metafisica*, Roma, Laterza, p. 71.

occurred because both John and Jack wanted to make event (4) happen. In other words, they wanted to conclude a contract and not simply say something to each other. However, on the balance, one could argue that these are not two identical events but rather the same event described differently. Event (4) and event (5) are ultimately the same event, which makes all the difference in the world(s).

There is, in fact, a fundamental premise that should be considered: this work adopts a realistic position regarding such issues. This assumption is sometimes called “realism”, or even “metaphysical realism”. The idea is very simple: in Lowe’s words, «*Metaphysical realism* is the view that most of the objects that populate the world exist independently of our thought and have their natures independently of how, if at all, we conceive of them». <sup>35</sup> The same principle applies to events: many of our representations of events – though not all – can be true or false depending on whether they correspond or do not correspond, respectively, to certain characteristics of reality.

At this point, one might be led to think that if reality is one, there should also be only one way to investigate and represent it. After all, if a Martian (without any legal or social terrestrial knowledge) were to observe the event just mentioned, he certainly would not describe it as event (4). Not knowing the law, how could he? Furthermore, not having any human legal or social knowledge, he would not even understand those pieces of colored paper exchanged by people around him in return for just about anything (food, drinks, clothes, etc.) or why many young people daily visit a certain building to hear another human talking for a few hours. Yet, things such as contracts, money or universities are part of our everyday human experience. The natural sciences do not seem able to give us an exhaustive explanation of these phenomena. Indeed, these phenomena do not seem to be analyzable exclusively in terms of physical objects consisting of particles that interact with each other within force fields. <sup>36</sup>

Of course, one could describe the conclusion of a contract as a simple verbal exchange between two people. After all, this is what really happens in the ordinary world. However, this description would neither tell us what the conclusion of the contract really is nor explain the idea of a contract – or the ideas of the legal meaning of proposal and

---

<sup>35</sup> E. Jonathan Lowe (2008), *Essentialism, Metaphysical Realism, and the Errors of Conceptualism*. *Philosophia Scientiae*, 12, 9–33, p. 9.

<sup>36</sup> Cf. Paolo Di Lucia and Lorenzo Passerini Glazel (2019), *La realtà è una sola, ma le ontologie sono due*, in John R. Searle, *Il mistero della realtà*, Raffaello Cortina Editore, Milano, IX–XXIV, p. X.



acceptance.<sup>37</sup> Terms such as these – and related notions – belong to another world: the legal world.

To explain what I mean by the legal world, I start with a brief analysis of the thought of John Searle. The American philosopher, in fact, has introduced the notion of the “social fact”, defining it as «any fact involving collective intentionality of two or more human or animal agents».<sup>38</sup> He has also pointed out how some social facts consist, in truth, in assigning certain functions to certain people or certain objects. Of course, in this way, all the functions are considered as observer-related. However, what is most surprising is that among the various functions that can be assigned to an object or person are some that cannot be performed solely by the physical structure of the object or person. In this regard, the most famous example that Searle has proposed concerns those small pieces of colored paper that each of us keeps inside a wallet. Each is just a piece of paper, and people find these scraps interesting only because they are money. The money is such because we have assigned the status of money to those types of objects. In other words, it is not that some pieces of paper perform the function of money because they are cut in a certain way, have a certain size or feature a particular color. They perform the function of money by virtue of the collective acceptance that those pieces of paper have the status of money.<sup>39</sup>

Hence, when there is an assignment of status and a corresponding function, there is what Searle calls a “status function”. This particular type of function, generally performed independently of the physical structure, is created from a “constitutive rule” through a very simple operation: the operation through which we count something as equipped with a certain status – and a certain function, which can only be performed by virtue of the collective acceptance of that status by the community.<sup>40</sup> In a general form, a constitutive rule appears as follows:

X counts as Y in context C. <sup>41</sup>

---

<sup>37</sup> This suggests that the description of an event has a certain importance. In the continuation of this work, the theme of the description of events is widely discussed.

<sup>38</sup> John R. Searle (2008), *Philosophy in a new century: selected essays*, Cambridge, UK, Cambridge University Press, p. 32. For an introduction to the notion of social facts, cf. Margaret Gilbert (1989), *On Social Facts*, Princeton, Princeton University Press. For a recent study on the concept of collective intentionality, Cf. Raimo Tuomela (2013), *Social Ontology: Collective Intentionality and Group Agents*, New York, Oxford University Press.

<sup>39</sup> For an in-depth analysis of this example concerning money, Cf. John R. Searle (2017), *Money: Ontology and Deception*, Cambridge Journal of Economics, 41, 5, 1453–1470.

<sup>40</sup> Cf. John R. Searle (2019), *Il mistero della realtà*, Raffaello Cortina Editore, Milano, pp. 207–220.

<sup>41</sup> John R. Searle (1995) *The Construction of Social Reality*, New York, Free Press, p. 28. One might be surprised to discover how the formula just mentioned has changed over the years. Searle himself has

Now, let us stop for a moment without going any further in Searle's thought – which, indeed, is much more articulated and complex – to collect our thoughts.

Until now, the analysis of the thought of this important American philosopher has revealed how the status function, according to Searle, refers mostly to persons and objects. However, since the beginning of this chapter, I have argued that our world not only is composed of the totality of people and objects that inhabit it, but also contains everything that happens to these people and objects.

There are even some philosophers «who conceive of objects as four-dimensional entities that extend across time just as they extend across space».<sup>42</sup> Hence, one might even go so far as to think of a physical object simply as «the whole four-dimensional material content, however sporadic and heterogeneous, of some portion of space-time» such that one can treat physical objects as «processes, happenings, events».<sup>43</sup> However, even wanting to pursue a different conception of events, people and objects, I personally think that imagining a world in which nothing ever happens is very difficult.<sup>44</sup>

Thus, taking for granted the presence of events in our world, one might wonder if status functions can also be assigned to events. The answer, in my opinion, should be positive. We do so continuously, and not only with regard to the legal world. Consider, for example, the following rule of chess:

---

admitted that there are some apparent counterexamples that, in recent years, have led him to change the original form to a more general form according to which we create a Y. With this new form, in other words, we ensure that there is a Y, namely, a status function. This operation consists of what Searle has called the "declaration of the status function". Cf. Searle, *Il mistero della realtà*, cit. pp. 227–238.

<sup>42</sup> Roberto Casati and Achille C. Varzi (2014) item "Events", *The Stanford Encyclopedia of Philosophy*, URL=<https://plato.stanford.edu/entries/events/>.

<sup>43</sup> William W. O. Quine (1986), *Philosophy of Logic 2<sup>nd</sup> Ed.*, Cambridge, Harvard University Press, p. 30.

<sup>44</sup> Actually, the topic is more complex than one might think. Since ancient times, indeed, the answer to one of the central questions in ontology – "What is there?" – has created intense and still unresolved debates. There is disagreement, for example, about the existence of abstract entities and about the existence of entities such as events or behaviors. However, there is also disagreement about the reality of mental states and the existence of supernatural entities (such as God) or universal entities (such as types, properties or relationships). Moreover, even if we agree on the existence of some entity, such as objects, it is one thing to agree on the existence of these entities; it is quite another thing to provide a precise metaphysical connotation – that is, a characterization of their nature and their conditions of identity. The latter is a task that can be pursued by philosophers of different orientations with contrasting formulas and methods. For a general introduction to this topic, cf. Achille C. Varzi (2005), *Ontologia*, Roma, Laterza; Reinhardt Grossmann (1992), *The existence of the world: an introduction to ontology*, London, New York, Routledge.

$R_c$ : A king is in checkmate if it is in check, the opponent's piece that has the king in check cannot be captured, the check cannot be blocked and the king cannot move to a square that is not under attack.<sup>45</sup>

This is, without a doubt, a constitutive rule in Searle's sense. One could even rewrite it as follows:

$R_c'$ : The king being in check, the opponent's piece that has the king in check being immune to capture, the check being impossible to block and the king being unable to move to a square not under attack *counts as* the king in being checkmate *in the context* of chess.

Of course, when written in this way, the rule, albeit clear, sounds strange – indeed an  $R_c$  formulation is preferable. Anyway, whatever its formulation, this rule, if known, can lead us to say that the following

(8) The move with which Erika places the queen so that Liam's king is in check, Erika's queen cannot be captured, the check cannot be blocked and Liam's king cannot move to a square that is not under attack

could be described as

(9) Erika checkmates Liam.

To realize that event (8) is a checkmate – and thus, the same event described in (9) – one must first know the rules of chess. However, there is no guarantee that one will recognize event (8) as a checkmate even if he or she knows the game of chess and its rules – in this sense, to know the rules of chess could be a necessary condition, but not a sufficient condition. I would like to be very clear on this point: the existence of constitutive rules such as  $R_c$  (or  $R_c'$ ) does not allow one to state with absolute certainty that event (8) is a

---

<sup>45</sup> This is my reformulation of what Burges wrote: «Checkmate occurs when the king is attacked and there is no way of stopping the attack (whether by taking the attacking piece or putting something in the way), and all of the king's possible flight squares are either attacked by enemy pieces or blocked by 'friendly' pieces». Graham Burges (2010), *The Mammoth Book of Chess*, Philadelphia, Running Press, p. 14.

checkmate. For example, Erika and Liam may not be playing chess but simply randomly moving their pieces.

This last consideration also applies to the legal world. Consider, for example, the following rule:

R<sub>2</sub>: The contract is concluded when the person making the proposal is aware of the acceptance of the other party.<sup>46</sup>

This rule clarifies why it is possible to argue that event (4) is the same event described in (5) according to R<sub>2</sub>. Furthermore, it appears equally clear why our Martian friend, not knowing the rule, could not have known that event (5) could have counted as event (4) in the context of the legal world. What, then, is the legal world?

In our ordinary world, events happen or do not happen. It happened that the sun rose this morning at 5:01 a.m. in Košice, just as it happened that someone shot John F. Kennedy in Dallas on November 22, 1963 at 12:30 p.m. On the other hand, many events have not happened: some of these could have happened, but have not – they constitute a sort of «unactualized possible»<sup>47</sup> events. Others, instead, could never have happened – they are “impossible events”. These negative events are thoroughly analyzed in the course of this work. For the moment, however, we focus on what has happened, rather than on what has not happened.

I would like to underline how, among all events that happen, there are events caused by human beings – such as the Kennedy assassination – and events not caused by human beings – such as the sunrise. Surely, if a human being has no influence whatsoever on the occurrence of an event, it would make no sense to legislate about that event. It would not make sense, for example, to legislate a rule forbidding the sun to rise before 10 a.m. on Sundays in August.<sup>48</sup>

In contrast, it does make sense to legislate on all those events in which the behaviors of human beings are fundamental. According to the law, indeed, there are events that ought to happen and events that ought not to happen. If a legislative body considers that an event caused by a specific human behavior ought no longer to happen, then it declares that

---

<sup>46</sup> This is the translation of the first section of Article 1326 of the Italian civil code. However, it is a principle widespread in many legal systems.

<sup>47</sup> Quine, *On What There Is*, 22.

<sup>48</sup> For a first look at the issue of impossibility in the legal world, Cf. Guglielmo Feis (2015), *Impossibilità nel diritto*, Pisa, Edizioni ETS.

particular human behavior prohibited by law. Conversely, if it considers that an event caused by a specific human behavior ought to happen precisely because of that behavior, then it declares that particular behavior imposed by the law. The legislative body declares its will regarding these events through legal rules: some of these forbid something, and others impose something else.

On closer inspection, however, to prohibit a behavior and to prescribe it do not sound so different. The reason is that to prohibit something means nothing more than to prescribe any non-prohibited behavior. Therefore, if, for instance, a rule states that

R<sub>3</sub>: Behavior p is *prescribed*,

according to this rule, one must maintain behavior p. However, if a rule states that

R<sub>4</sub>: Behavior p is *forbidden*,

According to this rule, one must maintain a  $\neg p$  (not p) behavior, which means that, according to R<sub>4</sub>, one could maintain any behavior except p (q, z, etc.).

Moreover, legal practice demonstrates that other types of rules are also possible. Actually, not all legal rules prescribe or prohibit human behavior – or, more generally, they do not deal with human behavior. Some, for example, repeal certain rules, and some others confer certain powers.

The legal world is therefore not perfectly specular to the ordinary world. This is because, on the one hand, there is no guarantee that an event of the ordinary world has some sort of relation with the legal world and, on the other hand, there are events in the legal world (such as a legislative repeal) that have nothing to do with our natural world. Therefore, seemingly the only thing that all the norms have in common is their use of a performative

language.<sup>49</sup> The performativity, indeed, seems to be a fundamental property of all legal rules, as each norm can be conceived as a linguistic act producing legal effects.<sup>50</sup>

However, the legal world is not just a question of norms. First, it is a world in which the notions of time and space are important and well known. The law, indeed, seems for all intents and purposes to be a social and cultural phenomenon. In this sense, it is part of that set of social and cultural phenomena such as language, knowledge, rules of living and the quality of the products of human activity that, on the whole, represent human culture. However, just as the human community does not speak a single language, it does not observe a single law. Consequently, we prefer to talk about human cultures and laws, instead of human culture and law. However, this creates a kind of paradox: if one of the purposes of language is to allow everyone on earth to communicate, it is paradoxical that different languages exist. Likewise, if one of the purposes of the law is to provide for the equal and predictable resolution of conflicts, it is paradoxical to realize that similar conflicts have different legal solutions depending on where they arise. This situation is possible because, just like the natural world, the legal world is politically divided. Not all events that happen in the ordinary world have the same relation with the legal world: for example, the same event in the ordinary world may be considered a legally binding marriage in one place, but have no legal value within a few kilometers of that location. Similarly, actions suitable to legally transfer the ownership of an object a few centuries ago may have no legal value today (this is the case, for example, with the *mancipatio*, previously mentioned). The reason is that the legal world changes over time, just as it changes in space. So, where is, in the end, this legal world?

As I have already mentioned, I believe that it is located in the ordinary world. In this sense, suppose I went to the tax office yesterday and paid my taxes. To speak plainly, I have done nothing but hand over a sum of money to an employee of the revenue agency. Yet, in that place and at that moment, I paid my taxes. The legal world, in other words, is

---

<sup>49</sup> The notion of performativity is more complicated than it may seem at first sight. This is primarily because this concept seems to have more than one application in diverse fields of knowledge, including law, linguistics and philosophy. Starting from the speech acts theory developed by John Austin in his well-known book titled *How to do things with words* [Cf. John L. Austin (1962), *How to do things with words*, Cambridge, Harvard University Press, 1975] this theory entered into the legal field also thanks to the works of John Searle [Cf. John R. Searle (1979), *A Taxonomy of Illocutionary Acts*, Minnesota Studies in the Philosophy of Science, 7, 344–369; ID. (1989) *How Performatives Work*, Linguistics and Philosophy, 12, 535–558]. For an application to the legal field, Cf. Gaetano Carcaterra (1974), *Le norme costitutive*, Milano, Giuffrè; ID. (1979), *La forza Costitutiva delle norme*, Roma, Bulzoni.

<sup>50</sup> In this regard, the perspective of Carcaterra seems very interesting. In his work titled *Le norme costitutive*, he indeed points out how a legal rule cannot fail to have, in addition to possible and more or less direct practical effectiveness, legal efficacy. Cf. Carcaterra, *Le norme costitutive*, cit., 118.

not placed in a transcendent beyond or in the unlocalized space of a utopia but is immanent in the world. It is, so to speak, in and between what is in the world. Hence, if one wishes to compile a catalog of everything that happens in the legal world, one must pay attention to time (should we include in the catalog everything that happens in this historical period? Or, should we also include everything that already happened?) and space (should we include in the catalog only what happens in a given territory? Or, should we also include what happens in all legal systems?) where certain events in the world occur.

Second, everything that happens in the legal world is *observer-relative*. There is nothing mysterious about this. In our common experience, certain concepts are frequently introduced on the basis of conventional definitions. Events such as the attacker's offside, items such as the ace of spades, properties such as to be two meters tall, relationships such as to be someone's godfather and roles such as point guard – they all are conventional concepts. For each, there is a rule that simply establishes what they are. Problems arise when we move from concepts to their existence. As I have said, no legal rule has the magical power to add or remove anything from the catalog of what exists in the ordinary world. However, no one could deny that in the ordinary world are things that exist only because human beings conceive of them as such. Consider, for example, artifacts: we can define them as objects created by human beings. We know for certain that when these objects are materials, they have properties that are certainly not attributable to the properties of the raw materials that compose them. For example, although Michelangelo's *David* is made of marble, it could not be reduced to a simple marble sphere and remain *David*. Indeed, as an artifact, *David* has relational properties that the marble of which it is composed does not have: properties dependent on the relationship between an artwork and the human beings intended as users that are sensitive to changes in shape.<sup>51</sup> In short, an artifact may exist only because human beings believe that it exists: it depends, so to speak, on the intentional states of human beings.<sup>52</sup>

---

<sup>51</sup> The example of *David*, as well as some of the ideas presented in the last lines, is from the interesting work of Corrado Roversi. Cf. Corrado Roversi (2012), *Costituire. Uno studio di ontologia giuridica*, Torino, Giappichelli, pp. 99–100. For a discussion on the philosophical debate concerning the concept of material constitution, see Michael C. Rea (1997) *Material Constitution: A Reader*, New York, Rowman & Littlefield.

<sup>52</sup> In this case, the notion of "intentionality" concerns the ability of human mental states of referring to something – in other words, to have something as an object. For this reason, intentionality is sometimes also described as "directionality". In other words, the mental state always "directs" itself towards something, and this something is its content. In this sense, Cf. Corrado Roversi (2016), *Intenzionalità collettiva e realtà del diritto*, in Giorgio Buongiovanni, Giorgio Pino e Corrado Roversi (Ed.), *Che cosa è*

However, the modalities of this dependence may vary. In the case of material artifacts, once created, they exist in space and time until their disintegration. It does not matter if, over the course of time, they lose the function for which they were conceived. A hammer, for example, would continue to exist even if no one remembered why it was created – after all, today there are many artifacts whose functions have been lost over time. The situation regarding rules forming the legal world, however, is different. They are abstract artifacts in all respects, and in this sense, they seem to need a form of constant dependence on the intentional states of human beings. If we forget their function or we simply begin to consider them ineffective or obsolete, nothing remains of those rules: neither what they contributed to constituting, nor the rules themselves. One can say that events in the ordinary world have also occurred in the legal world if and only if an observer believes that they have also occurred in the legal world – just as no effect prescribed by a legal rule can have any consequence in the ordinary world if no one “makes it happen”. In other words, people rarely go on their own initiative to prison just because there is a rule that states that if someone commits a crime punishable by imprisonment, that person must be punished by imprisonment. Indeed, once convicted, that person is more likely to be taken to prison against his or her will.

Third, the legal world is primarily a world of events, rather than persons. I am not arguing that there should be no people in a hypothetical catalog of all there is in the legal world. I am perfectly aware that people such as public officers, presidents and judges are part of the legal world. Yet, there is something strange about these people. Suppose somebody said, «The President of the United States was Eisenhower in 1955, Johnson in 1965, and Ford in 1975». No one is saying that there is a person, called the President of the United States, who «was identical with Eisenhower in 1955, with Johnson in 1965, and with Ford in 1975».<sup>53</sup> What is meant by that sentence is that in three different historical periods, three different people have served as president of the United States. Each became president only because of an important event, regulated by legal rules, happened: victory

---

*il diritto. Ontologie e concezioni del giuridico*, Torino, Giappichelli, 255294, p. 256. For further information, see Alberto Voltolini and Clotilde Calabi (2009), *I problemi dell'intenzionalità*, Torino, Einaudi.

<sup>53</sup> Roderick M. Chisholm (1976), *Person and object: a metaphysical study*, London, G. Allen & Unwin, p. 93. Curiously, it is also possible that as Chisholm has pointed out, «different official personages may be one and the same man: Possibly an illustration would be: 'The fire-chief isn't the same personage as the Sunday-school superintendent (for one is charged with putting out fires and the other with religious instruction); yet Jones is both.' But here one seems to be playing loose with 'isn't', for what one has in mind, presumably, is something of this sort: 'Being the fire-chief commits one to different things than does being the Sunday-school superintendent, and Jones is both». *Ibidem*, p.95.



in the presidential election. And this is precisely the point: people like the president of the United States, public officials or even just contractual parties are such because something has happened in the legal world – respectively, victory in the elections, the passing of a public competition and the signing of a contract.

Finally, before going any further, one more clarification is needed regarding the legal world. One could be confused by this “world” and think that the legal world is ultimately nothing more than one of the many possible worlds.<sup>54</sup> This idea seems fascinating in a way. In this sense, one could argue that the legal world is a world in which things happen in a very precise way: a world in which people and events follow the legal rules – a world in which there are no murders, contracts are respected, taxes are paid, every driver always stops at red lights, no one enters theaters without tickets and so on. In this world, everything respects not only the physical laws of possibility but also the legal laws of lawfulness. The task of the lawyer, in this sense, would be to compare what happens in the world around us with what happens in the legal world. In our world, for example, Lara has not paid taxes, but in the legal world Lara has paid them.<sup>55</sup> The possible worlds, in fact, represent all the possible scenarios that we can imagine (and maybe some more). These certainly include the legal world as I have just presented it. However, there is something that does not convince me of the semantics of possible worlds. Here, I can only outline a few brief considerations in support of my reluctance in considering the legal world as one of the possible worlds.

First, the legal world is not a world where things can happen in a certain way, but rather a world where things ought to happen in a certain way. When we establish a legal rule, we are certainly not going to claim that because of that rule, there is a possible world in which that rule is respected. What we expect is for this rule to also be followed in our world – and not only in the possible world. In other words, we are not legislating for

---

<sup>54</sup> Contained in an embryonic stage, in the works of Wittgenstein [Ludwig Wittgenstein (1921), *Tractatus Logico-Philosophicus*, cit.] and Carnap [Rudolf Carnap (1946), *Modalities and Quantification*, *Journal of Symbolic Logic* 3, pp 420-471; ID. (1947), *Meaning and necessity, a study in semantics and modal logic*, Chicago, University of Chicago Press], possible worlds semantics has undergone very ample development since the end of the 1950s with the works of Kripke [Saul A. Kripke (1959), *A Completeness Theorem in Modal Logic*, *Journal of Symbolic Logic* 24, pp. 1-14; ID. (1963), *Semantical Considerations on Modal Logic*, *Acta Philosophica Fennica* 16, pp. 83-94] and Hintikka [Jaakko Hintikka (1961), *Modality and Quantification*, *Theoria* 27, pp. 119-138; ID. (1963), *The Modes of Modality*, *Acta Philosophica Fennica* 16, pp. 65-79]. For a historical reconstruction, see B. Jack Copeland (2002), *The genesis of possible worlds semantics*, *Journal of Philosophical Logic* 31(2) pp. 99–137.

<sup>55</sup> On the other hand, there is no reason to think that we are not talking about the same person. Indeed, as Kripke has pointed out, «[t]here is no reason why we cannot stipulate that, in talking about what would have happened to [Lara] in a certain counterfactual situation, we are talking about what would have happened to [her]». Saul Kripke (1980), *Naming and Necessity* cit., p. 44.

another possible world but for our world. Moreover, even if we want to express this position in a formal language in which certain expressions are defined in an unambiguous way through two symbols expressing, respectively, the concepts of necessity ( $\square$ ) and possibility ( $\diamond$ ), if we say that a certain event is possible, in the language of the theoretician of possible worlds we are saying that there is at least a world (a scenario) in which that event occurs. If we instead say that an event is necessary, in the language of the theoretician of possible worlds we are saying that in all the worlds we can imagine, that event occurs.<sup>56</sup> However, as I said, it is not a question of understanding whether a certain event is possible, but of determining whether it is lawful. Of course, one could rightly argue that a deontic reading of " $\square$ " as "is mandatory that" and of " $\diamond$ " as "is legitimate that" is more correct than an alethic reading of " $\square$ " and " $\diamond$ ".<sup>57</sup> After all, we are dealing with legal entities. However, in this way the legal world would appear to be an ideal (or "deontically perfect") world in which all obligations are fulfilled, and since the present world does not seem to be so – on the contrary, one can reasonably suppose that several unfulfilled obligations exist in our world – then one can say very little about the legal world. Indeed, in the case of "it is mandatory that" and "it is allowed that", by the fact that statement  $\alpha$  is true or false, one cannot conclude anything about the truth or falsehood of "it is mandatory that  $\alpha$ " or of "it is allowed that  $\alpha$ ". For example, even if it is true that "it is mandatory for Marco to pay taxes", it does not follow that Marco actually pays taxes.<sup>58</sup>

The legal world as outlined in this work, therefore, should not be considered as a possible world, but as a current world that is part of the articulated structure of our reality. It is, in a sense, a "space other" that dwells in the folds of what until now I have called the ordinary world: a counter-space that lies in the world around us and that simultaneously

---

<sup>56</sup> For a systematic formal presentation, Cf. Rod Girle (2003), *Possible worlds*, Montreal, McGill-Queen's University Press; ID. (2009), *Modal logics and philosophy 2<sup>nd</sup> Ed.*, Montreal, McGill-Queen's University Press.

<sup>57</sup> Actually, once one accepts the issues relating to the modalities of existence of the entities, it is quite instinctive to classify the various modalities in different categories and consequently the ways in which they are expressed. In this regard, we can mention, for example, the "temporal modalities" ("today", "now", "in 1988", etc.) that specify the way of being in time; the "epistemic modalities" ("to believe that", "to know that", etc.) that specify the way in which entities are thought of; the "deontic modalities" ("it is mandatory that", "it is allowed that", etc.), from the ancient Greek *δέον* (duty), which specify the moral way of being of entities; and the "alethic modality" ("it is possible that", "it is necessary that", etc.), from the ancient Greek *ἀλήθεια* (truth), which specify the way of being true of entities. Cf. Andrea Borghini (2009), *Che cos'è la possibilità*, Roma, Carocci, pp. 14.

<sup>58</sup> Cf. Achille C. Varzi (2010), *Kripke: modalità e verità*, in Andrea Borghini (ed.), *Il genio compreso. La filosofia di Saul Kripke*, Roma, Carocci Editore, pp. 23–78, 186–191; Marcello Frixione, Samuele Iaquinto and Massimiliano Vignolo (2016), *Introduzione alle logiche modali*, Roma, Laterza.

is out of it. This is because, although the legal world is in the ordinary world, it is not part of the ordinary world as one of its places or spaces: the legal world is included outside. Right now, for example, I am writing inside my own house. It is not just a simple building made of walls, doors, windows and a roof: it is my home; I own it. When I enter my house, I enter a building, but I also enter a space that, according to the law, is mine, and it is mine because, among other things, I concluded a building sales contract (that event occurred). I have powers, faculties and rights over it; I can legally do something to it and for it. Of course, I could take such actions even if there were no legal world, but in that case, they could be senseless or useless gestures.

In this sense, one could say that the other legal world has some traits in common with what Foucault calls “heterotopia”: «a sort of place that lies outside all places and yet is actually localizable».<sup>59</sup> However, as suggestive as this consideration may be, this is not the place to explore it.

Therefore, now that I have highlighted these characteristics of the legal world, there is nothing left but to start compiling the catalog of everything there is in it.

### 1.3. Perspectives and prejudice

Once one takes seriously the hypothesis that certain actions and events should be included in the catalog of what there is in the legal world, the variety certainly is not lacking: there are voluntary events (such as Brutus’s stabbing of Caesar) and involuntary events (such as the maneuver with which the driver hit a pedestrian), simple events (such as a gunshot) and complex events (such as the shareholder meeting of a public limited company), positive events (such as the signature of a contract) and negative events (such as the non-payment of taxes); it is a list that could go on for a long time.<sup>60</sup>

These last events, from the very first glance, clearly appear as legal events, even if the variety considered in itself is not specific to legal events only. Indeed, events like

(10) Peter’s kissing of Lara

(11) Brutus’s stabbing of Caesar

---

<sup>59</sup> Michel Foucault (1984), *Of Other Spaces: Utopias and Heterotopias*, in Neil Leach (ed.) (1997), *Rethinking architecture: a reader in cultural theory*, New York, Routledge, pp. 330–336, p. 332.

<sup>60</sup> For a list of the different types of events, Cf. Achille C. Varzi (2001), *Parole, oggetti, eventi e altri argomenti di metafisica* cit., p. 39-40.

are both voluntary events – meaning that Brutus wanted to stab Caesar as well as Peter wanted to kiss Lara. Nevertheless, while the first does not seem particularly interesting for the lawyers, the second seems to outline a case of attempted murder. The problem, therefore, is: what distinguishes legal events from all other events?

At first glance, the answer to this question seems pretty intuitive: legal events are ones that are in some way pointed out by a legal source. It does not matter what kind of legal source it is; what matters is that there is at least one law that refers to a specific event. This answer, however, is not at all obvious. Indeed, someone could argue (rightly) that this response is affected by a positivist point of view. In this case, positivism does not mean philosophical positivism, but rather legal positivism. The latter can be defined as follows:

Here we shall take legal positivism to mean the simple contention that it is no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.<sup>61</sup>

Consequently, if one identifies the law «with positive legal orders, rejecting any reference to preceding legal values»,<sup>62</sup> then it could be argued that only events described – or presupposed – by legal rules are legal events. In other words, it seems that for legal positivists, an event is to be considered a legal event not because it is intrinsically right or wrong, but just because it has been somewhat envisaged by a legal rule – enacted by those who have the power to enact it.<sup>63</sup>

Actually, a different answer could come from scholars of the natural law theory which, despite a recent revival, seems a long way from being free of criticism. The fundamental assertion of the theory of natural law, in fact, states that the authority of legal rules necessarily derives from moral considerations. Some of these considerations could exist independently of reason – they are not, so to speak, created by reason – but, certainly, all

---

<sup>61</sup> Herbert L. A. Hart (1994), *The Concept of Law 2nd Ed cit.*, pp. 185-186.

<sup>62</sup> Cees W. Maris and Frans C.L.M. Jacobs (ed.) (2011), *Law, order and freedom: a historical introduction to legal philosophy*, Dordrecht, New York, Springer, p. 15.

<sup>63</sup> This is, obviously, a perhaps excessive simplification of a very varied and complex philosophy of law which emphasizes the conventional nature of law. It is important that one is not misled by approaching only some of the most famous positivists' theorists – such as Bentham, Austin, Kelsen or Hart. Each theory has its own special insights. For a general introduction to the topics of legal positivism Cf. Matthew H. Kramer, (1999), *In defense of legal positivism: law without trimmings*, Oxford, Oxford University Press; William E. Conklin (2001), *The invisible origins of legal positivism: a re-reading of a tradition*, Boston, Kluwer Academic Publishers.

moral considerations may be understood by it. Therefore, events are to be considered legal events if they are intrinsically in accordance with a sort of universal moral principle, regardless of the existence or not of a rule.

Obviously, nowadays no one would dream of affirming that humans were born with any pre-determined ends. In recent years, however, some interesting fields of knowledge, like genetics or neuroscience, seem to suggest that the human race has certain innate characteristics which have led it to follow certain pre-determined patterns of behavior.<sup>64</sup> But, if we really act in this way, at least with regard to a certain set of our behaviors, would it make any sense to legislate on something that we are “constrained” to do by our nature? And above all, would there be any difference between legal and physical events? Admittedly, one could rightly argue that the difference lies in the fact that human beings have free choice and, then, legal events are the chosen one. In other words, human personal preference might constrain such a decision. According to natural law theorists, however, the only justification above the rational is the moral one. For this reason, they generally sustain that a person «should follow a pattern of behavior, in moral terms, because it is good».<sup>65</sup> But, unfortunately, that leads to another problem: how can identify the natural patterns of behavior which are morally good to follow?

Historically speaking, there were two different alternatives. Initially, natural law theorists founded the conception of the good on a superior entity who required people to do what is good – and who enacted laws. Subsequently (starting at least from the work of Grotius), they claimed that if it is possible to show that all men believe that a thing is good, then it is possible to claim that natural law is self-evidently good.<sup>66</sup> In this regard, we must immediately note how the first option seems to be a circular argument: we act in a certain way because we think it is good and we think it is good because we are obeying a superior entity and we are obeying a superior entity because it is good. That way, though, we got back to where we started: what is good? The conception of the self-evidence of good, instead, seems to be a sort of tautology according to which what everybody thinks is good is good.

---

<sup>64</sup> For a brief introduction to the relationship between new neuroscientific and genetic discoveries and Cf. Sommaggio, Paolo et al, (2017). *Cognitive Liberty. A first step towards a Human Neuro-Rights Declaration*, *Biolaw Journal* 3, pp. 27-45; ID, (2016), *Filosofia del Biodiritto. Una proposta socratica per società postumane*, Torino, Giappichelli.

<sup>65</sup> Michael Doherty (2001), *Jurisprudence: the Philosophy of Law*, London, Old bay press, p. 144.

<sup>66</sup> For a first short and reasoned path concerning the evolution of naturalist law thought, of the hierarchical order of the legislative sources, and of the concept of secularization of law Cf. Francesco Cavalla (2011), *All'origine del diritto. Al tramonto della legge*, Napoli, Jovene, pp. 161-199.

In addition to all this, it should also be added that it is not clear how a universal morality can coexist with individual morality. This is because to ignore one's own personal consciousness in order to obey some universal consciousness seems to be a contradiction. It is in fact universally known that a person can only know his or her own conscience, since it is not possible to objectively demonstrate the presence of universal moral norms. Moreover, even if one could prove the existence of universal morality, this would not prove that there is the duty to follow it.<sup>67</sup>

Similarly – but not too much – other authors who were well aware of the limits of natural law, as well as of legal positivism,<sup>68</sup> have tried to create what could be defined as a “mobile bridge” between fact and value.<sup>69</sup> The main purpose of the scholars of the “nature of the thing” (*Natur der Sache*)<sup>70</sup> is not the definition of a general concept obtained through progressive abstraction in higher concepts, but rather to discover the meaning of a legal institution starting from a concrete phenomenon. In this regard, authors such as Gustav Radbruch have argued that since the application of law means to subsume legal cases under legal propositions, it is possible to subsume only the concepts that have taken some conceptual form. Legal science, therefore, presupposes a conceptual prefiguration of its subject matter.<sup>71</sup> The meaning of a phenomenon, in other words, is the “ought to be” realized into “what is”, the value manifested in reality. The search for the meaning of a phenomenon requires, therefore, venturing outside the world of reality and entering into the world of values in order to find the idea that gives meaning to that phenomenon, the

---

<sup>67</sup> In this regard, some authors stated that fundamental values would not be rationally derived from the individual's point of view. Rather, they have an irrational nature and are emotionally felt. In this sense, then, they do not need an (absolute) rational justification in the daily life of an individual. Cf. Günther Kreuzbauer, (2006), *Die Norm im Völkerrecht: eine rechtsphilosophische und rechtstheoretische Untersuchung*, Wien, LIT Verlag.

<sup>68</sup> In this regard, for example, in a famous essay of 1946 Gustav Radbruch launched a direct and frontal attack on legal positivism which, in his opinion, would have been guilty of some of the worst degeneration of the Nazi-fascist regime: «[Legal] Positivism, in fact, with its conviction that "law is law", has rendered the German legal profession defenseless against laws of arbitrary and criminal content» («*Der Positivismus hat in der Tat mit seiner Überzeugung »Gesetz ist Gesetz« den deutschen Juristenstand wehrlos gemacht gegen Gesetze willkürlichen und verbrecherischen Inhalts*») Gustav Radbruch (1946), *Gesetzliches Unrecht und übergesetzliches Recht*, *Süddeutsche Juristen-Zeitung Jahrg*, 1, 5, pp. 105-108, p. 107.

<sup>69</sup> Cf. Alessandra Mazzei (2011), *Un'incursione trasversale nella dottrina della natura della cosa*, in Alessandra Mazzei and Tommaso Opocher (Ed.), *Fondazione ontologica del Diritto e «natura della cosa»*, Padova, CEDAM, pp. 1-43.

<sup>70</sup> Even if, as Enrico Opocher rightly noticed, there is no doubt that the word “things” indicates, from a legal point of view, a series of behaviors. Cf. Enrico Opocher, *Considerazioni su alcuni equivoci inerenti al significato assiologico della nozione di «natura della cosa»* in Alessandra Mazzei and Tommaso Opocher (Ed.), *Fondazione ontologica del Diritto e «natura della cosa»*, Padova, CEDAM, pp. 167-175, p. 168.

<sup>71</sup> Cf. Gustav Radbruch (1923), *Rechtsidee und Rechtsstoff. Eine Skizze*, *Archiv für Rechts- und Wirtschaftsphilosophie*, 17, 3, pp. 343-350, p. 347.

idea that it adapts to it.<sup>72</sup> According to this last conception, an event is thus a legal event because it is the immanent manifestation of some kind of value.

In summary, while for legal positivism legal events seem to be all of those events that are in some way pointed out by some legal source, for natural law theory, as well as for the “nature of the thing”, an event is a legal one if and only if it intrinsically violates or follows some sort of moral principle or value, regardless of the existence of a specific legal rule.<sup>73</sup> Actually, for scholars of the nature of the thing, if a law is extremely unfair – i.e., extremely contrary to a value – that law is not valid.<sup>74</sup>

In other words, following the path traced in the previous section, while the former think that almost all events of the legal world are events of the ordinary world, the latter think that some events of the ordinary world are events of the legal world. Therefore, if, for the advocates of legal positivism, there is a legal event because there is a legal rule, for the scholars of natural law and of the nature of things there is a legal rule precisely because there is a legal event.

Luckily, these schools of thought are not the only ones. In truth, over the last 150 years, many scholars have had a different approach to the law: a values-free approach which, with its methodologies, has opposed most versions of contemporary legal positivism and natural law theories. I am talking about legal realism.<sup>75</sup>

Over time, there have been several currents of thought more or less identifiable within the broad framework of legal realism: some are part of the past, while others are more contemporary.<sup>76</sup> Of course, these very different conceptions are all accumulated by the

---

<sup>72</sup> Cf. Gustav Radbruch (1948), *Die Natur der Sache als juristische Denkform*, in Gustaf C. Hernmarck. (ed.) *Festschrift zu Ehren von Prof. Dr. jur. Rudolf Laun, Hamburg*, pp. 157-176, p. 172

<sup>73</sup> As Enrico Opocher rightly points out, although not easy to notice, there is a substantial difference between the nature of the thing and natural law. In fact, if correctly interpreted, the nature of the thing does not express at all an "ought to be" that is infallibly valid in any historical situation, but rather the need for specific regulation for each individual relationship. Cf. Enrico Opocher, *Considerazioni su alcuni equivoci inerenti al significato assiologico della nozione di «natura della cosa»* cit. p. 170-173.

<sup>74</sup> This is nothing more than an example of the so-called Radbruch formula. According to Gustav Radbruch, in fact, when the discrepancy between the positive law and justice reaches a level so unbearable, the statute has to make way for justice because it has to be considered "erroneous law". This is because the positive law, which cannot be defined otherwise than as a rule, is precisely intended to serve justice. Cf. Gustav Radbruch (1946), *Gesetzliches Unrecht und übergesetzliches Recht*, *Süddeutsche Juristen-Zeitung Jahrg cit.*, p. 107

<sup>75</sup> For a schematic overview of the differences between legal positivism, legal naturalism and legal realism Cf. Mauro Barberis (2017), *Una filosofia del diritto per lo stato costituzionale*, Torino, Giappichelli, pp. 45-88.

<sup>76</sup> This is not the occasion for an in-depth analysis of the different schools of thought relating to legal realism. I would just like to mention the two historically most important movements of legal realism: American realism and Scandinavian realism. Among the more recent schools that are explicitly or implicitly inspired by legal realism, I would instead like to mention: The Law and Society movement, the Critical Legal studies, and the movement Law and Economics. For a first in-depth analysis Cf. Lawrence M.

attempt to study what is perceived as the actual legal experience. According to the theorists of legal realism, in fact, it is the reality – which, I suppose, in this case, it means what actually happens in the courtroom – that must guide us in the study of legal concepts and not vice versa. Therefore, in their opinion, the only way «to know the law and nothing else»<sup>77</sup> is to test the law in its material realization – i.e., in its impact on reality – which means to observe (and to predict) what the courts decide.

Although appreciating the attempt to “return to the reality” of legal realism, I cannot help but notice a certain confusion between physical and legal reality. This confusion led legal realists (especially the Americans) to adopt the notion of legal indeterminacy as a real milestone. To be precise, the scholars of legal realism speak about legal indeterminacy in two different ways: the rational one and the causal one. The first consists in the impossibility of arriving at a unique and determined normative solution of a concrete legal case – i.e., for each legal case, there is more than one possible normative solution. The second concerns the impossibility of knowing what drives the courts to prefer one regulatory solution over another, given the simultaneous validity of many possible – and often conflicting – normative solutions. Both aspects seem, however, to be two sides of the same coin: the rational impossibility of finding a single regulatory solution would make it impossible to explain the choices of the courts causally. Therefore, since different legally valid solutions are possible for each concrete event, the law should ultimately be considered as “ontologically” indeterminate.<sup>78</sup>

In this sense, then, for each event, there could be more than one possible corresponding legal event. However, unlike many jurists, I do not consider legal indeterminacy so worrying. On closer inspection, indeed, it is nothing more than an opening of the legal world to the possibility. On the other hand, the possibility lurks in the most everyday concepts: even in those that, at first glance, concern what is and what happens. If I am Italian, I can freely travel within the countries of the European Union; if I have three thousand euros, I can buy certain goods; Napoleon’s defeat at Waterloo is significant precisely because he could have won. In everything that is and happens in the ordinary

---

Friedman (1986), *The Law and Society Movement*, *Stanford Law Review*, 38, 3, pp. 763-780; Daniel Blocq and Maartje van der Woude (2018), *Making Sense of the Law and Society Movement*, *Erasmus Law Review*, 2, pp. 134-141; Aristides N. Hatzis and Nicholas Mercuro (ed.) (2015) *Law and Economics: Philosophical Issues and Fundamental Questions*, London, New York, Routledge; Mark Kelman (1987), *A Guide to Critical Legal Studies*, Cambridge, Harvard University Press.

<sup>77</sup> Oliver W. Holmes (1897), *The Path of the Law*, *Harvard Law Review*, 10, pp. 457-462, p. 459.

<sup>78</sup> For a brief introduction on this topic Cf. Brian Leiter (2005), *American Legal Realism*, in Martin P. Golding and William A. Edmundson (ed.), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Oxford, Blackwell, pp. 51-52.



world, there are the germs of what can be and will be, as well as of what can happen and will happen. After all, if something is or happens, it means that it was possible that it was or happened. The current situation, therefore, is nothing more than one of the faces of possibility.<sup>79</sup>

Returning, therefore, to the problem of the difference between legal events and all other types of events, it is possible to notice how every single philosophy of law has its own view of what a legal event is and how it differs from all other events. In this sense then, while for legal positivism an event is a legal event when it violates or follows a valid legal norm (it does not matter whether it is derived from a statute, a precedent or a custom), for natural law theorists and for the scholars of the “nature of the thing” an event is a legal event when it follows or contravenes a moral principle or a value (universal or contingent, depending on the theories). Finally, for scholars of legal realism, a legal event is a concrete event that happened in reality which is declared as such by those who have the power to do so – generally judges. In other words, for legal realism, legal events are observer oriented; i.e., it is the observer/interpreter labeling an event as legal or not depending on certain factor including rules, principles, values, and all other factors.<sup>80</sup>

Not entirely unlike the latter approach, an event-based perspective of law assumes that an event is a legal event when it belongs to the legal world. This solution, however, only shifts the problem just outlined, which becomes: when does an event belong to the legal world?

In this case, though, exactly as for legal realism, legal events are observer-related, which means that every event might be considered as belonging to the legal world, either because it is believed to be as such, or because it is declared as such. In other words, for the event-based perspective of law, an event belongs to the legal world when it is considered as such. Let us take, for example, the event (11) mentioned at the beginning of this section: at first glance, it appeared to me as belonged to the legal world. This is because described in that way and based on my knowledge of the law as well as on my conscience, I do not seem to be able to do anything but label this event as:

(12) The attempted murder of Caesar by Brutus.

---

<sup>79</sup> I owe these important considerations to Andrea Borghini. Cf. Andrea Borghini (2009), *Che cos'è la possibilità* cit., pp. 7-8.

<sup>80</sup> In this sense, then, «[t]heir approach prefers rule analysis plus sociological approach. It takes the law as it is posited and addresses the question of the factors that will influence those engaged in the application of the law» Michael Doherty (2001), *Jurisprudence: the Philosophy of Law* cit., p 200.

In this case, indeed, the event (11) counts as the event (12) in the context of the legal world because the description of (11) seems to be an exemplification of what is described by one or more rules concerning the attempted murder. In other words, according to the information I had – regarding (11), the law, and other factors –, I am able to state that (11) counts as (12) in the legal world. However, if I had had access to more information about (11), maybe I would have changed my conception of (12). Suppose, for example, that I learn that Caesar died a few hours after Brutus’s stab. With this additional information, it is likely that a new legal event will emerge on the horizon:

(13) The voluntary murder of Caesar by Brutus.

Moreover, if I continue to add other information, such as that Brutus simply reacted to Caesar’s aggression, the picture could become even more complicated – and new legal events may arise.

But there is more: even apparently harmless events like, for instance, the event (10), could become legally interesting – and, thus, be considered a legal event. In this sense, let us suppose that we are given information additional to the description of the event (10), such as the ages of Peter (suppose 40 years) and Lara (suppose 13 years). Clearly, with this latest information, even the event (10) seems to become legally interesting.

It therefore seems undeniable that, whatever the philosophy of law that influences our conception of legal event, we should be very cautious in describing events: legal and otherwise.

#### **1.4. Worlds, Events, Universals, and Particulars**

One of the advantages of the event-based perspective of law is that it is extremely clear in its willingness to distinguish between the legal world and the ordinary world, immediately posing a capital philosophical question: is it possible (for an event) to exist in more than one world?

In the eyes of many it is dangerous nonsense to challenge the idea that there is only one world: the real world, the one we live every day. However, it seems to me that this is exactly how the law works: it breaks a certain region of existence. Whenever someone believes in the existence of a certain rule, indeed, another world – in the world – opens in front of him/her: the world of what ought to be according to that rule. But there is more,

even if one does not believe – or does not know – that a certain rule exists, he/she can claim that he/she does not perceive the legal world which the rule unlocks, but he/she certainly cannot claim not to be subject to that world. The law, in other words, has a dual personal and social dimension, and legal events happen even if one is personally unaware of being within a legal world. It is possible to not know the speed limits of a certain part of the world, but this does not mean that if we exceed them nothing will happen to us: our behavior in the ordinary world, in fact, violates a rule of the legal world and, for this reason, we may suffer legal consequences that could be reflected in the ordinary world (e.g., through the disbursement of a sum of money).

Luckily, the event-based perspective of law seems to be particularly advantageous in analyzing cases in which the events of the legal and ordinary worlds seem to overlap and blur with each other. When, for example, we say that

(14) Schulze is a thief<sup>81</sup>

we are saying that the event that sees Schulze as a protagonist in the legal world has been qualified as a theft (i.e., it seemed legally relevant to the jurist, according to his/her knowledge of rules, principles, values, and all other factors that have influenced him/her). It could, therefore, be rewritten in this way:

(14)' The theft committed by Schulze

However, we are still not saying anything about the physical event. What did Schulze do to be charged with theft?

Then there is the opposite case. When we say, for example:

(11) Brutus' stabbing of Caesar

(15) Brutus' killing of Caesar

---

<sup>81</sup> This example is an explicit reference to the famous example proposed by Hans Kelsen in his *General Theory of Norms*. Indeed, as he wrote: «'Schulze the thief is to be punished with imprisonment' follows logically from the meaning-content 'All thieves are to be punished with imprisonment', just as the meaning-content 'Socrates is mortal' follows logically from the meaning-content 'All humans are mortal'» Hans Kelsen (1979), *General Theory of Norms*, trans. Michael Hartney, Oxford, Oxford University Press, 1991, p. 251.

we still do not know if Brutus' actions exist also in the legal world. In truth, we do not even know whether (11) and (15) are the same event or two events. However, before resolving these last issues, an even more important and, in a sense, preliminary issue needs to be resolved: are the events entities that can manifest themselves in different times and places? Or are they entities with their precise space–time placement? In other words, are they universals or particulars?

Indeed, we all know that the stabbing of Brutus at Caesar occurred on the Ides of March (15 March) of the year 44 BC. But let us try to imagine that Caesar did not die that day and that 10 days later (25 March) Brutus stabbed Caesar again. Would we perhaps say that this last stab is the same stab that Brutus gave Caesar a few days earlier? Would we say that the event (11) is the same as the following event (16)?

(16) Brutus's stabbing of Caesar

Would we say that the event "Brutus's stabbing of Caesar" is a Universal that has occurred at least twice? In other words, is "Brutus's stabbing of Caesar" of the event (11) the same "Brutus's stabbing of Caesar" of the event (16)?

I would say no, it is not! However, ordinary language is full of pitfalls. When, for example, after Schulze was caught stealing again, we state that "Schulze committed the same offense", obviously, we do not mean to say that the last event is exactly the same event that happened previously (same place, same identical stolen goods, etc.), but rather that Schulze has committed several events that are quite similar to each other. In this sense, therefore, we can consider universal events as a product of our conceptual activity. Starting from the particular events, it is possible to arrive at the idea of a corresponding class of events.

Let us focus, then, on the particular events – i.e., the entities which cannot recur, but only occur once. How should they be considered?

Well, some philosophers argue that events should be treated as concrete entities which occupy a specific space–time region. Indeed, according to Quine:

Physical objects [...] are not to be distinguished from events[...] Each comprises simply the content, however heterogeneous, of some portion of space-time, however disconnected or gerrymandered.<sup>82</sup>

Thus, according to this conception, the objects themselves would be nothing more than «long event[s]». <sup>83</sup> To be sure, sometimes it seems difficult to locate the spatial-temporal boundaries of an event. However, we must not let ourselves be deceived: these are semantic problems, not metaphysical ones. If we cannot be precise about an event, this does not mean that the event itself is vague, but simply that we are talking in a vague way (maybe because we have a vague idea of what happened). We are often unable to be precise, but that does not mean that the responsibility for this lies with the things we are talking about.<sup>84</sup>

According to other philosophers, on the contrary, it is possible to characterize events in a pluralistic way, rather than a monistic one – without using, at the same time, the semantics of possible worlds. In this regard, for example, the philosopher Jaegwon Kim in 1973 suggested characterizing events in the following way:

We think of an event as a concrete object (or n-tuple of objects) exemplifying a property (or n-adic relation) at a time<sup>85</sup>

At first glance, Kim's characterization might seem consistent with a reductionist conception of events, according to which events are related to other entities. Upon a closer look, however, the properties mentioned in Kim's formulation would correspond to events understood as universal and, consequently, the individual events would be nothing more than recurrences of such universals. To explain this point, imagine a material object such as an apple. After we perceive its shape, color, weight, and other properties, suppose we notice that its color is exactly the same red as the bicycle parked outside of the Empire State Building. The apple and the bicycle would then have a common property. Obviously, the red of the apple and the red of the bicycle are two distinct things: they are

---

<sup>82</sup> Willard V.O. Quine (1960), *Word and Object*, Cambridge, MIT Press, p. 131.

<sup>83</sup> Charlie D. Broad (1923), *Scientific Thought*, New York, Harcourt Brace and Co., p. 393. It should be noted, however, that even if we support a philosophical position of this kind, we could still maintain a certain difference between events and object, the first being the first entities that *protract* over time, while the second are entities that *persist* over time. In this regard Cf. Achille C. Varzi (2001), *Parole, oggetti, eventi e altri argomenti di metafisica* cit., p. 45.

<sup>84</sup> Cf. *Ibidem*, p. 47.

<sup>85</sup> Jaegwon Kim (1973), *Causation, Nomic Subsumption, and the Concept of Event*, *The Journal of Philosophy* 70 (8): 217-236, p. 222.

examples of the same property but in two different places and times, and as such they are particulars. And since they are properties that can be exemplified – in this case, by two different objects (an apple and a bicycle) which, in turn, simultaneously exemplify other properties – we can conclude that they are abstract (and not concrete) particulars. They are what Donald Williams called "tropes".<sup>86</sup> According to this last conception, thus, all events are tropes. Therefore, if exemplifications of different properties are different tropes, then exemplifications of different "event-properties" are different events. In this sense, for instance, "killing" is different from "killing violently" which, in turn, is different from "killing violently with premeditation". Hence, the event (15) is different both from the event (11) and from, for instance, the following event:

(17) The violent killing of Caesar by Brutus

However, while in the second case a kill implies the others – specifically, the event (17) implies the event (15), – so that when it comes to listing Brutus' actions it is enough to list only the main kill (i.e., the event that logically implies all the others), in the former case, killing and stabbing are not only two different actions, but they are also events for which there is no logical relationship. Brutus, therefore, did not commit several murders, but only one – which logically implies others – as well as inflicting a single stab.

Now, Brutus may disagree with this reconstruction, claiming that it is unclear what is meant by "killing". He might, after all, argue that he did nothing but stab Caesar. If by "killing" we mean a sort of cause–effect relationship such that, in this specific case, we mean that the generic action of Brutus (the stab inflicted to Caesar) caused the following event:

(18) Death of Caesar

then it must first be demonstrated that (11) caused (18) before asserting (15). In any case, even if it was possible to prove this, it would not have proved to be anything other than that the event (15) is composed of the events (11) and (18), or that, if we are prepared to allow causal relations to appear in events, we can render the composed event:

---

<sup>86</sup> Cf. Donald C. Williams (1953), *On the Elements of Being*, Review of *Metaphysics* 7(1):3-18. I took the example of the bicycle and the apple from the work of Achille Varzi. Cf. Achille C. Varzi (2001), *Parole, oggetti, eventi e altri argomenti di metafisica* cit., p. 51.

(19) Brutus's stabbing, which caused the death of Caesar

into:

(19)' [(Brutus, Caesar), for a stabbing event P and time t\* [(①, ②), P<sub>①②</sub>, t\*]  
caused [(②, dies, t'), t]]<sup>87</sup>

Which basically mean that the event P ("stabbing") from Brutus (①) to Caesar (②) at a certain time t\*, caused the death of Caesar at a later time t'.

At this point, one might wonder if the predicate "killing" completely describes the relationship exemplified by Brutus and Caesar during the event in question. Unfortunately, the answer (as Bennet rightly points out) is that Kim's metaphysical thesis that an event is the exemplification of a certain property relationship does not imply at all the semantic thesis that each name of that event contains a predicate describing that relationship completely.<sup>88</sup>

So far, I have shown two different positions on events: the radical "unifiers" position (the monist one) and the radical "multipliers" position (the pluralist one). They can give us an idea of what happened in the ordinary world around us, but can they tell anything about the legal world?

The answer to this question varies according to our philosophy of law. Indeed, those who adopt the philosophy of natural law, for instance, might be comfortable with Kim's position. They probably would say that legal events, after all, are nothing more than a normal exemplifications of properties that exemplify also a "legal property": being against (or in accordance) with the natural law. Slightly different, instead, would be the response of the legal positivists. For the latter, the legal rules would be nothing more than a long list of abstract event-properties which, if exemplified by an event, might trigger some legal consequences. In the first case, therefore, the task of the jurist will be to understand if the event exemplifies all of the properties (including the legal one); in the second case, instead, the task of the jurist is to discover if some of the properties

---

<sup>87</sup> This is my reworking of Jaegwon Kim (1976), *Events as Property Exemplifications*, in: Brand M. and Walton D. (ed.) *Action Theory. Synthese Library (Monographs on Epistemology, Logic, Methodology, Philosophy of Science, Sociology of Science and of Knowledge, and on the Mathematical Methods of Social and Behavioral Sciences)*, vol 97, Dordrecht, Springer, 159-177, p. 176.

<sup>88</sup> Cf. Jonathan Bennet (1988), *Events and their Names*, Oxford, Clarendon Press, pp. 119-128.

exemplified by the event appear in a legal norm – there are, so to speak, no legal properties.

The position of the theorists of legal realism (or of some of its derived theories) is still different. Of course, since both legal realism and legal positivism consider law as a human construct, they do not differ so much – in certain respects. However, unlike the positivists, realists think that the law does not provide determinate guidance pertaining to the solution of concrete legal cases. Actually, that is precisely the point for legal realists: «statutes and the like may be law, but [...] Because the law is indeterminate, judges actually decide cases on the basis of nonlegal considerations».<sup>89</sup> For this reason, in their opinion, the task of lawyers should be to convince the judge or the jury every time that a specific event is or is not a specific legal event – using even non-legal arguments.

Now, with the exclusion of natural law theories, according to which events themselves follow or violate a universal legal principle, the event-based perspective of law could be welcome from the viewpoints of both legal positivist and legal realism theories. Indeed, after having argued in favor of a conception of events as particulars, and having mentioned how both the radical “unifiers” position (who take events to be as coarse-grained as ordinary objects) and the radical “multipliers” position (who take events to be exemplifications of properties by objects at times) are not exempt from a certain dose of semantic indeterminacy, all that remains is to answer the initial question of this section: is it possible (for an event) to exist in more than one world? Is it possible to argue that a certain event that happened in the ordinary world also happened in the legal world? In other words, is the event that happened in the ordinary world also a legal event?

In the previous section I mentioned that, according to the event-based perspective of law, an event is a legal event if it belongs somehow to the legal world. In that case, the verb “to belong” is used in the sense of “be a part of” the legal world, which actually means that a certain event happened in the legal world. This means, in other words, that someone stated that what happened in the ordinary world is the same event that happened in the legal world.

---

<sup>89</sup> Michael S. Green (2005), *Legal Realism as Theory of Law*, William & Mary Law Review 46(6): 1915-2000, p. 1918.



However, this formulation raises a rather complex problem: one of identity. To be sure, an in-depth study of certain philosophical literature might, if not solve the problem, at least suggest some identity criteria<sup>90</sup> to solve the following equality:

event x = event y

In this regard, while authors like Quine could state that "event x" and "event y" are identical if and only if they occurred in the same spatiotemporal region (i.e., they occurred at the same time and in the same place), other authors such as Davidson propose a causal requirement, according to which "event x" and "event y" are the same event if and only if the "event x" has exactly the same causes and the same effects as the "event y".<sup>91</sup>

Unfortunately, legally speaking, the problem cannot be solved simply by establishing identity criteria which are able to determine whether, for example:

(20) Brutus' stabbing of Caesar = Brutus' killing of Caesar

In this case, the problem for jurists is not only to establish when events are identical, and when distinct – i.e., the problem of the individuation of events - but also to establish whether, for instance:

(21) Brutus' killing of Caesar = Brutus' murdering of Caesar

where the word "killing" is not exactly a synonym for "murdering" but means «unlawful killing of another human being with premeditated intent or malice aforethought». <sup>92</sup> So that one can express (21) as:

---

<sup>90</sup> It is important to underline how the identity criteria, as exposed in this work, have no epistemic nature. Indeed, they have the purpose of establishing under what conditions one can say that "x" and "y" are identical; they do not provide instructions to check if "x" is identical to "y". Cf. Achille C. Varzi (2001), *Parole, oggetti, eventi e altri argomenti di metafisica* cit., p. 64

<sup>91</sup> Indeed, in this work, I have privileged the "extremists" positions of Quine and Kim, but there are several other "moderate" positions. In this sense, Cf. Donald Davidson (1969), *The Individuation of Events*, in N. Rescher (ed.), *Essays in Honor of Carl G. Hempel*, Dordrecht, Reidel, pp. 216-234; Irving Thalberg (1971), *Singling out Actions, their Properties and Components*, *Journal of Philosophy* 68(21): 781–787; Myles Brand (1977), *Identity Conditions for Events*, *American Philosophical Quarterly* 14 (4): 329 - 337; Carol Cleland (1991) *On the Individuation of Events*, *Synthese* 86 (2): 229 - 254.

<sup>92</sup> Steven H. Gifis (2008), item "Murder", *Dictionary of Legal Terms 3<sup>rd</sup> ed.*, New York, Barron's Educational Series, p. 310.

(21)' Brutus' killing of Caesar = Brutus' *unlawful* killing of Caesar

However, Brutus might, once again, disagree with this reading and might even argue that:

(22) Brutus' killing of Caesar = Brutus' killing of tyrant

Therefore, since tyrannicide is lawful, even if the event can be identified properly as a "killing", it must be determined whether it is unlawful (such as, in this case, a murder) or lawful (such as, in this case, a tyrannicide).<sup>93</sup>

Thus, it is not only a question of determining whether an event occurs or not in the legal world, it is also a question of classifying the event – i.e., to decide if it is lawful or unlawful.

### 1.5. Describing and Classifying

Many issues relating to the concept of legal event that have arisen during this chapter seem to be inevitably linked to the notion of classification. The latter, indeed, seems to be so important a notion that authors like Jensen have clearly highlighted how the main problem of legal reasoning is not so much to infer a legal consequence from the occurrence of an event but, rather, to understand whether a concrete event could be classified as a legal event. In the words of the author: the problem is not to determine if «All S is P, but the crucial question is just whether the conduct of the defendant (or of the plaintiff or of the accused) is S. In other words, the problem is one of classification rather than one of deduction».<sup>94</sup>

---

<sup>93</sup> It is just worth noting how, in this specific case, the lawfulness or unlawfulness of Brutus' action might be based on a characteristic of Caesar: to be or not to be a tyrant. This last characteristic, however, seems to refer to a series of actions committed by Caesar. In other words, to determine whether "Brutus' killing of Caesar" is lawful or unlawful it must first be determined whether the actions of Caesar can qualify him as a tyrant. But does this raise a set of questions such as: When is an action defined as an "action of a tyrant"? How many of such actions must be committed in order to classify a person as a tyrant?

<sup>94</sup> Otto C. Jensen (1957), *The Nature of Legal Argument*, Oxford, Blackwell, p. 16. It should also be mentioned that when Jensen states 'All S is P' he seems to refer to a sort of syllogistic reasoning. In truth, starting at least from the work of Cesare Beccaria [Cf. Cesare Beccaria (1754), *Dei delitti e delle pene*, Milano, Feltrinelli, 2007], many jurists have tried to develop a legal reasoning based on the so-called legal syllogism. However, this is not the appropriate place to deepen the discourse on legal syllogism [for an initial approach Cf. Neil MacCormick (2005), *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford, Oxford University Press, pp. 32-48]. What matters most here is to point out how the relation expressed in propositions such as "All S is P" is that of inclusion in or exclusion in a certain class. So that all you have to do is establish that the event S occurred, and then P must follow.

Obviously, when we talk about "classification" we mean nothing more than «The action of classifying or arranging in classes, according to shared characteristics or perceived affinities; assignment to an appropriate class or classes».<sup>95</sup> However, before one can classify anything, it is necessary to define the classes – and their boundaries.

Fortunately, from a legal point of view, this activity of creating and defining classes takes place in many ways: sometimes it is the legislator who creates a class; other times it is the court which defines a class, through a meticulous activity of reconnaissance and interpretation of precedents case law; other times it is we ourselves who recognize legal classes of a customary nature.<sup>96</sup> I could even go so far as to say that a large part of the legal rules (perhaps all) establish, recognize, or take for granted that there are one or more classes. Therefore, when we say that a certain rule states that certain behavior is prohibited or that another legal rule prescribes that, if someone wants to obtain a certain legal effect, he or she must perform certain actions, those rules do nothing but establish a legal class. The problem, then, it is not to create a class of events through a list of their characteristics (I might even venture to call them properties), but rather to verify whether a concrete event has those characteristics – and, thus, can be considered as a member of the class identified by the legal rule.

Upon a closer look, this is a problem similar to the one faced with language. For example, when a child is taught a language

An important part of the training will consist in the teacher's pointing to the objects, directing the child's attention to them, and at the same time uttering a word; for instance, the word "slab" as he points to that shape. (I do not want to call this "ostensive definition", because the child cannot as yet ask what the name is. I will call it "ostensive teaching of words". - I say that it will form an important part of the training, because it is so with human beings; not because it could not be imagined

---

<sup>95</sup> item "*classification*", Oxford English Dictionary Online, June 2019, Oxford University Press. <https://www.oed.com/viewdictionaryentry/Entry/33896> (accessed August 01, 2019). It should be noted that this is not the only definition of classification. There are also two other separate but interlinked definitions such as: «a systematic distribution, allocation, or arrangement of things in a number of distinct classes, according to shared characteristics or perceived or deduced affinities. [...] A category to which something is assigned; a class».

<sup>96</sup> On this point, I find it particularly interesting to note how Ronald Dworkin has, in a sense, tried to unify this tripartition. He actually identified judicial interpretation as the moment in which judges, like chain novel authors, must elaborate on and follow the laws set before them. He imagines normative text as the ground for a series of successive interpretations: a first judge in this chain interprets the text to resolve a specific case; subsequently, other judges will refer to the text but also to previous interpretations. In this way, a judge can innovate the law but cannot break with the previous law because he/she must maintain a level of integrity. Cf. Ronald Dworkin (1986), *Law's Empire*, Cambridge, Belknap Press, pp. 228-238.

otherwise.) This ostensive teaching of words can be said to establish an association between the word and the thing.<sup>97</sup>

Similarly, the teaching of legal rules very often involves that, once a rule has been presented, an example of its application is immediately proposed. In this way, for example, once the rule prohibiting murder (and punishing who committed it) has been presented, students are generally presented with cases in which a certain killing has been considered murder. These are not events yet to be classified; they are events already ascribed to a certain legal classification (by a judge for example). In this way, students are either immediately informed of the end of the case, or, even if they are not informed, they can get an idea of the classification of the case from the context in which it is dealt with. This is because if the rules on murder are being studied, the teacher will have all the interest in presenting murder cases in order to train students to recognize homicide cases. In those cases, moreover, even if a student who does not agree with the classification of the case – i.e., they are not convinced that the event narrated during the lecture is legally configurable as a murder – the professor could simply argue that the student does not have all the information on the case or, more simply, that there is a court ruling that closes the matter.<sup>98</sup>

Problems for students will most likely arise when they are no longer students and wonder what to do when an event has not yet been linked to a class of event.

Consider, for example, the following events:

(23) On 5 August 2018 at 2:50 p.m. Mr. Smith parked his car in the parking area property of Parking Alpha Company and go shopping but, when he came back to the parking area, at 7:28 p.m., he couldn't find his car anymore.<sup>99</sup>

---

<sup>97</sup>Ludwig Wittgenstein (1953), *Philosophical Investigations*, trans. G.E.M. Anscombe, Oxford, Basil Blackwell, 1986.

<sup>98</sup> At this point, a really good student might argue that it does not matter whether or not there is a court ruling concerning that specific murder case. This is because even courts can be wrong. However, a good law teacher, after congratulating the student, should inform him or her that, unless one wants to unleash a revolution, after a certain degree of judgment and it no longer being possible to appeal, one must accept the judgment or, otherwise, the judgment is imposed by force. In fact, despite the cynicism of the teacher, I can only agree with him/her. Actually, beyond a certain degree of judgment, it does not matter if the considerations adopted by the judges to justify their sentences are right or wrong: what matters is that the last court, the Supreme Court, has expressed itself. The ruling of the Supreme Court, in other words, is to be considered perfect and, therefore, correct in the legal world.

<sup>99</sup> For a first presentation of this case, Cf. Paolo Sommaggio and Marco Mazzocca (2016), *The Only Impossible Solution. The Case of the Parking Lot*, in Paolo Sommaggio, *Philosophy, Law & Society. Seven Simple Samples*, Padova, libreriauniversitaria.it, pp. 73-83.

Suppose then, that Mr. Smith sues Alpha Company claiming damages for the loss of the vehicle because, in his opinion, the event (23) is a breach of a bailment agreement. This is because he assumes that the following legal event (24) has occurred:

(24) Conclusion of the bailment agreement between Mr. Smith and the Alpha Company.

However, the Alpha Company argues that the plaintiff has no right to compensation because the agreement was not a bailment but a lease of a parking space, involving no duty of care. In other words, the Alpha Company assumes that the following legal event (25) has occurred:

(25) Conclusion of the lease agreement between Mr. Smith and the Alpha Company

The problem here is just how to legally categorize an event. In fact, none of the parties disputes the succession of physical events – Mr. Smith entered the parking lot, parked the car, locked the car, moved away from the parking lot, returned to the parking lot a few hours later and did not find his car – the problem is that the same events are considered differently by the parties. Certainly, a shrewd scholar could minimize the problem by arguing that, after all, it is a problem of description rather than classification. In the previous example, indeed, the description of the events does not provide enough information to determine, for example, whether it is a lease or a bailment. Thus, all you have to do is to provide a "complete event-description". The latter can be viewed as the representation which describes a given state of affairs without leaving out anything relevant. However, the problem is not solved at all: it has only been moved from the classification to the description of an event, a far more complex problem.

In this regard, in order to analyze the problem related to the description of an event, I think it is useful to subdivide it into two different but connected subproblems:

DsP<sub>1</sub>: The problem of *what* to describe

DsP<sub>2</sub>: The problem of *how* to describe

Now, with regard to DsP<sub>1</sub>, I suppose that it may seem strange to wonder what is being described. After all, on closer inspection, when we study an event we focus our attention on a specific "piece of the world" – i.e. a well-defined portion of spacetime – which we want to bring into focus through a series of more and more refined cognitive activities according to a spectrum that goes from a "passive empirical observation" to an "active description" of what happens in the world. However, in order to carry out this step, it is necessary first to make descriptive choices, which are all the more extensive the more complex the event to be studied, but which allow us to identify certain categories of events characterized by certain specific properties. In a sense, it is as if we were given the opportunity to choose cognitive glasses that allow us to focus better on some characteristics of events rather than others.<sup>100</sup> It is for this reason that the "complete event-description" is a notion entirely relative to the context of «the event which it purports to describe»<sup>101</sup>. It is, in other words, an observer-related description. So, the solution to the DsP<sub>1</sub> seems to be the one according to which we describe what we want to describe. Obviously, I am not arguing that every description is possible and admissible, what I am arguing is that for every event there could be more than one possible description. In this sense, different "observations" lead to different considerations (legal or otherwise), and even in the simplest cases, a perfect convergence between descriptive levels is very often not possible.<sup>102</sup>

Fortunately, if our purpose is to describe a legal event, then law offers us more than just cognitive glasses: it offers us legal rules. The problem is that, as we have seen in the example of the parking lot, very often you can describe an event using two different types of cognitive–legal glasses. Of course, I also argued that, in that case, the problem is related to the lack of information. In fact, when providing a full description of a legal

---

<sup>100</sup> On the idea of "cognitive glasses" that allow us to study entire classes of events Cf. Ignazio Licata (2013), *Incertezza. Un approccio sistemico*, in Lucia Urbani Ulivi (ed.), *Strutture di Mondo 2. Il pensiero sistemico come specchio di una realtà complessa*, Bologna, il Mulino, pp. 35-71.

<sup>101</sup> Lois Frankel (1986), *Mutual Causation, Simultaneity and Event Description*, *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 49(3): 361-372, p. 368.

<sup>102</sup> In a sense, it seems to me that this kind of "observation" is similar to what in the field of philosophy of science is called "theory-laden observation". The latter is a notion often used to indicate the observer's non-objectivity and the influence of the theory during the observation of a phenomenon. It appeared for the first time in Norwood R. Hanson (1958), *Patterns of Discovery: An Inquiry into the Conceptual Foundations of Science*, Cambridge, Cambridge University Press. This notion was subsequently also studied by other authors like Thomas Kuhn or Paul Feyerabend, who claimed that «one can't use empirical evidence to test a theory without committing oneself to that very theory». James Bogen (2017), item "*Theory and Observation in Science*", *The Stanford Encyclopedia of Philosophy*, URL = <https://plato.stanford.edu/entries/science-theory-observation/>

event it should be considered that a description of such an event is complete if and only if:

- (i) the set of information is sufficient to uniquely identify a unique legal event;
- (ii) the set of information must not be random, i.e., it must be rule-governed.<sup>103</sup>

Now, suppose one adds the following information to the description of the event (24):

I<sub>1</sub>: Once he parked and locked his vehicle, Mr. Smith kept the car key with him.

With this additional information, we are able to rule out the hypothesis that the agreement between Mr. Smith and Alpha Company was a bailment. This is because case law appears to agree almost unanimously in considering that a bailment «exists when: (1) possession of an item of personal property (2) is transferred by its rightful possessor to another person (3) with the transferee's agreement (a) to accept the item and (b) to return it to the original possessor or otherwise deliver the item as the transferor directs».<sup>104</sup> Therefore, since as it has been argued,<sup>105</sup> the possession of the vehicle is transferred through the transfer of its control, normally symbolized by the transfer of keys from the owner (bailor) to the lot operator (bailee), in this case, it is possible to exclude that there was a breach of bailment agreement. Can we say, then, that following the addition of I<sub>1</sub>, the description of what happened to Mr. Smith is a complete description? In other words, does our description of the events related to the disappearance of Mr. Smith's car comply with the meta-rules (i) and (ii)?

Actually, no. I mean: the addition of I<sub>1</sub> surely rules out the possibility that the event (26) happened – and, consequently, it is not possible to configure a breach of the bailment. However, although I<sub>1</sub> is able to rule out one of the legal classification hypotheses relating to an event, it is not able to identify a unique legal event. Let me explain. In the example of the parking lot, the assumptions at stake are that events recounted (a) constitutes a

---

<sup>103</sup> This is my reworking of the "rules" presented by Achille Varzi in his essay, *Patterns, Rules and Inference*. Cf. Achille C. Varzi (2008), *Patterns, Rules and Inference*, in Adler J. E. and Rips L. J. (ed.), *Reasoning: Studies of Human Inference and Its Foundations*, Cambridge, Cambridge University Press, pp. 282-290, p. 285.

<sup>104</sup> William V. Vetter (1999), *The Parking Lot Cases Revisited: Confusion at or About the Gate*, *The Santa Clara Law Review*, 40: 27-64, p. 32.

<sup>105</sup> Cf. *Travelers Ins. Co. v. Pond*, 143 N.E.2d 189 (Ohio C.P. 1957); *Giles v. Meyers*, 107 N.E.2d 777 (Ohio C.P. 1952); *Allright Phoenix Parking, Inc. v. Shabala*, 429 P.2d 513 (Ariz. Ct. App. 1967); *Osborn v. Cline*, 189 N.E. 483 (N.Y. 1934); *Rhodes v. Pioneer Parking; Lot, Inc.*, 501 S.W.2d 569 (Tenn. 1973).

violation of the bailment agreement or (b) they do not constitute any violation of the lease agreement. The introduction of the  $I_1$  in the description of events excluded that the event (25) occurred – rejecting also the hypothesis (a) – but certainly did not prove that the event (26) occurred, nor that the car's owner is not entitled to any compensation. In truth, many possibilities remain open.<sup>106</sup>

One might as well settle for this solution. In other words, it is possible to concede that a description of an event is acceptable if and only if:

- (i)' the set of information is sufficient to rule out all the proposed hypotheses of legal event description except one.

As it is possible to notice, I did not just change the first meta-rule (i); I also deleted the second (ii). The reason for this latter choice is simple: as we have seen, the meta-rule (ii) states that information cannot be random, it must be the expression of a rule. Let it be clear: I do not necessarily mean a formal legal rule implemented by a legislative body before the occurrence of the event. In truth, it could be a rule that has been found precisely because of that event. What is important is that jurists succeed in describing the event as though it followed or violated a (legal) rule. However, precisely because it is possible to provide more than one description of an event which appears to follow or violate one legal rule rather than another, (ii) is useless. Any information considered random for the rule-governed description of an event could, in fact, not be random at all for another rule-governed description. This is because it is not possible to know if the event described follows or violates a certain rule and not another. All that can be said, in case you fail to come up with another legal rule that "fits" with the described event, is that the set of information provided by the description of the event seems to not question a particular legal rule.<sup>107</sup>

---

<sup>106</sup> In *Ellish v. Airport Parking Co. of America, Inc.*, for example, the court said that traditional bailment or lease rules were not helpful and stated that the rule for determining the lot operator's liability should be based on «the realities of the transaction in which the parties engaged». This is because, in the judge's opinion, the «liability should not be determined by ancient labels and characteristics not connected with present-day practices. It is one thing for the owner of a livery stable to have to explain the disappearance of a horse from its stall to the owner, but it is not at all the same for the operator of a parking lot at a busy airport to have to explain the disappearance from the lot of one of the thousands of cars parked there daily. Unless proof of negligence is present on the part of the operator of the lot, the risk of loss must be assumed by the owner of the automobile». *Ellish v. Airport Parking Co. of Am., Inc.*, 345 N.Y.S.2d 650 (App. Div.1973).

<sup>107</sup>As is well known, the "rule-following" problem (also known as the "rule-following paradox") was explored by Ludwig Wittgenstein in his *Philosophical Investigations* (1953) and *Remarks on the*



Now, after exposing the problem of the match between events and legal events, I showed how a large part of the problem is related to the consideration according to which legal rules create a classification of legal events – by identifying them through certain characteristics. Consequently, I argued that a large part of the characteristics required by legal classification of an event is generally highlighted by the description of the event itself, and I pointed out the importance of the choice regarding what to describe. This is because the description is never "neutral"; on the contrary, it is influenced by what one wants to describe. Finally, I have argued that a "complete event description" able to identify one and only one correspondence between the characteristics of a single particular event and the characteristics expressed by a class of events identified by one or more legal rules can never be provided. Indeed, since it is always possible to add information related to the description of an event, all that remains is to strive to achieve an "acceptable event description" – i.e., a description that excludes any other proposed legal classification (and its corresponding description) in a given case.

Thus, all that remains at this point is to address the  $DsP_2$ ; i.e., the problem of *how* to describe an event. This is because, once you have chosen *what* to describe and, in a sense, *how much* to describe – how much information to provide in the description – all that remains is to choose *how* to describe. Therefore, the question is as follows: how can one describe an event in itself?

There is no single answer to this question: it depends on the description level. So, what are the most appropriate terms to use in describing a legal event?

In order to answer this last question, it is necessary to mention again the thought of the American philosopher John Searle. Previously, I focused on his idea of status function and I argued that, in my opinion, even events can have a status function, according to which it is possible to say that

A certain event *X counts as* a certain event *Y* in the context *C*

---

*Foundations of Mathematics* (1956). Subsequently, the topic was rediscovered and re-debated by philosophers a few decades later (starting in the '80s of the twentieth century) following the controversial work of Saul Kripke in *Wittgenstein on Rules and Private Language* (1982). However, maybe it is not so well known that starting from the same period, the rule-following problem has also been discussed by jurists and legal philosophers. In this sense, Cf. Ludwig Wittgenstein (1953), *Philosophical Investigations*, cit.; ID. (1956) *Remarks on the Foundations of Mathematics*, trans. G.E.M. Anscombe, Oxford, Basil Blackwell, 1967; Saul Kripke (1982) *Wittgenstein on Rules and Private Language*, Cambridge, Harvard University Press. For an introduction to these issues from a legal point of view, Cf. Mauro Barberis (2002), *Seguire norme giuridiche, ovvero: cos'avrà mai a che fare Wittgenstein con la teoria dell'interpretazione giuridica?*, *Materiali per una storia della cultura giuridica* 1:245-273.

These kinds of rules, as I have said, are called constitutive rules by Searle and are considered by him as a means to impose a status. However, it should be pointed out that, for the American philosopher, alongside the constitutive rules there are those he calls *regulative rules*. The latter, in fact, are rules which «regulate a preexisting activity, an activity whose existence is logically independent of the rules».<sup>108</sup> In this sense, then, a good example of a regulative rule is the one according to which:

R<sub>5</sub>: Car drivers must drive on the right-hand side of the road.

In Searle opinion, R<sub>5</sub> regulates the driver's behavior, but the driver's behavior exists regardless of that rule.<sup>109</sup> The driver, in other words, would drive even if there were no rules governing driving.

However, I am not convinced that the rule just mentioned is a regulative rule only. On the contrary, it seems to me also a constitutive one: a rule which impose the status of "rules-abiding driver". The R<sub>5</sub> sentence can be interpreted both as rule formulations and also as descriptive sentence. Indeed, it describes the characteristics a particular event must have in order to be considered as a legal (and, in this case, also lawful) event.

To be honest, nowadays more than one scholar denies the differentiation between constitutive and regulative rules proposed by Searle – at least as far as the field of legal studies is concerned.<sup>110</sup> However, what is truly important is that if all legal rules are

---

<sup>108</sup> John R. Searle (1969), *Speech Acts. An Essay in the Philosophy of Language*, cit., p. 34. It is interesting to note how, despite his statement that regulative rules «have the form or can be comfortably paraphrased in the form "Do X" or "If Y do X"» [*Ibidem*], this does not exclude that some of the regulative rules can take the form of "X counts as Y in context C". Indeed, the latter «is not intended as a formal criterion for distinguishing constitutive and regulative rules». This is because «the noun phrase following "counts as" is used as a term of appraisal not of specification. Where the rule naturally can be phrased in this form and where the Y term is a specification, the rule is likely to be constitutive». [*Ibidem*, p. 36] What, according to Searle, would distinguish the regulatory rules from the constituent ones is the fact that while constitutive rules «create or define new types of behavior» [*Ibidem*, p. 33], regulative rules regulate existing forms of behavior, antecedently or independently.

<sup>109</sup> Cf. John R. Searle (2019), *Il mistero della realtà*, cit., p. 215.

<sup>110</sup> On this point Cf. Joseph Raz (1999), *Practical Reason and Norms*, Oxford, Oxford University Press (First published 1975), pp. 108-111; David-Hillel Ruben (1997), *John Searle's The Construction of Social Reality*, *Philosophy and Phenomenological Research* 57(2): 443-447; Jaap Hage (2013), *The Deontic Furniture of the World. An Analysis of the Basic Concepts That Embody Normativity*, in Jerzy Stelmach, Bartosz Brozek, and Mateusz Hohol (ed.), *The Many Faces of Normativity*, Krakow, Copernicus Center Press, pp. 73-114. The works mentioned are just some of the works that over the years have dealt with the difference between regulative rules and constitutive rules. For a more recent approach, I also recommend reading Adriana Placani (2017), *Constitutive and Regulative Rules: a Dispute and a Resolution*, *Phenomenology and Mind* 13: 56-62.

considered both constitutive and regulative, then every legal event is an institutional event or, in Searle's words, an institutional fact.

According to the American author, the latter can be described in at least two ways: a) using brute terms or b) using institutional terms. The difference, according to Searle, lies in the fact that while the *description in terms of brute facts* of an institutional fact does not refer to the constitutive rules of the described fact, the *description in institutional terms* refers to them.<sup>111</sup> To make the concept even clearer, suppose that a group of observers attends an American football game without knowing the rules of the game:

we can imagine that after a time our observer would discover the law of periodical clustering: at statistically regular intervals organisms in like colored shirts cluster together in a roughly circular fashion (the huddle). Furthermore, at equally regular intervals, circular clustering is followed by linear clustering (the teams line up for the play), and linear clustering is followed by the phenomenon of linear interpenetration. [...] But no matter how much data of this sort we imagine our observers to collect and no matter how many inductive generalizations we imagine them to make from the data, they still have not described American football.<sup>112</sup>

In other words, according to Searle, to describe an American football game it is necessary to use institutional terms such as "touchdown", "offside", "first down" or "time out" – i.e., terms which express concepts «backed by constitutive rules».<sup>113</sup>

Similarly, I could argue that also for the description of legal events it is necessary to use institutional terms, rather than brute terms. After all, most of the time what is desired is a

---

<sup>111</sup> In this regard, it is interesting to note how instead Joseph Raz prefers to distinguish between a *normative act description* and a *natural act description*. Cf. Joseph Raz (1999), *Practical Reason and Norms*, cit., p. 110. These two authors, however, are not the only ones to have provided different levels of description of an act consisting of rules. On the point, for example, Giuseppe Lorini identifies five levels of description of an act consisting of rules: (i) a *pre-semiotic* level, (ii) a *syntactic* level (iii) a *semantic* level, (iv); a *pragmatic* level and (v) an *idiographic* level. Cf. Giuseppe Lorini (2008) *Praxeografia. Descrivere un'azione Vs. descrivere un atto costituito-da-regole*, in Enzo di Nuoscio e Paolo Heritier (ed), *Le culture di babele. Saggi di antropologia filosofico-giuridica*, Milano, Medusa, pp. 115-134.

<sup>112</sup> John R. Searle (1969), *Speech Acts. An Essay in the Philosophy of Language*, cit., p. 52.

<sup>113</sup> *Ibidem*. In this sense, it should also be mentioned that language conventions and legal rules are distinct, albeit related, things. One thing, in fact, is the linguistic convention on the meaning of words such as "murder", "lease" or "bailment"; another thing are the legal rules on "murder", "lease" or "bailment". This distinction, among other things, allows distinguishing between two typical forms of (in)determinacy of legal rules: a purely linguistic (in)determinacy and a specifically legal (in)determinacy. The latter, in particular, relates to all of those further factors of legal interpretation that are added to purely linguistic interpretation factors: think, for example, of the interpretative rules allowing the interpreter to use the purpose of the legislator. On this distinction Cf. Timothy A. O. Endicott (1996), *Linguistic Indeterminacy*, Oxford Journal of Legal Studies 16(4): 667-697, p. 669.

legal consequence of an event that occurred in the ordinary world. It seems, therefore, necessary to describe that event *as if it had happened* in the legal world (thus using "institutional terms" backed by legal rules, broadly understood).

The problem is that very often the same brute fact can be described with different (and often conflicting) institutional terms. Consider, once again, the case of the parking lot: despite both parties accepting, at least initially, a unique description in brute terms, they both described the situation using different institutional terms. It was only with the introduction of one further piece of information – described in brute terms – that one of the two descriptions in institutional terms became unacceptable.

In general, a legal claim should always be expressed with terms backed by legal provision. However, if the use of certain institutional terms is not clear or even disputed, then a description in brute terms of the events could be useful to reveal a) an inappropriate legal classification or b) that there is more than one description in institutional terms that can be compatible with the same description in brute terms. It is this inability to identify a single legal event from the description of a single physical event that often makes the legal matters so complicated.

### **1.6. Things that (do not) happen**

In the section just concluded, the importance of the description of an event was highlighted. In particular, I tried to emphasize the importance and risks of a description of an event in institutional terms, stressing how only through such a description is it possible to speak about legal event. As we have seen, this is not a problem-free operation. However, let us admit that it is successful and that, for example, it is easy to describe an event such as (19) in institutional terms. After all, it is something that Brutus did "actively". In other words, it is a positive event.

Unfortunately, as Davidson wrote, «We often count among the things an agent does things he does not do».<sup>114</sup> In this moment, for example, I am *not* drinking coffee, I am *not* riding a bike and I am definitely *not* dancing. Of course, if someone asked me what I am doing, I can simply answer that I am writing my doctoral thesis, but the answer may vary depending on the context. Suppose, for example, that my doctor, worried about my health, calls and asks what I am doing: it is likely that I would respond that I am *not* drinking

---

<sup>114</sup> Donald Davidson (1985), *Reply to Bruce Vermazen*, in Bruce Vermazen and Merrill B. Hintikka (ed.), *Essays on Davidson: Actions and Events*, Oxford, Clarendon Press, pp. 172–176, p. 175.

coffee. This is because, in that context, she would not really be interested in what I am doing but wants to know if I am exaggerating with caffeine.

Many philosophers, in this regard, argue that talking about events that do not happen is like talking about objects or people that do not exist. Of course, no one can forbid us to say that "the present King of France is bald", but that would be a very strange statement since, as far as I know, there is no King in France today.<sup>115</sup> Therefore, although we often talk referring to things that do not really exist, it is very likely that we do not want to make any ontological commitment when we do that. Similarly, it is very likely that when we talk about events that did not occur, we do not really want to say that a non-event such as "the walk I did not take" really occurred. Yet very often the language practices we use to refer to certain events in the legal world seem to refer precisely to negative (legal) events such as:

(26) Charlie's *non-performance* of the contract

(27) Gordon's *non-payment* of taxes

(28) Dr. House's *failure* to provide medical care *caused* the death of the patient

(39) Johnny's *failure* to turn off the gas *caused* an explosion.<sup>116</sup>

These are just some of the examples of negative events which we should take seriously.

So how to handle them?

First of all, I would like to point out how, in many cases, a negative event is an ordinary, positive event under a negative description. Indeed, as we have seen in the previous section, we can provide multiple descriptions of an event, both in institutional and in brute terms; it depends on the context and, more importantly, on what we want to describe. In other words, descriptions – and also classifications – may vary. However, this must not lead us to argue that in the same spatiotemporal portion two or more different events have

---

<sup>115</sup> The issue, which is presented here in a maybe too simplistic way, is actually very well studied. For Bertrand Russell, for example, this statement does not say anything *about* a certain individual, who is currently the king of France and is bald. Rather, this statement says *that* a certain individual is currently the king of France and is bald. Cf. Bertrand Russell (1905), *On Denoting*, *Mind* 14(56): 479-493. On this point I also recommend reading: Cf. Willard V.O. Quine (1948), *On What There Is*, cit.; Achille C. Varzi (2001), *Parole, Oggetti, Eventi e altri argomenti di metafisica*, cit., pp. 22-23. For a different point of view on the issue Cf. Alexius Meinong (1904), *Über Gegenstandstheorie*, in Alexius Meinong (ed.) *Untersuchungen zur Gegenstandstheorie und Psychologie*, Barth, Leipzig, pp. 1-50; Francesco Berto (2010) *L'esistenza non è logica. Dal quadrato rotondo ai mondi impossibili*, Roma, Laterza.

<sup>116</sup> The event (30) proposed here is one of the events provided in: Achille C. Varzi (2007), *Omissions and Causal Explanations*, in Francesca Castellani and Josef Quitterer (ed.), *Agency and Causation in the Human Sciences*, Paderborn, mentis Verlag, pp. 155–167.

occurred. More simply, the same event may have different descriptions.<sup>117</sup> If this is true, why should we not describe an event in negative terms?

Obviously, when we talk about event such as (26) or (27) we are not referring to negative actions; we are referring to what Charlie and Gordon actually did «by mentioning a salient property that it lacked. A negative description has a negative sense, not a negative referent».<sup>118</sup> After all, in the legal world, it could be the only interesting information. Indeed, if we expect that something happens only because imposed by a legal rule – thus, it *ought to happen* – then it will certainly be legally relevant if that event did not happen – it *is not* the case that it happened.<sup>119</sup> But, I repeat, neither Charlie nor Gordon performed "negative actions"; they simply performed "positive action" which, in both cases, lacked a property: respectively, to perform a contract and to pay taxes.

There is also another type of omission that seems to be significant in the legal world. From the very first glance, indeed, it is possible to notice how events (28) and (29) are very different from events (26) and (27). The latter, in fact, appear to be (legally) significant omissions merely because the expected event did not occur. Charlie was supposed to be fulfilling the contract, but he did not do it, or rather, he did something else. In the same way, Gordon was supposed to pay taxes, but he did something else – and he did not pay taxes. These types of omissions – i.e., positive events under a negative description – are legally relevant therefore, precisely because the positive event that

---

<sup>117</sup> In the previous section, I have already mentioned how one can come to the description of the different legal events starting from a unique event. In other words, only one event occurred. Of course, it can be described in several ways and thus be legally "classified" in multiple ways. In this sense, a legal event might be considered as a sort of "gestalt situations" in which the same physical event can be (legally) described differently. Therefore, just as in the famous rabbit–duck illusion, although it is possible to see a duck or a rabbit, the figure is one physical event. Although it is possible to describe it differently, it remains a unique event. For a first approach to the rabbit–duck illusion Cf. Ludwig Wittgenstein (1953), *Philosophical Investigations*, cit., pp. 194-207

<sup>118</sup> Achille C. Varzi (2006), *The Talk I was Supposed to Give...*, in Andrea Bottani and Richard Davies (ed.), *Modes of Existence. Papers in Ontology and Philosophical Logic*, Frankfurt, Ontos, pp. 131–152, p. 136.

<sup>119</sup> In this respect, a further problem must be highlighted. Someone, in fact, might wonder how it is possible to expect that something happens because a legal rule prescribes its occurrence if, as I state in the previous section, it does not seem possible to claim that an event has "followed" or "violated" a legal rule. This is, of course, a pervasive consideration to which I can only respond here by sharing a few brief remarks. First of all, stating that an event is expected to happen because it is prescribed by a legal rule does not mean that the event will happen because of the legal rule. Events, in fact, happen or do not happen regardless of the legal rules. However, as I have already pointed out, it can sometimes happen that we want to make certain events happen because we want to regard them as legal events – and thus benefit from their legal effects. To put it more clearly, we often take certain actions as having legal significance for their legal effects. For example, in events (4) and (5), both John and Jack took the actions described in the event (in brute terms) (5) because they wanted to conclude a contract – i.e., the event (4). For this reason, they considered that the actions described in (5) *count as* the actions described in (4) in the legal world context. I repeat, these are only considerations, and they are certainly not exhaustive. I hope to be able to give a more accurate answer in a future work.

occurred was not the expected one. They are, in other words, what can be called *simple omissions*.

However, it should be noted that there is another type of omission in the legal world. This is a type of omission that is legally relevant not because it relates to a certain event that has not occurred, but because the event that has not occurred appears to have been the cause of a legal event. In this case, in fact, you are not blamed for not having done something: you are blamed because your "not doing it" has caused a (legally relevant) event. I suppose one might call this second type of omission *causal omission*.

Now, to think that the failure of an event may have caused another event seems to be challenging our robust sense of reality.<sup>120</sup> That is because we are used to thinking that: a) omissions are negative action and b) causation depends only on positive action. Thus, it seems contradictory to state that c) omissions have a causal role.<sup>121</sup>

Of course, it should be stressed how the English language, using the word "failures" to refer to omission, try to solve the problem upstream. Truly, this is a kind of linguistic fiction with important legal consequences. When, in fact, we say that "someone fails to do something" we are implicitly saying that he/she at least tried to.<sup>122</sup> However, there may not have been any attempts: it may simply be that something has not been done, and that is all - so to speak, they have not even tried us out.

Moreover, even if they had tried, it would still be an omission precisely because the attempt failed. If, for example, at the last inning of a baseball game the third batter of the losing team is called out, it is quite obvious that he failed to hit the ball, despite trying to do it. In other words, although he tried, the positive event "batter hitting the ball" did not occur. This is the reason we talk about "batter's failure to hit the ball". The question at

---

<sup>120</sup> Here, the reference goes to Russell's robust sense of reality, which, according to Bonino, can be defined as «a philosophical attitude close to a sort of common sense empiricism». Guido Bonino (2014), *On Russel's Robust Sense of Reality*, in Guido Bonino, Greg Jesson and Javier Cumpa (ed.), *Defending Realism: Ontological and Epistemological Investigations*, Boston, De Gruyter, pp. 363-378, p. 376. On this point Cf. Bertrand Russell (1919), *An Introduction to Mathematical Philosophy*, London, George Allen & Unwin, pp. 169-170.

<sup>121</sup> I adopted this approach to the problem inspired by Giovanni Tuzet (2013), *The Omission Dilemma*, Bocconi Legal Studies Research Paper No. 2887393, <http://dx.doi.org/10.2139/ssrn.2887393>.

<sup>122</sup> In this regard, as Varzi rightly points out, «The notion of trying, however, is itself troublesome. For we can try to do something just as we can try not to do something. In the first case, the something we are trying to do is an action of some sort (turning off the gas, for instance). But what about the second case? Shall we say that when we try not to do something, our trying is directed towards a negative action of some sort? [...] I think this is another case where our intuitions and linguistic practices are seriously misleading. [...] For when we try to do something, we are striving for there to be some event of a certain kind. When we try not to do something, however, our endeavors admit of two different construals: one can push the analogy and say that we are again striving for there to be some event of a certain (negative) kind; but one can also say that we are striving for there to be no event of a certain (positive) kind.» Achille C. Varzi (2006), *The Talk I was Supposed to Give...*, cit., pp. 146-149.

this point is: are we also willing to assert that the match was won by the winning team because the last batter of the losing team did not hit the ball? In a nutshell, are we ready to accept that the victory of the winning team was caused by the last batter's failure to hit the ball?

In this regard, I believe that no one is willing to argue that the winning team won because of the points not made by the losing team. On the contrary, I expect that everybody agrees that the winning team won because of the points it made.

Naturally, one could argue that this approach applies perfectly to baseball and not to law. Yet I cannot help but notice how often in the legal discourse one tends to blame those who, as our batter, causes something else by not doing something. The point is that, exactly like the "batter's failure to hit the ball" did not cause the victory of the opposing team, "Dr. House's failure to provide medical care" did not cause the death of the patient and "Johnny's failure to turn off the gas" did not cause an explosion. In truth, it is very likely that the death of the patient was caused by his or her disease and the explosion was caused by the one who switched on the light.<sup>123</sup>

Therefore, assuming that no omissions have a causal role, all that remains is to understand how to assess causal omissions correctly. Indeed, since it was not Dr. House who caused patient disease in (28), and it was not Johnny who, turning on the light, caused the explosion in (29), I wonder: what would have happened if Dr. House had provided medical care and Johnny had turned off the gas?

The patient would probably not have died and there would certainly not have been an explosion. In other words, Dr. House and Johnny's failure to act did not cause anything: their failure did not stop the occurrence of something. We could then rephrase (28) and (29) as follows:

(28)' Dr. House's *failure* to provide medical care *did not stop* the death of the patient

(29)' Johnny's *failure* to turn off the gas *did not stop* an explosion

---

<sup>123</sup> It is also worth noting how it is not even always useful to consider events like (29) and (30) simply as negative descriptions of positive events, as we previously did with *simple omissions*. In both cases, the dividing line is formed by the trying of the agents: if House or Johnny have tried to, respectively, provide medical assistance and turn off the gas, then it is still possible to consider events (29) and (30) as negative descriptions of positive events. Otherwise, if they have not even tried, then, as Higginbotham noted, there does not seem to be any particular positive event described negatively. Cf. James Higginbotham (2000), *On Events in Linguistic Semantics*, in James Higginbotham, Fabio Pianesi, and Achille C. Varzi (ed.), *Speaking of Events*, New York, Oxford University Press, pp. 49-79, p. 73-75.



In other words, according to events (28)' and (39)' one is not blamed for causing something, but for not preventing something that occurred.<sup>124</sup> This, however, could easily lead to bizarre conclusions. As an example, consider the case of the event (29)':

not only does the causal history that led to the explosion include no event of Johnny's turning off the gas; it includes no event of my turning off the gas, either. Still, had I turned off the gas, there would have been no explosion.<sup>125</sup>

So, why should I not be blamed?

The answer, I think, is both spatial-temporal and legal in nature. This is because not everyone can actually stop an event from occurring. Sure, it is true that neither Johnny, nor I – and nor you – turned off the gas: nobody did it. However, unlike Johnny, I was not there at that time. I do not know who this Johnny is, I do not know where he lives, and I do not even know when the explosion happened, so why blame me? In order to prevent the occurrence of an event, it is therefore necessary at least to be close to that event in time and space of that event. But it may not be enough. In some cases, in fact, to be spatiotemporally close to the event might not be sufficient.

Consider, for example, the event (28): even if I had been there, in that hospital room at the exact moment the patient was being examined, what could I have done? Not being a physician, I would not have known how to prevent the patient's condition from deteriorating. In that case, therefore, only a person with the qualification (and skills) of a medical doctor and who was spatiotemporally close to the patient could have prevented him or her from dying. To prevent an event, therefore, it seems necessary at least a) to be close in space and time to the event, and b) to be able to prevent it - i.e., to have the "qualities" to prevent it. Beware: necessary, not sufficient. Very often, for example, the law requires an additional requirement: the existence of a legal duty to prevent such an event.

Now, since it is not a task of this work to explain what is meant and from what this legal duty derives – each philosophy of law, in truth, is potentially able to give a different

---

<sup>124</sup> On closer inspection, indeed, some legal systems provide this kind of reading of what I called causal omissions. The Italian Criminal Code, in this sense, is explicit: in Article 40(2) it states that "where someone has the legal obligation to impede a crime, failing to prevent that crime is the same as committing such crime". In short, for the Italian penal code, causal omissions are nothing more than a "*fictio iuris*".

<sup>125</sup> Achille C. Varzi (2007), *Omissions and Causal Explanations*, cit., p.164.

response to these issue –, I prefer to conclude this section with two brief consideration on the causal omission.

In this regard, I would first like to emphasize, once again, how what I called causal omissions are not causal at all. In this sense, they are not true *causal reports*, since they do not express any cause of any event. But this brings me to another consideration: if causal omissions are not true causal reports, what are they?

Certainly, omissions like (28) or (29) explicitly involve the word "caused", and this might lead us to think they are speaking of causes and effects. However, as Beebee rightly pointed out, to explain the cause of an event does not imply that it should be identified precisely. Indeed,

the way in which causal facts enter into an explanation can be more complex than that. One can give information about an event's causal history in all sorts of other ways—by saying, for instance, that certain events or kinds of event do *not* figure in its causal history, or by saying that an event of such-and-such *kind* occurred, rather than that some *particular* event occurred. The moral here, then, is that something can be the explanans of a causal explanation without itself being a cause of the event cited in the explanandum.<sup>126</sup>

Therefore, it is for this reason that the *causal omissions* should not be considered as *causal reports* but rather as *causal explanation*. The difference between them is, at this point, quite simple to understand: *causal reports* make explicit the *cause* of an event, *causal explanations* explain *why* an event occurred. Of course, sometimes it is possible to produce a causal explanation of a certain event which explicitly mentions its causes. Other times, this is not possible and, as in (28) and (29), one can simply highlight how a certain event, which could have prevented certain effects, did not occur.

In such cases, we have a causal explanation that cannot be matched by a genuine causal report. [...] And although we can always switch from the 'cause' language to its 'because' counterpart, the converse does not hold. Every causal report translates directly into a causal explanation, but not vice versa.<sup>127</sup>

---

<sup>126</sup> Helen Beebee (2004), *Causing and Nothingness*, in John Collins, Ned Hall, and Laurie A. Paul. (ed.), *Causation and Counterfactuals*, Cambridge, MIT Press, pp. 291-308, p. 302.

<sup>127</sup> Achille C. Varzi (2006), *The Talk I was Supposed to Give...*, cit., p. 144.

On closer inspection, it appears that this last distinction – between causal reports and causal explanations – might have an enormous influence on jurists' thought and, more generally, on the legal world. If, in fact, one of the aims of the law is to prevent the occurrence of an event – of course, not "physically", as I said at the beginning of this chapter –, then it is interesting to note how it seems more effective to declare unlawful not stopping it, rather than to cause it. This is because, a ban that "contemplates" only the causes of an event fails to impose anything to those who, despite not having contributed to causing it, was in the condition to stop it from occurring – while, on the contrary, to impose someone to stop an event from occurring also implies prohibiting him/her from causing it.

To be honest, everything that happens has not been stopped before it happened. In this sense, then, even simple omissions such as (26) or (27) might be considered problematic. After all, no one prevented Charlie from not fulfilling the contract, nor did someone prevent Gordon from not paying taxes. So, why has nobody – except Gordon and Charlie – been blamed for such events?

The answer, I suspect, lies in the choices made by the lawmaker (broadly understood as any person having the power to create a legal rule): choices that I do not face in this work, but that appear to me, from the very first glance, to not be problem-free ones.

### **1.7. A place for facts**

Before concluding this chapter, one more distinction should be considered. It is one that often tends to vanish in everyday language: the distinction between "events" and "facts". In truth, it seems to be a distinction largely ignored, even by lawyers who tend to treat the aforementioned terms as synonyms. In other words, from the legal perspective, there would be no difference between

(11) Brutus's stabbing of Caesar

and:

(11)\* *The fact that* Brutus stabbed Caesar

Yet they are different.<sup>128</sup> On a closer look, in fact, it is possible to note how, while (11) is a particular historical event that occurred at the Ides of March of the year 44 BC, "that Brutus stabbed Caesar" is a fact today as it was then, in New York as in Rome.<sup>129</sup> Paraphrasing an observation made by Frank Ramsay: the stabbing of Caesar must not be confused with the fact that Cesar was stabbed, as well as the President of Italy should not be confused with the fact that Italy has a President.<sup>130</sup>

Facts, in other words, are ubiquitous, eternal and always true. This last feature, in particular, seems to be so important as to be repeatedly mentioned as a salient feature of the facts by various philosophers. Thus, in this sense facts would be «Actual state of affairs, corresponding to true statements».<sup>131</sup> It is, indeed, «the facts that characterize reality that make true interests true», so that statements like «"That wall is roughly eight feet high" is true because there is a fact-of-the-matter regarding the height of the wall from which is logico-conceptually derivable».<sup>132</sup>

It is therefore not surprising that, in the field of law, we are generally talking about facts, rather than events. If, in fact, one believes facts make the assertions true, then it is not surprising that in legal practice they are considered as something closely related to a judge's decision.<sup>133</sup> The latter, if based on facts, can only be true.

However, something particular is perceived in this way of considering facts. If, indeed, facts are considered as what judgment is based on, then they seem to be explanations (or justifications) of the decisions of a judge, rather than genuine events. In that sense, they can only assert that:

(30) *The fact that* an occurrence occurred has led to the decision of a court.

---

<sup>128</sup> In this regard, one might wonder if there is any kind of relationship between facts and events. On this point, however, several authors have provided different answers. In this sense, for example, while for Bennet facts and event are categorically distinct even if «many facts are not events [...] but every event is a fact» [Cf. Jonathan Bennet (1988), *Events and their Names*, cit., p. 129], other authors such as, for example, Chisholm, argued that both are species of the same genus (called "state of affairs") [Cf. Roderick M. Chisholm (1970), *Events and Propositions*, *Noûs* 4:15–24]. For a general introduction on this point Cf. Roberto Casati and Achille C. Varzi (2014) item "*Events*", cit.

<sup>129</sup> Cf. Achille C. Varzi (2001), *Parole, oggetti, eventi e altri argomenti di metafisica* cit., p. 60.

<sup>130</sup> Cf. Frank P. Ramsey (1927), *Facts and Propositions*, *Proceedings of the Aristotelian Society*, 7: 153-170, p.156. I have updated the example proposed, since Italy is no longer a monarchy.

<sup>131</sup> David H. Mellor (1995), *The Facts of Causation*, London, Routledge, p. 8.

<sup>132</sup> Nicholas Rescher (2006), *Metaphysic: The Key Issues from a Realistic Perspective*, Amherst, Prometheus Books, p. 104.

<sup>133</sup> In this sense, for example, Jeremy Bentham considered that facts, in the legal field, «are those facts, and those only, concerning the existence or non-existence of which, at a certain point of time and place, a persuasion may come to be formed by a judge, for the purpose of grounding a decision thereupon». Jeremy Bentham (1827), *Rationale of Judicial Evidence Vol I*, New York, Garland Publishing, 1978, p. 40.

But the occurrence itself is not a fact: it is an event. The latter, as we have seen, is a particular entity which can only occur, and not recur – i.e., it may happen one time and one time only.

In this regard, someone might argue that we need legal facts precisely because the event occurs once and only once in the ordinary world. These, in other words, would allow us to assert that a particular event in the ordinary world is legally relevant. It should therefore be correct to state that:

(31) *The fact that* a particular event x occurred is legally relevant

But in this way, it seems to me that one tries, on the one hand, to avoid such an event (or its legal classification) from being refuted and, on the other hand, to explain in a simple way why a certain event is legally relevant: because it is a fact, period. Considering an event and its legal qualification simply as a legal fact, in other words, saves it from rebuttal and justification. Therefore, it is preferable to talk about legal events – i.e., particular entities that occurred in the ordinary world described through institutional terms – rather than legal facts.

This does not mean, however, that I totally deny any relevance to the facts in the legal world. On the contrary, I recognize that facts play a very important role. Let us assume, for example, that something happened and that, after a heated debate in court, there was a judgment ruling that what happened was a legal event and as such has a legal consequence for those who caused it. Let us assume, therefore, that, once all appeals have been exhausted, the judgment is upheld. Therefore, from that moment, and only from that moment, it can be considered a fact that a legal event has happened and has led to a certain judgment.

However, two further clarifications need to be made. The first concerns the legal world. It is not a fact that things have gone in a certain way, but it is a fact that things have gone in a certain way in the legal world. Furthermore, the fact that in the legal world things have gone in a certain way does not imply that it is true that things have actually in that way even in the legal world. The only implication is that in fact the legal event is no longer questionable in the legal world.

This, by the way, seems to be intuited also by some jurists. In this sense, for example, I find interesting the statement of Robert H. Jackson, judge of the Supreme Court of the

United States of America between 1941 and 1953, who, referring to the role of the court itself, wrote «We are not final because we are infallible, but we are infallible only because we are final».<sup>134</sup>

In the same way, I think, one can say that the fact that a legal event happened and caused certain legal consequences is not indisputable because it is true, but it is true because it is indisputable. As such, therefore, it is true now, as it was then, here as everywhere.

And this is a fact!

---

<sup>134</sup> *Brown v. Allen*, 344 U.S. 443 (1953).

## 2. WHAT HAPPENED?

Daß man nicht erkennen kann, ohne etwas zu erkennen, allgemeiner: daß man nicht urteilen, ja auch nicht vorstellen kann, ohne über etwas zu urteilen, etwas vorzustellen, gehört zum Selbstverständlichsten, das bereits eine ganz elementare Betrachtung dieser Erlebnisse ergibt.

(Alexius Meinong)<sup>135</sup>

As the careful reader probably remembers, the previous chapter opened with a very clear question: what happened?

Well, if the person who asked that question had looked for an answer in the first part of this work, she would have found several interesting things. She would first have noticed how a purely materialistic ontological conception (so to speak) does not seem able to offer much information on the gestures and actions we carry out daily to obtain a legal effect. Therefore, I hope she would agree with the distinction between the legal world and the "ordinary world" (although, at this point, it would perhaps be more accurate to call it the "material world").<sup>136</sup> It is only in the latter that marriages are celebrated, contracts are concluded, or murder are committed. In other words, only in the legal world can legal events occur.

I want to be clear on the point: the world around us, the ordinary world, does not know things like marriages, contracts, or murders. In this regard, I have already pointed out how a Martian unaware of our social practices, for example, might describe any legal event only through a language that makes extensive use of "brute" terms – of course, only if he or she was able to speak our language. I also tried to show in what sense physical events, being particular – and thus unique and unrepeatable – raise problems in the legal world which may be partially solved through a conscious description of the event. All this was done without ever losing sight of the main distinctions among different

---

<sup>135</sup> Alexius Meinong (1904), *Über Gegenstandstheorie*, in Alexius Meinong (ed.), *Untersuchung zur Gegenstandstheorie und Psychologie*, Leipzig: Johann Ambrosius Barth, pp. 1-50, p.1.

<sup>136</sup> Indeed, in the previous chapter, I stated that the term "ordinary world" refers to everything that makes up reality around us [see footnote n. 32]. So, if we were to ask ourselves what exists, we could only answer everything. However, we must be careful, at least, to consider: 1) *ontological short-sightedness* – i.e., to believe in the existence only of certain things, because we never thought of others – and 2) *ontological hallucinations* – i.e., to believe in the existence of certain things, just because we think they exist. Cf. Achille C. Varzi (2010), *Il mondo messo a fuoco. Storie di allucinazioni e miopie filosofiche*, Roma, Laterza.

philosophies of law, instead trying to show the problematic nature of some specific cases (such as those concerning so-called negative events).

There is, however, something that was not done in the first chapter: the initial question received no answer. So far, I have preferred to focus on what happens in the legal world. Things happen, and they are mostly events. Some of them are negative and seem more challenging to deal with than others. Each event is different from others only in the ordinary world: the legal world, in a sense, reduces their differences. In a nutshell, I have focused so far on what happens in the legal world, trying to explain in what sense an event can also be considered a legal event.

Nevertheless, it is one thing to wonder if an event is a legal event; it is another entirely to wonder if we have good evidence for thinking that an event is a legal event. And «This is true despite the fact that the most reasonable way of trying to find the answer to the first question is to try to answer the second».<sup>137</sup>

Obviously, it is not possible to give a precise answer to the question "what happened?" in the specific case. This is because it is an invented case. Furthermore, the question posed, despite the appearance, aims probably to know only what the neighbor has been sentenced for. Thus, in a way, the question assumes that if he has been convicted, he must have done something. This is the crucial point: to be able to claim that an event is a legal event, it seems necessary to prove first that an event occurred.<sup>138</sup>

## 2.1. What are we playing at?

Many of us (perhaps all) have some experience with games. We come across a rulebook, read it carefully, and start playing. More often, however, we start to play, knowing only a few rules approximately and trusting the game knowledge of experienced players.<sup>139</sup>

---

<sup>137</sup> Roderick M. Chisholm (1976), *Person and Object: A Metaphysical Study*, cit., p. 113.

<sup>138</sup> The issue, incidentally, seems to imply an agnostic position, so to speak, according to which one has first to prove that an event occurred to clarify if it is or not a legal event. Searle's position on this point is clear. When asked about it, he said: «any ontology only works if you had a set of procedures for deciding how to apply the ontology. That means you have got to have an epistemology to enable the ontology to work. You have got to have some way of deciding "is this law constitutional?" or "is this agreement a contract?" The epistemology is necessary to verify the validity and the legitimacy of an ontology». [Angela Condello and John R. Searle (2017), *Some Remarks about Social Ontology and Law: An Interview with John R. Searle*, *Ratio Iuris* 30(2): 226-231, p. 229]. However, since I do not have a precise opinion, I try to remain as neutral as possible on this point.

<sup>139</sup> It was also argued that not all games are characterized by rules. Indeed, according to Caillois, «Rules are inseparable from play as soon as the latter becomes institutionalized. [...] But a basic freedom is central to play in order to stimulate distraction and fantasy. [...] Such a primary power of improvisation and joy, which I call *paidia*, is allied to the taste for gratuitous difficulty that I propose to call *ludus*, in order to encompass the various games to which, without exaggeration, a civilizing quality can be attributed». [Roger



They are the ones who, from time to time, correct our mistakes, explaining to us why a particular move cannot be made or the reason why a certain strategy cannot work.

At first, we are clumsy, but then, by trying and trying again, we will "get into the game," inventing more and more refined strategies. We would no longer have the problem of rules – as at the beginning – because we will play according to them.

In other words, one has to respect rules to play; otherwise, one is not playing. It is the rules that *constitute* the game.<sup>140</sup> As mentioned, this does not prevent us from thinking about possible strategies or talking about them with friends. On the contrary, a decent game always involves the following dichotomy: on the one hand, regularity and, on the other hand, indeterminacy. Thus, no matter how regulated it may be, «the game would no longer be a game if it did not have a proportion of uncertainty, risk, and arbitrariness that no pre-established rule can totally control».<sup>141</sup> This is because, despite attempts to create as objective and neutral a game as possible, one cannot fail to consider the players.

Now suppose one moved a piece. To those who do not know the game, that gesture is nothing more than the movement of a piece a few centimeters. However, for those playing it could mean much more. For example, it could be the winning move or a prohibited one that could disqualify the player who made it. Admittedly, the fact that the piece has been moved does not imply that anyone is playing – someone might have accidentally hit it by moving it. It is not because of their intrinsic properties that certain gestures constitute a game move. Yet it moved! And if it did so during a match, that is probably a move of the game. Of course, this distinction only applies to those who know the rules of the game and know that someone is playing that game – with that piece.

In a way, the law has some "affinity" with games.<sup>142</sup> To be sure, the seriousness of the issues, the vital interests of the individual and society, and the absolute social importance

---

Caillois (1958) *Man, Play and Games*, trans. Meyer Barash, London: Thames and Hudson, 1961, p. 27]. In this work, however, only games characterized by rules are considered.

<sup>140</sup> In this regard, Wittgenstein wondered the following in referring to the game of chess: «But isn't chess defined by its rules? And how are these rules present in the mind of the person who is intending to play chess?» [Cf. Ludwig Wittgenstein (1953), *Philosophical Investigations*, cit., p. 82]. For a more in-depth analysis, see Cf. Amedeo G. Conte (1983), *Analisi della regola in Wittgenstein*, in Aldo Giorgio Gargani, Amedeo G. Conte and Rosaria Egidi (eds.) *Wittgenstein: momenti di una critica del sapere*, Napoli: Guida Ed., pp. 37-82.

<sup>141</sup> François Ost (1987), *Between Order and Disorder: The Game of Law*, in Gunther Teubner (eds.) *Autopoietic Law: A New Approach to Law and Society*, Berlin; New York: W. de Gruyter, pp. 70-97, p. 85.

<sup>142</sup> On the so-called "games analogy," Cf. Bernard S. Jackson (1991) *Towards a Semiotic Model of the Games Analogy in Jurisprudence*, *Droit et Société* 17-18: 99-123; Michel van de Kerchove and François Ost (1993), *The Legal System Between Order and Disorder*, trans. Iain Stewart, Oxford: Clarendon Press; Andrei Marmor (2006), *How Law Is like Chess*, *Legal Theory* 12: 347-371. For an interesting general discussion on the metaphors used in the legal world, Cf. Claudio Sarra (2010), *Lo scudo di Dioniso: Contributo allo studio della metafora giuridica*, Milano: FrancoAngeli.

make the law a delicate matter to consider. However, as Huizinga rightly points out, «the sacredness and seriousness of an action by no means preclude its play quality».<sup>143</sup>

Since birth and as long as we live in society, we are in a way forced to play the game of law. No one ever provides us with a complete rulebook. And even if someone had done so, since legal systems are often changing, we would have had to update it regularly. Often, we try to play our best and, if we are caught violating specific rules, we might be sanctioned and "re-introduced" into the "game". But the rules do not just oblige us to adhere to certain standards of conduct; they allow us to do something otherwise impossible, such as entering into agreements or weddings.

On second thought, out of the "law-game" it would not be possible, for example, to get married. It would perhaps be possible to fall in love and spend life together, in the same place and at the same time. However, it would not be possible to do so as a husband and wife. These last terms denote "status" acquired as a result of a specific legal event: the marriage. It involves precise actions that not-yet-spouses must perform. However, I would like to be clear on this point: they cannot become a husband or wife just because of specific actions. They acquire the status of husband and wife – they get married – because it is recognized that such activities in a given context are suited to constitute a marriage.

Social–legal entities such as marriages, contracts, or public limited companies cannot be reduced to (and should not be confused with) physical (or natural) entities. Of course, they can be constituted by physical entities, but they cannot be reduced to them. In this sense, then, it is not possible to reduce a verbal obligation either to mere sounds or to the feeling of being obligated, or a train ticket (or travel document) to a small piece of paper. Moreover, unlike entities such as animals or trees, which exist regardless of subjects and their *intentionality* towards them,<sup>144</sup> things like tickets or oral agreements ontologically depend on our beliefs. All of these entities are irreducible to the natural objects that compose them, or with which they are correlated.

A piece of paper is a train ticket because we believe it is such. It would not exist if there were no beliefs, perceptions, memories, desires, will, intentions, feelings, and actions

---

<sup>143</sup> Johan Huizinga (1949), *Homo Ludens*, London: Temple Smith, p. 97.

<sup>144</sup> On closer inspection, one might question not so much the existence of things like trees or animals, but rather what trees and animals are. Someone, for example, might describe them as clusters of particles that respectively 'is-tree' and 'is-animal'. Cf. Achille C. Varzi and Maurizio Ferraris (2010), *Che cosa c'è e che cos'è*, in Achille C. Varzi, *Il mondo messo a fuoco. Storie di allucinazioni e miopie filosofiche*, Roma, Laterza, pp. 5-27. The terms 'is-tree' and 'is-animal' are inspired by Quine's work: Cf. Quine, *On What There Is*, cit., p. 27.

related to it. In other words, social–legal entities depend on the *intentionality* of the subjects. The latter is a basic (although amazing) aspect of our mental life: «it is the power of minds to be about, to represent, or to stand for, things, properties and states of affairs». <sup>145</sup>

Of course, even the pieces of the game or the table I am writing on are such because they are objects of my intentionality. <sup>146</sup> However, they do not seem to be socio-legal entities. Our intentionality is not enough to identify social-legal entities. Such entities are not only irreducible to natural entities and dependent on intentionality: they are also *normative entities*. It is this last characteristic that distinguishes them from other closely related entities such as artifacts and artworks – which also depend on the intentionality of the subjects. <sup>147</sup> But what does it mean to be a normative entity?

According to Searle, the specific normative nature of social entities lies in their being carriers of "deontic powers." These last would provide reasons to act which are independent of desires – i.e., reasons that do not depend on our preferences/inclinations or their usefulness. <sup>148</sup> In this sense, then, the contract I concluded with my employer is a sufficient reason to go to work, regardless of whether I want to or not. Likewise, the promise I made to my girlfriend to go out to dinner is a sufficient reason to do so. So why could there be legal consequences if I do not go to work, while if I do not go to dinner with my girlfriend there are none? In other words, why can my employer sue me, while my girlfriend cannot?

A first intuitive answer, based on the metaphor of the law as a game, could be that while in the first case I am violating a rule of the law-game, in the second case I am not violating it. <sup>149</sup> The relevant question then becomes how do we know when we are playing the law-game?

A first answer could be the following: each of us is always playing the law-game. In other words, anything we do could be contrary to or in accordance with the law. However, this response is unsatisfactory. Thus, we should not distinguish between legal action and no legal actions, since, according to this answer, we are always playing the law-game.

---

<sup>145</sup> Pierre Jacob (2019), item "*Intentionality*", *The Stanford Encyclopedia of Philosophy*, <https://stanford.library.sydney.edu.au/entries/intentionality/>

<sup>146</sup> They could also be reduced to clusters of particles that respectively denote 'is-piece' and 'is-table', the choice of particles to separate from the whole being completely arbitrary.

<sup>147</sup> Cf. Francesca De Vecchi (2012), *Ontologia sociale e intenzionalità: quattro tesi*, *Rivista di estetica*, 49, <http://journals.openedition.org/estetica/1707> (accessed 28 August 2019)

<sup>148</sup> In this sense, Cf. Searle, *Il mistero della realtà*, cit., pp. 216-219;

<sup>149</sup> This does not, of course, rule out the possibility that, even in the latter case, there may be legal issues that do not appear at first glance.

After all, it is a common knowledge that from when we are born to when we die – and as long as we live in a society – we are always subject to the law.<sup>150</sup> But that does not mean that everything we do is legally relevant. For example, lying in bed or counting sheep to fall asleep are not legal actions. Surely someone could argue that the fact that there is no information relating to the legal status of actions like lying in bed and mentally counting sheep does not mean that they cannot be considered legally relevant activities. However, this perspective would lead to worrying certainty: every action we take would be a law-game action, every event a legal event.

Fortunately, the metaphor of law as a game allows us to go further. Consider, for example, the game of chess: if we took a pawn and instead of moving it on the chessboard, we threw it out the window, would we still say it is – or that it could potentially be – a chess move? I am sure not. On the contrary, we have argued the opposite: a move of a game is such only if we know the game and recognize it as a move of the game. There is no intrinsic property of an action that qualifies it as a chess action, as well as there is no inherent property of an event that qualifies it as a legal event.

As mentioned, social entities, as well as some non-natural physical entities (such as tables and chairs), depend on the intentionality of the subjects. However, there is an essential difference between social entities and non-natural physical entities: while the former need at least two subjects to exist, the latter need only one subject.<sup>151</sup> Further, while more than one subject must believe in the existence of social entities, not every individual has to believe in their existence. In other words, collective and not individual intentionality is necessary for the existence of social entities.

This last consideration is particularly important for what we have called social-legal entities. Indeed, every legal system «will work only to the extent that it is generally accepted by the members of the community».<sup>152</sup> Therefore, it does not matter if an isolated individual does not know or does not accept a particular law-game: he will be subject to it anyway. In this sense, suppose that someone does not know that a particular verbal exchange constitutes an oral agreement, or that she does not share the belief that it is legally binding. According to what has just been written, for an oral agreement to exist,

---

<sup>150</sup> In this sense, for example, Bobbio observed how individuals, from birth to death, live in a world of norms, which direct their actions. Cf. Norberto Bobbio (1958) *Teoria della norma giuridica*, Torino: Giappichelli, p. 3.

<sup>151</sup> Cf. Francesca De Vecchi (2012), *Ontologia sociale e intenzionalità: quattro tesi*, cit.

<sup>152</sup> Angela Condello and John R. Searle (2017), *Some Remarks about Social Ontology and Law: An Interview with John R. Searle*, cit., p. 230.

it needs a community of people who believe and accept that a given verbal exchange has the status of an oral agreement. Thus, if a community becomes aware that a person tried to exploit the law by breaking it in various ways, that person will suffer the legal consequences of their actions. In our example, the person who violated the oral agreement will be compelled to compensate the other party.

Therefore, if ignorance or disrespect of the rules leads to exclusion from competition in many games, what we called the law-game does not work like that: even if one does not know the rules (or does not share them), he or she is "forced" to play. Our actions, indeed, may carry precise legal consequences, regardless of our awareness that we are playing the law-game.

However, if legal systems rest in collective intentionality, then it will not be possible to affirm that an action is a legal action before the community hears about its existence. If there is no intrinsic characteristic of an action that makes it a legal action, but it is only through collective intentionality that this action is classified as such, then the action must first occur to be classified as legal action. In other words, it is not *a priori* possible to distinguish action from legal action. Thus, the criteria to distinguishing between an event and a legal event can only be applied *a posteriori*.

For this reason, a first answer to the question relating to our self-awareness of playing law-games is as follows: it is not possible to know if an action is a legal action before the action is taken.

## **2.2. A Matter of Conventions**

If legal events were just a matter of conventions, then one could argue that it makes no sense to talk about the ontology or metaphysics of legal phenomenon. Our theories, indeed, would not concern the world, but our image of the world; and this would lead us directly to that postmodern extremism which replaces "facts" with "interpretations".<sup>153</sup> How, then, is it possible to combine the (metaphysical) realism hypothesis, according to which the world is what it is independently of our organization, with the conventionalism of legal systems?

---

<sup>153</sup> This is post-modern extremism, which derives from Nihilist thinking in particular. It was the German philosopher who wrote: «Against positivism, which halts at phenomena – "There are only facts" – I would say: No, facts is precisely what there is not, only interpretations. We cannot establish any fact "in itself": perhaps it is folly to want to do such a thing». Friedrich W. Nietzsche (1967), *The Will to Power*, trans. Walter Kaufmann and Reginald J. Hollingdale, New York: Vintage Books, p. 267.

After all, rules, rulings, or customs seem like the way human beings organize their world.<sup>154</sup> It is precisely because we claim we can organize the world through rules that there must be something underlying in the world on which the rules can be applied. In this regard, consider the following object: my own home. I can say that it is "my own home" because that house belongs to me: it is mine; it is my property. Now the "ownership of a house" is certainly the result of conventions and collective acceptance: no one can lawfully penetrate into my property without my permission, and unless there are objections, everyone knows that the portion of the space occupied by that building is mine. I own it. The concept of ownership is probably the result of a legal convention, but this does not mean that the house, that specific building made up of bricks and located in a particular location of time-space, is not real.<sup>155</sup>

The same could be said of some events: they are conventionally considered as being "legal," but this does not imply that something did not happen in the ordinary world. In other words, their legal classification is conventional, not their occurrence. Of course, one could further complicate the matter by arguing that even if what happens in the world is not the result of conventions, events would not be "objective," since they are the result of subjective human perception.<sup>156</sup> However, this is not the place to address this last issue, since this section focuses on the convention rather than on perception. Instead, particular attention should be paid to the question of the arbitrariness of the conventions. What would be wrong with it? In most cases, indeed, the conventions belonging to the sphere of our social life, as well as those acquiring scientific prestige, are the outcome of some sort of democratic reasonableness built on the experience.<sup>157</sup>

---

<sup>154</sup> Indeed, if legal rules have any influence in the world, it would be a "mediated" and indirect influence. As we have seen, the law is about lawfulness, not about the possibility of action. Thus, the influence of legal rules on the ordinary world is indirect and mediated precisely because the occurrence of an event remains possible, despite the rules. They can influence individuals, but they cannot directly affect the world.

<sup>155</sup> Of course, someone could argue that even the house is the result of a convention since we could always say that it is a cluster of particles that 'is-house'. However, it would still be a convention on a cluster of real particles. The point in these cases, as Luca Morena observes, is to not confuse the conventionalism with the spectrum of Berkeley's idealism, according to which everything is just a matter of perception. Instead, the existence of a bona fide material on which to carry out our delineations is always necessary. Cf. Luca Morena (2002), *I confine delle cose*, *Rivista di estetica* 42(2): 3-22, pp.19:20; Id. (2004), *Oggetti Convenzionali*, *Rivista di estetica* 44(2): 115-128.

<sup>156</sup> In this case, I am referring to Descartes' evil spirit «supremely powerful and cunning [who] devoted all his efforts to deceiving» of our senses [René Descartes (1641), *Meditations on First Philosophy*, trans. Michael Moriarty, Oxford: Oxford University Press, 2008, p. 16]. This demon is now back in vogue, mainly because of the "brain in a vat" thought experiment by Hilary Putnam. Cf. Hilary Putnam (1981), *Reason, Truth, and History*, Cambridge: Cambridge University Press, pp. 1-21.

<sup>157</sup> Cf. Achille C. Varzi (2010), *Il mondo messo a fuoco. Storie di allucinazioni e miopie filosofiche*, cit., pp. 75-76. Indeed, it may be rather difficult to accept that even some "scientific solutions" are the result of conventions. On this point, the relevant literature is really exterminated. However, at least from Kuhn's

Legislation, case-law, customs, and all other sources of law seem to arise from the need to solve, in a conventional but effective way, problems that can seriously interfere with our activities. Consider the rules on "property": every rule tries to solve a concrete problem; for instance, to ensure that a particular object is exclusively at the disposal of the owner. Of course, no rule can physically prevent someone from breaching the ownership of that object. No rule, in other words, can avoid a specific event from happening. However, if such an event is qualified as a legal event, then it can be considered unlawful and, consequently, might cause certain legal consequences. Thus, if an event is considered as a legal event on the grounds of a convention, it is by an arbitrary choice.

Nevertheless, claiming that a choice is arbitrary does not mean that one should always be able to choose between two or more equally reasonable choices:<sup>158</sup> it implies only that it is up to him or her – it is in his or her arbitrariness – to make a choice. Hence, it may well be that the convention on the grounds of which we classified a certain event as a legal event is the best convention for us. In other words, we can adopt a certain convention rather than another one precisely because it seems to us the most reasonable and, then, the best one. Therefore, the idea that legal events are, in a sense, conventional does not lead to the nihilistic apocalypse.

At this point, however, someone could argue that an event-based perspective of law, as outlined so far, seems to involve a crucial legal-ontological sacrifice. Indeed, consider if every event:

- is a particular which can occur only once;
- must first happen so that it can then be considered as a legal event;
- needs intentional states of acceptance shared by individuals of a given community (collective acceptance) in order to be considered as a legal event.

---

work, we can distinguish different phases of the scientific discoveries. The first, called pre-paradigm phase, is the one in which there is no agreement on a theory. In the second phase, after the general acceptance of a new paradigm by the scientific community, puzzles start to be solved in the context of the new dominant paradigm. Therefore, if, during the progress of normal science, an anomaly is revealed, it may lead to the beginning of a further phase, which involves a crisis that is often solved in the normal science context, even if it sometimes implies the beginning of a fourth phase. In this phase, we have the real scientific revolution in which the underlying assumptions of the field of knowledge are examined in order to establish a new paradigm so that, with the last phase, Post-Revolution, the new dominant paradigm is established (and accepted), so that scientists can return to normal science. In this sense, Cf. Thomas S. Kuhn (1962), *The Structure of Scientific Revolution*, Chicago; London: University of Chicago Press.

<sup>158</sup> In this regard, for instance, David Lewis argues that conventions are arbitrary because they always admit equally good alternatives; if a problem admits only one solution, then it is not a conventional solution. Cf. David Lewis (2002), *Convention: A Philosophical Study*, Cambridge: Harvard University Press. However, I do not agree with Lewis on this point.

According to these premises, then, the ontological relevance of legal rules would be compromised. This is because, as argued by Corrado Roversi, the thesis according to which a system of rules make a legal event possible makes sense and has a specific ontological value if and only if it can be demonstrated that these rules have a logical and chronological priority over the event itself – i.e., first legal rules then legal events.<sup>159</sup> In other words, individuals should perform or refrain from performing certain actions because they have somehow learned the rules. Instead, from the premises just explained, the opposite would emerge: the rules seem to be inferred (on a hypothetical basis) from the occurrence of an event each time. Thus, it would not be possible to demonstrate any priority. Therefore, if we consider collective acceptance as something that causes the legally relevant actions of individuals, then we are providing a *progressive* explanation of the legal world – i.e., we move from rules to legal events. If, on the contrary, we consider collective acceptance as something we (abductively) infer from the occurrence of an event, without knowing the intentional states of the subjects involved, then we are providing a *regressive* explanation of the legal world – i.e., we move from a legal event to the rules.

The main consequence of a regressive approach, thus, is the impossibility of establishing whether the rules we infer are actually constitutive rules or descriptions (in legal terms) of the structure of an existing practice (in other words, a dichotomy between constitutive rules, on the one hand, and descriptive statements of a constituted, on the other, would emerge). This is, however, a dichotomy on which I have already implicitly expressed myself in the last chapter, when I stressed the importance of the description of an event in legal terms.<sup>160</sup> After all, beliefs or intentions underlying legal events

need not be "occurrent" (causally active) nor conscious one. Standing (viz. dispositional) beliefs will do – the participants cannot be required to keep the beliefs in mind when acting any more than we keep, for instance, the rules of language in mind when speaking. We can even allow that the beliefs in question be only dispositions to believe.<sup>161</sup>

---

<sup>159</sup> Cf. Corrado Roversi (2012), *Costituire. Uno studio di ontologia giuridica*, cit., pp. 55-83. In truth, the author's criticism does not refer to the event-based perspective. However, I believe that some of his considerations, properly adapted to the perspective in question, could be very interesting. Therefore, if there is anything unclear, the responsibility is my own.

<sup>160</sup> In this sense, Cf. supra Ch. 1.3.

<sup>161</sup> Raimo Tuomela (1995), *The Importance of Us: A Philosophical Study of Basic Social Notions*, Stanford: Stanford University Press, p. 131.



Of course, the collective belief that a specific occurrence corresponds to a certain legal event may be grounded in the knowledge of legal rules,<sup>162</sup> as well as our knowledge of the rules may lead us to take specific actions that we consider to be legally relevant. However, as mentioned in the last section, it is not the event in itself that is legally relevant, it is the collective intentionality that makes the event legally relevant – and this can only be achieved with abductive reasoning.

Now, before moving on to the study of abductive reasoning – which is addressed in the next section – it is necessary to expose some further considerations concerning ontology (in general) and legal ontology (in particular). In this regard, I believe that any study of ontology should start from the classic question: what there is?<sup>163</sup> Ontology, indeed, is a sort of prelude to metaphysics: while the first establishes *what there is*; the last establishes *what is what there is*. In other words, while ontology tells us that certain entities exist, metaphysics specifies the nature of those entities.

An objection to this differentiation claims that it is not at all clear how it is possible to determine whether certain entities exist without, at the same time, giving them a precise characterization.<sup>164</sup> This objection is fairly clear for sciences such as physics: in revealing that the Higgs boson exists, the physicist also tells us what it is. Otherwise, to simply assert that certain things exist without assigning a specific meaning to them is to talk in vain. The same could be said for legal events, in stating that a certain legal event occurred (what there was), we also say what happened (what was what there was).

Thus, although it is hard to separate ontological issues from the metaphysical one, it seems to me that the distinction between *constitutive rules* and *descriptive statements of a constituted* does not concern the existence of legal events (i.e., the ontological aspect) but their nature (i.e., the metaphysical aspect). In other words, there is a consensus on their existence, not on their essence. What deteriorates is the "constitutive power" of the rules, not the ontological relief of what is constituted – i.e., the legal events.

---

<sup>162</sup> In this regard, it is interesting to note how John Searle himself argues that collective intentional states can be incorporated into the "background" and, thus, escape any form of conscious reflection [Cf. John R. Searle (1995) *The Construction of Social Reality*, cit., p. 142].

<sup>163</sup> Of course, I do not intend to argue that the whole of ontology is strictly limited to the answer to this question. For a first general presentation of the topic of ontology, Cf. Achille C. Varzi (2005), *Ontologia*, Roma: Laterza.

<sup>164</sup> On this point, Cf. Claudia Bianchi and Andrea Bottani (2003), *Introduzione: metafisica, ontologia e significato*, in Claudia Bianchi and Andrea Bottani (eds.), *Significato e Ontologia*, Milano: Franco Angeli, pp. 7-23.

Obviously, such a perspective is based on the assumption that space–time is what it is. In other words, there is an entire objective world from which it is possible to extrapolate the entities that interest us most. This extrapolation is not objective; events are ultimately extracted from reality on the basis of subjective perceptions and identified based on equally subjective conventions.

However, this formulation does not seem not to be inconsistent with any of the traditional schools of thought of the philosophy of law. On the contrary: we have seen how, according to natural law theory, the validity of the natural law can be based on the consideration that a law is valid if it is self-evidently good, which means that what everybody thinks is good *is* good. In other words, we could say that for the theorists of natural law, natural law itself could be based on a kind of collective acceptance. If it is "evident" to everyone that a certain law is good, then this means that everyone accepts it as such.

The discourse for legal positivism, on the other hand, is different and a little more complicated. Although much legal positivism theory declares that morality is irrelevant to the identification of valid law because it is ultimately the command of a sovereign, it seems that the law cannot "work" without widespread acceptance by the community to which that law is addressed.<sup>165</sup> Indeed, the strong point of legal positivism seems to be «its declaration of the limits of state requirements».<sup>166</sup> If nobody accepts the validity of the law, this means that the law is not valid. Who would carry out the orders of the sovereign if no one recognized their status?<sup>167</sup>

Finally, even many of the schools of thought more or less pertaining to legal realism recognizes a certain importance to conventional wisdom. In discussing the constraints to which the judges' decision would be subject, Duncan Kennedy – a leading exponent of so-called Critical Legal Studies (CLS) – has no problem admitting that:

---

<sup>165</sup> Indeed, it should be noticed how some of the goal of legal positivists is to describe what the law is. In this sense, for example, Herbert Hart, in his *The Concept of Law*, stated that, among other aims, he intended to provide a «descriptive sociology» of the law [Herbert L. A. Hart (1994), *The Concept of Law 2nd Ed*, cit., pp. vi]. Thus, it is not strange that part of the work of the legal positivists also concerns, in a certain sense, the relationship between law and individuals.

<sup>166</sup> Michael Doherty (2001), *Jurisprudence: The Philosophy of Law*, cit., p. 67.

<sup>167</sup> One could at this point discuss whether, for the positivists, collective acceptance concerns all individuals in a given community or only those who administer justice: the officials. Both Hart and Kelsen seem to think this way, for example. Cf. Herbert L. A. Hart (1994), *The Concept of Law 2nd Ed*, cit.; Hans Kelsen (1960), *Pure Theory of Law 2nd Ed.*, cit.

judges, as an empirical matter, as a matter of plausible social facts, are also constrained by the reaction they anticipate from their audience. In other words, judges, as fallen beings vis-à-vis their oaths, want to *appear* to be "following" rather than "making" law. What a given judge will do in a case depends on what she thinks will "fly" as "good legal argument" in the minds of others, as well as, on what she herself thinks about the matter.<sup>168</sup>

This statement proves how even some legal realists (widely considered) consider convention.

It seems, then, that the conventionalism in the legal field does not amount to the end of either philosophical or legal investigation. On the contrary, since conventionalism is open to many possibilities, it allows us to decide what is legal and what is not.

### **2.3. A Useful Fallacy**

Often, in our daily lives, we think in a strictly deductive way, proceeding from causes to effects. Other times, we know only effects and ignore causes. The problem, in this latter case, it is not to infer what is going to happen, but what happened.

In the previous section, it was argued that legal events might be inferred abductively from the occurrence of events each time. In other words, I supported a regressive explanation of what happened in the legal world, rather than a progressive explanation of what happens. In this sense, every time that two individuals wish to get married, they will try to "follow" some specific legal rules. However, and this is the crucial point, it is not possible to consider their actions as a marriage just because they were convinced they had followed the rules of marriage. Something more is needed: their reference community needs to accept "spouses'" actions collectively as a legally valid marriage. On closer inspection, it is a kind of points of view game: partners undertake certain activities believing they are following specific legal rules, while community, in "logical" terms, infer the legal rules from their actions abductively. Only at this point, after collective acceptance of the actions of the partners as legally valid marriage actions, one can speak

---

<sup>168</sup> Duncan Kennedy (1997), *A critique of Adjudication: Fin de Siècle*, Cambridge: Harvard University Press, p. 161.

of a marriage.<sup>169</sup> All that remains, thus, is to understand what abductive reasoning is and how it works.

It is not easy to state when abductive reasoning was first investigated. Cicero, for example, thought he could establish the existence of some events from their effects (he called it *Argumentum ex Consequentibus*).<sup>170</sup> However, it is mainly from the work of the American philosopher Charles Sanders Peirce that the current conception of abductive reasoning derives.<sup>171</sup> The latter, from a formal logical point of view, can be expressed in the following way,

$$\begin{array}{l} C \\ A \rightarrow C \\ \hline A^{172} \end{array}$$

in which the symbol ' $\rightarrow$ ' is used to indicate the conditional relationship "If... then". Therefore, if we change the letter 'A' with the statement "It is a legally valid marriage" and the letter 'C' with "Partners' actions are such-and-such", then we will have this scheme:

---

<sup>169</sup>To be clearer (and changing the example), even if Brutus had stabbed Caesar believing himself to be following the rules imposing the killing of tyrants, his community may not have been willing to accept his legal classification of events. Indeed, the ancient Roman community could have punished him for his actions because, from their point of view, Brutus' stabbing of Caesar violated rules prohibiting murder. Obviously, the consequences of that "famous" stab were quite different. For a first reading about the historical context before and contemporary to the assassination of Julius Caesar, Cf. Michael Parenti (2003), *The Assassination of Julius Caesar: A People's History of Ancient Rome*, New York: New Press.

<sup>170</sup> The latter is the argument on knowing «quod effectum est quae fuerit causa demonstrat» (i.e., the argument which «is concerned with the effects arising from causes»). Cicero (2003), *Topica*, trans. Tobias Reinhardt, Oxford: Oxford University Press, pp. 150-151 (Top. XVIII, 67). It is also possible to find the wording: «ex consequentibus» in Cicero (1957), *De Oratore*, trans. Edward W. Sutton and Harris Rackham, Cambridge: Harvard University Press, p. 318 (De Or., II, 170). To be honest, Cicero was not the only (or even the first) to face this kind of problem. Indeed, on the same topic Aristotle (An. Pr., II, 27, 70 a) and Quintilian (Inst. Or., V, 9, 8-9) also expressed similar observations.

<sup>171</sup> Henceforth, for quotations relating to Charles Sanders Peirce's works, I will follow the standard rules of the research community who deal with Peirce's works. For this reason, the quotations from: Charles S. Peirce (1931-66), *Collected Papers of Charles Sanders Peirce, vol. I-VIII*, Charles Hartshorne, Paul Weiss and Arthur W. Burks (eds.), Cambridge: Harvard University Press, will be indicated in the body of the text by the acronym CP, followed by the volume number and the section number (ex.: CP 6.15 refers to the sixth volume's fifteenth section). Further, I will follow the same criteria for Charles S. Peirce (1992), *The Essential Peirce: Selected Philosophical Writings*, Nathan Houser and Christian Kloesel (eds.); Bloomington: Indiana University Press. In this latter case, I will use the acronym EP followed by volume number and section (ex.: EP 1.7 refers to the first volume's seventh section). Finally, the pages of Charles S. Peirce (1982-2010) *Writings of Charles S. Peirce: A Chronological Edition vol. I-VIII*, Max H. Fisch (eds.), Bloomington: Indiana University Press, will be marked with the letter W followed by the volume number and the page (e.g.: WI: 3 Indicates p. 3 of Writings' first volume)

<sup>172</sup> Atocha Aliseda (2000), *Abduction as Epistemic Change: A Peircean Model in Artificial Intelligence*, in Peter A. Flach and Antonis C. Kakas (eds.), *Abduction and Induction: Essays on their Relation and Integration*, Dordrecht: Springer, pp. 45-58, p. 49.

Partners' actions are such-and-such

If it is a legally valid marriage, then Partners' actions are such-and-such

It is a legally valid marriage

Unfortunately, what at first glance may seem like a valid *modus ponens* is actually not.<sup>173</sup> The last scheme, indeed, represents a formal fallacy in logic called *affirming the consequent*.<sup>174</sup> However, as long as «the status of A is tentative (it does not follow as a logical consequence from the premises)», then «any other nonstandard form of logical entailment [...], are all feasible interpretations for "if C were true, A would be a matter of course"». <sup>175</sup>

Therefore, even if it is a logical fallacy, it can nevertheless be a useful tool to formulate an explanatory hypothesis. In this regard, according to Peirce, once it is established that an explanation is needed, a «hypothesis then, has to be adopted, which is likely in itself, and renders the facts likely» (CP 7.202). From this point of view, then, anyone could formulate a hypothesis of a legal classification of an event. What matters, however, is that such a hypothesis is accepted by the community.

It is, therefore, better to consider abductive reasoning as an «inference to explanatory hypotheses»,<sup>176</sup> which proceeds from the consequent to the antecedent – it is, indeed, also called «Retroduction» (CP. 1.68) – rather than a valid logical inference. In this way, we can even accept this "fallacy", since, after all, it only allows us to state that from some premises follows a possible – and not certain at all – consequence. And the consequences are not sure precisely because it is a logical fallacy. However, it is one that allows us to take an "obscure path" to go:

- from something known to something known (ordinary abduction);
- from something known to something unknown (extraordinary abduction).<sup>177</sup>

---

<sup>173</sup> *Modus ponens* is a simple «rule of inference [which] entitling us to pass from p, and p→q, to q». Simon Blackburn (1996), item '*modus ponens*', in *Oxford Dictionary of Philosophy*, Oxford-New York: Oxford University Press, p. 237.

<sup>174</sup> The affirming the consequent is a «formal fallacy, so named because the categorical premise in the argument affirms the consequent rather than the antecedent of the conditional premise». Irving M. Copi, Carl Cohen and Kenneth McMahon (2014), *Introduction to Logic 14<sup>th</sup> edition*, Harlow: Pearson Education Limited, p. 618.

<sup>175</sup> Atocha Aliseda (2000), *Abduction as Epistemic Change: A Peircean Model in Artificial Intelligence*, cit., p. 49.

<sup>176</sup> Lorenzo Magnani (2001), *Abduction, Reason, and Science: Processes of Discovery and Explanation*, New York: Kluwer Academic, p. XI.

<sup>177</sup> This distinction is taken up (and reformulated) by Tuzet's works. Cf. Giovanni Tuzet (2006), *La prima inferenza: l'abduzione di C.S. Peirce fra scienza e diritto*, Torino: Giappichelli; ID (2010), *Dover decidere:*

In this regard, Peirce stated that abductive reasoning is necessary when «surprising facts» (CP 7.220) occur. Indeed, according to the American philosopher, the abductive inference is needed in «the case in which a phenomenon presents itself which, without some special explanation, there would be reason to expect would not present itself» (CP 7.194).

Now, beyond the word "fact", what could be more surprising than an entity that can happen once and only once? In other words, what could be more unexpected than an event?

I have previously argued that events are particulars that may occur but not recur. Of course, this is not surprising since, in the philosophical tradition, particulars have always been considered as items that are numerically one. A particular, in other words, is 'one thing', such as a book, an apple or a bike. However, although the most common examples of particulars are the objects, this does not mean that also events can be – and indeed they are – particulars. Events such as the following, for example, are particular:

- (1) Donald Trump's affirmation at the West Front of United States Capitol Building in Washington, D.C. on January 20, 2017
- (2) Barack Obama's affirmation at the Blue Room of the White House in Washington, D.C. on January 20, 2013

Of course, even if the subjects, places, and dates are different, the words pronounced and the effects of these statements were very similar (if not the same). Indeed, with the formula: «I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States»<sup>178</sup> both Donald Trump and Barack Obama took the oath of office of the President of the United States. These events are, to all intents and purposes, different from each other. Yet, each of them can be classified as the oath of office of the President of the United States. Of course, they are not precisely the same oath. However, it seems that there is at least something common and universal between (1) and (2).

Indeed, it is more challenging to provide a strict definition of what is understood by "universal," since there are many open questions on its existence and nature. However, it

---

*diritto, incertezza e ragionamento*, Rome: Carocci. The latter, however, is not the only possible subdivision. Other authors, such as Pizzi, prefer to distinguish between *selective abduction* and *creative abduction*. Cf. Claudio Pizzi (2009), *Diritto Abduzione e Prova*, Milano: Giuffrè, 2009.

<sup>178</sup> U.S Const. Art. II Sect. 1.

should be noticed how, in general, “universal” means «a nature or an essence which more than one thing can (or could) have» or, in other words, «something which is *apt* to be truly predicated of more [than] one thing».<sup>179</sup>

Indeed, the term 'book', for example, can truly be the predicate of more than one 'thing' like the Bible, an algebra book or a Harry Potter book: each of them is a 'book'. So, the word 'book' seems to refer to something all books have.<sup>180</sup> In a sense, it seems that when we say that a particular item *x* has the general property *P*; where *x* is a particular book and *P* is the predicate 'book' (such as "the Bible is a book"), we are predicating the general property *P* to that *x*. But how can a particular thing have a general property?

To say that in the library, near to the Bible, there is Harry Potter and that also Harry Potter is a book, it is not only possible but could also be true ("Harry Potter is a book" is, indeed, a true statement).<sup>181</sup> But how can two different things, like the Bible and Harry Potter, have the same property (i.e., 'being a book')? And if two particular things can have the same property, what kind of thing is that kind of thing that may be predicated of several things?

All of these questions refer us to one of history's most important philosophical problems: the problem of universals. Indeed, the latter «is a historically variable bundle of several closely related, yet in different conceptual frameworks rather differently articulated metaphysical, logical, and epistemological questions, ultimately all connected to the issue of how universal cognition of singular things is possible».<sup>182</sup> Obviously, this work does not intend to make any significant contribution to this "problem" – it would not, so to speak, be able to do so. However, it should be noticed how the legal world also seems to be somewhat affected by this problem. In this sense, consider the cases of legal events classify as "murders". Already at first glance, events such as the following one:

---

<sup>179</sup> Jens T. Anfindsen (2005), *On particulars and universals*, HonestThinking.org, Retrieved from [http://www.honestthinking.org/en/pub/HT.2005.JTA.Particulars\\_and\\_universals.html](http://www.honestthinking.org/en/pub/HT.2005.JTA.Particulars_and_universals.html)

<sup>180</sup> Actually, the term 'book' itself is quite vague. Generally, when we hold a book in our hands, we are holding a specific concrete object. But when we say that in that book the story of a person named Harry Potter is narrated, are we still talking about that object? Not exactly: what I just said would continue to be true even if I destroyed the copy of the book in your hand. And it would still be true even if I destroyed the original copy delivered to the publisher or even the draft in the author's computer. Moreover, if someone bought a further copy of the book, he or she would not read another book but the same one. Thus, what exactly are we talking about when we talk about a book? Cf. Achille C. Varzi (2001), *Parole, oggetti, eventi e altri argomenti di metafisica* cit., pp. 15-16.

<sup>181</sup> Incidentally, it should be noted how the term 'Bible' could also be predicated on something else. In some cases, indeed, if one wants to underline the importance of a specific book, he or she could say something like "Hart's *Concept of Law* is the bible for many legal philosophers."

<sup>182</sup> Gyula Klima (2017), item "*The Medieval Problem of Universals*", *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/universals-medieval/>.

(3) Jack's gunshot to John

is surely different from the event:

(4) Mike's gunshot to Jack

No one, in other words, could argue that (3) and (4) are the same event. Yet both of them might be classified as the legal event "murder" – that is, as mentioned in the previous chapter, the unlawful killing of another human being.<sup>183</sup> Thus, they could be at least the same: legal events. But be careful: (3) and (4) might be the same legal event – i.e., two different exemplifications of the same legal event – but they might also not be.

The crucial problem, therefore, seems to be very similar to the problem of universals just mentioned: how is it possible to "connect" a particular event with what – like legal events – seems to be universal?

Regardless of the possible philosophical positions related to universals,<sup>184</sup> abductive reasoning might help us face this challenge. Indeed, since it is, in a sense, a logical fallacy, abduction does not in itself contain its logical validity and must, therefore, be confirmed every time – since it concedes more than one possible solution.

In particular, according to Peirce, human thinking has at least three options to create inferences: abduction, deduction, and induction. However, according to the American philosopher, it is necessary to distinguish between deduction, on the one hand, and abduction and induction, on the other. Indeed, while the former is not an ampliative inference – which means that all conclusions are already in the premises –, abduction and induction are ampliative inferences – i.e., conclusions are not contained in the premises.<sup>185</sup> However, it should be noted how, even if we were to decide to use abductive

---

<sup>183</sup> In this sense, Cf. supra Ch. 1.4.

<sup>184</sup> In this regard, it should be noted how traditionally there are at least three distinct philosophical positions concerning the universals. The first is the *realist* position, according to which the kind of thing that two or more things can have in common is something independent of the human mind. The second philosophical position, the *conceptualist* one, instead claims that universals are mental representations or concepts. Finally, the *nominalist* position is inclined to consider each universal as a linguistic item: a sort of a "name" that two or more entities can have in common. Obviously, the distinction just outlined is an only rough draft. For a first in-depth study, Cf. Farhang Zabeeh (1966) *Universals: A New Look at an Old Problem*, Dordrecht: Springer Netherlands; Josef M. Bochenski, Alonzo Church and Nelson Goodman (1956), *The Problem of Universals: A Symposium*, Notre Dame: University of Notre Dame Press.

<sup>185</sup> Cf. Giovanni Tuzet (2006), *La prima inferenza: l'abduzione di C.S. Peirce fra scienza e diritto*, cit., p. 2. Moreover, it should be pointed out how, although similar, induction and abduction are different. In this



inference, the other two inferences just mentioned would not be left aside at all. Peirce himself, suggested that once a hypothesis is adopted through abductive inference, «the first thing that will be done (...) will be to trace out its necessary and probable experiential consequences» (CP 7.203). Thus, «having (...) by means of deduction, draw from a hypothesis predictions as to what the results of experiment will be, we proceed to test the hypothesis by making the experiment and comparing those predictions with the actual results of experiment. (...) This sort of inference it is, from experiments testing prediction based on a hypothesis, that is alone properly entitled to be called induction» (CP 7.206). However, since abduction involves, as we said, a sort of "obscure path" which can lead us to different conclusions from time to time (precisely because, unlike the deduction, in the abductive inference, they are not contained in the premises), it can pave the way for different solutions (not because it is impossible to confirm a precise abductive hypothesis through deduction and induction, but only because it is possible to confirm different abductive hypotheses through them). For this reason, abductive reasoning in itself is not sufficient to confirm that a particular event corresponds to a specific legal event. Anyone might abduce to a conclusion, but this implies that there might potentially be more than one for each individual. Yet, if many individuals agree on a single conclusion, then the collective acceptance will confirm the abductive reasoning. This is because, as well highlighted by Saul Kripke, it «is not that the answer everyone gives (...) is, by definition, the correct one, but rather the platitude that, if everyone agrees upon a certain answer, then no one will feel justified in calling the answer wrong».<sup>186</sup>

Therefore, a regressive explanation of what happened in the legal world through abductive inference produces an explanation in which the occurrence of a constituted legal event is stated. It will then be the collective acceptance that will make that event undisputed.

---

sense, Peirce argued that «both lead to the acceptance of a hypothesis because observed facts are such would necessarily or probably result as consequences of that hypothesis. But for all that, they are the opposite poles of reason (...) Abduction makes its start from the facts, without, at the outset, having, any particular theory of view (...) Induction makes its start from a hypothesis which seems to recommend itself (...) Abduction seek a theory. Induction seek facts» (CP 7.218). However, still today the distinction between abduction and induction is not uncontested and, while some authors insist on understanding abduction as a form of induction (often supporting this view in different ways), other authors argue their diversity. For a preliminary overview, Cf. Peter A. Flach and Antonis C. Kakas (2000), *Abduction and Induction: Essays on their Relation and Integration*, Dordrecht: Springer.

<sup>186</sup> Saul Kripke (1982) *Wittgenstein on Rules and Private Language*, cit., p. 112.

## 2.4. To Agree to Disagree

From a certain point of view, the conventional nature of legal events seems to be, in some way, opposed to the notion of abductive inference. On closer inspection, indeed, since abductive reasoning allows us to get several hypotheses of legal events, this means that each event might match to several legal classifications. How, then, is it possible to maintain the conventional nature of law while recognizing the possibility that there might be disagreements about what legally happened?

Of course, in order to exist, a legal system must be grounded on the common acceptance of something. However, not everything that happens is accepted peacefully in the legal world; indeed, there may be disagreements. On the other hand, as well highlighted by Lorena Ramírez Ludeña, «the number of disputes that end up in court is very small if we compare it with our relationship to norms».<sup>187</sup>

Moreover, disagreement, where present, does not in any way imply the absence of any "consensus". In other words, two or more individuals may disagree on something and agree on something else. Even in the extreme case where they agree on nothing, they should at least agree to disagree – i.e., to agree that there is no agreement. Indeed, consensus itself does not seem to require unanimity, but rather general acceptance.<sup>188</sup>

Traditionally, Ronald Dworkin has been credited with putting the argument of legal disagreement on the agenda of legal theory. In this sense, he sketched the topic in *Taking Rights Seriously*, in which he pointed out how principles have a fundamental role in resolving legal cases.<sup>189</sup> Some years later, he returned to the topic in *Law's Empire*, emphasizing how legal reasoning involves a constructive and creative interpretation.<sup>190</sup> Indeed, Dworkin's aim was to explain and highlight the difficulties that legal positivists generally face when they try to reconstruct the so-called *hard cases* in which officials disagree.<sup>191</sup>

---

<sup>187</sup> Lorena Ramírez Ludeña (2016), *Legal Disagreements*, *Revus* 28: 11-32, p. 17.

<sup>188</sup> In this regard, for instance, Jürgen Habermas stressed how the complexity of modern societies also involved the risk of disagreements. Cf. Jürgen Habermas (1998), *The Inclusion of the Other: Studies in Political Theory*, Cambridge: MIT Press.

<sup>189</sup> Cf. Ronald Dworkin (1977), *Taking Rights Seriously*, Cambridge: Harvard University Press.

<sup>190</sup> Cf. Ronald Dworkin (1986), *Law's Empire*, cit., pp. 45 and ff.

<sup>191</sup> Actually, there are many definitions of *hard cases*. Dworkin, for example, argued that for positivists a hard case is «a particular lawsuit [which] cannot be brought under a clear rule of law, laid down by some institution in advance» which lent the judge the «discretion to decide the case either way». [Cf. Ronald Dworkin (1977), *Taking Rights Seriously*, cit., p. 81]. However, this definition is what Dworkin thinks legal positivists claim, not what legal positivists really do affirm. Herbert Hart, indeed, replied to this description of positivist thought in the postscript of the second edition of *The Concept of Law*. Cf. Herbert L. A. Hart (1994), *The Concept of Law 2nd Ed*, cit., pp. 238-276.

In recent years, starting from the considerations proposed by Dworkin, many works have appeared regarding disagreement in general, and legal disagreement in particular.<sup>192</sup> In this regard, one can even distinguish different levels at which legal disagreement takes place. Several authors, indeed, have provided some not exhaustive lists of the different levels of disagreement showing how, in the discussion regarding disagreements in law, a range of arguments from different levels may be offered.<sup>193</sup> In this work, however, we deal only with the specific type of disagreement which could arise in legal practice and concerns legal events.

It is common knowledge that, in professional practice, lawyers disagree on many issues. For instance, they might not agree on the sources of law, on criteria of interpretation, or even on the solution of a specific case. Not agreeing is somehow part of lawyers' professional traits. In a sense, they are paid for disagreeing – or to reach an agreement among parties who disagree. As a result, we can consider disagreements as being instances of *intersubjective* divergence that are distant, for example, from moral dilemmas – which are, indeed, *intrasubjective*.<sup>194</sup>

Anyway, the choice to focus on the conflict between two or more parties concerning the events must not mislead us. There are at least three distinct philosophical challenges concerning such kind of disagreement: a metaphysical, an epistemological, and a semantic one.<sup>195</sup>

The first of these challenges – the metaphysical one – is well exposed in Immanuel Kant's *Critique of Judgement*, in which the Königsberg philosopher states that: «For in a matter in which contention is to be allowed (...) one must be able to reckon on grounds of judgement that possess more than private validity and are thus not merely subjective».<sup>196</sup>

---

<sup>192</sup> The bibliography of this topic is really extensive. For a first glimpse of the issues concerning legal disagreement Cf. Samantha Besson (2005), *The Morality of Conflict: Reasonable Disagreement and the Law*, Oxford-Portland: Hart Pub; Jeremy Waldron (2004), *Law and Disagreement*, Oxford-NY: Oxford University Press.

<sup>193</sup> In this regard, for example, Cf. Lorena Ramírez Ludeña (2016), *Legal Disagreements*, cit. pp. 23-26.

<sup>194</sup> For a first introduction to the topic of moral dilemmas, Cf. H.E. Mason (1996), *Moral Dilemmas and Moral Theory*, New York: Oxford University Press.

<sup>195</sup> It seems to me, however, that the proposed challenges are nothing more than a sort of re-proposal of the main thesis of Gorgias' lost work titled: *On Nature or the Non-Existent*. In that work, in fact, the ancient sophist developed a skeptical argument which may be summarized in this way:

- Nothing exists;
- Even if something exists, nothing can be known about it; and
- Even if something can be known about it, knowledge about it cannot be communicated to others.

As we shall see in the course of this section, these three points seem very close to the challenges just mentioned. For a first approach to the skeptical thesis of Gorgias, Cf. Gorgias, *Su ciò che non è*, trans. Roberta Ioli (eds.), Hildesheim: Olms, 2010.

<sup>196</sup> Immanuel Kant (1790), *Critique of Judgement*, trans. James Creed Meredith, Oxford: Oxford University Press, 2007, p.166

In other words, according to Kant, if we want to disagree rationally, there must be some objective grounds on which not to agree. Of course, Kant introduced this metaphysical argument in the context of the judgments of taste, but this does not mean that it cannot be true for legal claims also. After all, he simply suggested grounding our disagreements on something independent of our subjective view.

At first glance, since the disagreements on legal events seem to be grounded on the occurrence of events, the already mentioned realistic position on events of this work seems to be able to address Kant's challenge efficiently.<sup>197</sup> However, someone might say that, in the legal context, the disagreement is not based on events but on their legal classification. The legal disagreement, in other words, would not be due to general uncertainty about what happened, but to the impossibility of uniquely determining what legally happens. Indeed, it would be precisely this impossibility that would lead to the assertion that the "law is indeterminate." The occurrence of an event could also be objective, but the existence of a legal event, based on the discussion so far, is not. So, how could our disagreements be rational?<sup>198</sup>

Nevertheless, suppose we succeed in settling the metaphysical challenge. At this point, problems would arise from another point of view: the epistemological one. Indeed, even if parties recognize a common ground of judgment, it is possible that, even after a comparison, they would continue to disagree. It is possible, therefore, that two or more equally well-informed parties may disagree. In other words, each party knows that there is disagreement and that the disagreement is with an interlocutor able to make informed judgments about the subject matters just like him or her – even if opposite. Therefore, the epistemological challenge is to deal with the disagreement among "epistemic peers." However, since this challenge is analyzed in more detail in the continuation of this work,<sup>199</sup> I will limit myself here to underlining how some authors, doubting the rationality of the disagreement between epistemic peers, suggest a certain epistemological modesty, according to which suspension of judgment is the epistemically proper attitude.<sup>200</sup> How,

---

<sup>197</sup> In this sense, Cf. supra Ch. 1.2.

<sup>198</sup> The rhetorical question does not mislead us: even if it is not possible to provide a perfectly rational solution, this does not mean that it is not possible to provide a reasonable solution. After all, as pointed out by Rawls, «merely rational agents lack a sense of justice and fail to recognize the independent validity of the claims of the others». John Rawls (2005), *Political Liberalism 2<sup>nd</sup> Ed. Expanded*, New York: Columbia University Press, p. 52. On this point, moreover, Cf. infra Ch. 2.7.

<sup>199</sup> In this sense, Cf. infra Ch. 2.6.

<sup>200</sup> On this point, for example, Cf. Richard Feldman (2006) *Epistemological Puzzle about Disagreement*, in Stephen C. Hetherington (eds.), *Epistemology Futures*, Oxford: Oxford University Press, pp. 216-236.

then, can we rationally justify our position in the face of disagreement with apparently well-qualified opponents who should be considered our epistemic peers?

Finally, assume we successfully overcome both the metaphysical and epistemological challenges: the semantic issue regarding the language we use remains. Since disagreement is grounded in something objective and yet parties continue to disagree given equal information, then one might think they are using different languages. Therefore, the semantic aspect of disagreements should not be underestimated. In truth, it is precisely this aspect that comes to the fore in the work of Dworkin, under the now-famous label of "the semantic sting".<sup>201</sup>

However, it should be noticed how, «with only a few exceptions, the argument from disagreement was never really taken up by the legal theories that Dworkin attacked – and if they did, they rather dropped the ball».<sup>202</sup> This is because, according to these authors, legal disagreement cannot exist if there is nothing "legal" about which to disagree. But what can we say, then, about disagreements on legal events? Is there anything legal to disagree with? What, in other words, do we not agree on?

We have just said that the disagreements that interest us here are those concerning legal events. Of course, not every legal event generates disagreement. Very often legal events are generally accepted as such from all individuals – or at least they are not disputed. But apart from the latter cases, it remains unclear in what sense one can talk about disagreements on legal events. Furthermore, disagreements regarding legal events are often anticipated chronologically and logically by disagreements regarding (physical) events. Indeed, legal practice shows how often the question of the legal qualification of an event is preceded by the problem of understanding what has happened in the world around us. In this sense, then, the work of the jurist is similar to the work of the historian:

---

<sup>201</sup> In this regard, he writes, for example, that «lawyers cannot all be using the same factual criteria for deciding when propositions of law are true and false. Their arguments would be mainly or partly about which criteria they should use. So, the project of the semantic theories, the project of digging out shared rules from a careful study of what lawyers say and do, would be doomed to fail. [...] If two lawyers are actually following different rules in using the word 'law', using different factual criteria to decide when a proposition of law is true or false, then each must mean something different from the other when he says what the law is. Earl and Gray must mean different things when they claim or deny that the law permits murderers to inherit: Earl means that his grounds for law are or are not satisfied, and Grey has in mind his own grounds, not Earl's. So, the two Judges are not really disagreeing about anything when one denies and the other asserts this proposition». Ronald Dworkin (1986), *Law's Empire*, cit., pp. 43-44.

<sup>202</sup> Ralf Poscher (2016), *Why We Argue About the Law: An Agonistic Account of Legal Disagreement*, in Paweł Banaś, Adam Dyrda and Tomasz Gizbert-Studnicki (eds.), *Metaphilosophy of Law*, Oxford: Hart Publishing, pp. 191-226, p. 202.

both are concerned with the research of past events starting from evidence.<sup>203</sup> In short, one needs to figure out what occurred before establishing what legally happened. The problem, however, is that it does not seem possible to determine what happened objectively. On the contrary, a reconstruction of the events conditioned by our perceptions and intentions seems more likely.

Moreover, even if consensus on a description of an event were reached, this, as we have seen, would not involve an agreement on the legal event. In this regard, take the event (3) and suppose that two different parties, called prosecution (P) and defense (D), agree on such a description. Also assume that these two parties, while agreeing on (3), do not agree on its legal qualification: for P the event (3) is legally equal to

(3)<sup>P</sup> Jack's murdering of John,

while for D the event (3) is legally equal to

(3)<sup>D</sup> Jack's self-defense against John.

Of course, exactly like the parking lot case of the previous chapter, one might argue that the problem is the lack of information related to the event (3).<sup>204</sup> However, considering that it seems impossible to collect all of the information relating to an event, it should be noticed that adding information can exclude some hypotheses, but it does not resist all other remaining conflicting assumptions. So, if it is no longer possible to retrieve further information, there would be an impasse in which two different legal events – (3)<sup>P</sup> and (3)<sup>D</sup> – would remain on the table. Since, however, what happened in the ordinary world is the event (3), it is impossible to claim that in the legal world two opposing events occurred at the same time and at the same place.<sup>205</sup> In other words, in the legal world things are not too different from the ordinary world: even there it is not possible for two different and opposing events to occur in the same place and at the same time. The problem, therefore,

---

<sup>203</sup> However, unlike historians, jurists are not engaged on a fragment of the past of their choice and legal research; unlike the historical one, is not fully revisable anytime. Cf. Claudio Pizzi (2009), *Diritto Abduzione e Prova*, cit., pp. 16-17.

<sup>204</sup> In this sense, Cf. supra Ch. 1.5.

<sup>205</sup> It would perhaps be possible to support such a position if it were discovered that, for example, a generic X event could be legally classified as 'X<sup>P</sup> and X<sup>D</sup>'. In this case, however, the disagreement between parties disappears as soon as they realize that legal events X<sup>P</sup> and X<sup>D</sup> are actually part of the same legal event 'X<sup>P</sup> and X<sup>D</sup>'.

is to find a way to exclude from the catalog of everything that happens in the legal world the legal event of too much.

## 2.5. The Game of Courts

Every player of any game knows that acting according to the rules – or, at least, acting by thinking about following the rules – is often the most advantageous way to play. Every respected rule of the game is able to affect the "value" of human actions in-game. In "Draughts", for instance, if, with a series of valid playing actions, one succeeds in reaching the "kings row" with a "man," that "man" becomes a "king" and acquires additional powers that benefit the player who did those actions. In other words, game actions acquired a certain in-game value and meaning, precisely because of its rules.

Even the law, just like all other games, is composed of rules that assign "value" (positive or negative) to specific game actions. The problem, as we have seen, is to know when an action is a game action – i.e., a legal action – since the "chessboard" of the law is reality itself. This problem is only apparently easily solvable by the supposed conventional nature of legal events. Indeed, even opting for a conventional solution of the legal issues regarding events, we have seen how such a choice seems to be strictly related to the abductive reasoning which is, probably, the primary source of disagreement on legal events. This is because, it allows claiming different legal events from the same event.

Fortunately, the law-game, like many other games, has an effortless way to resolve disputes: the referees. The latter, frequently called judges, operate and cooperate (sometimes with the help of juries) with those who disagree within a kind of "mini-game" (inside the law-game) called a trial. The main purpose of a trial and of the courts in which it takes place is to settle legal issues.<sup>206</sup>

However, unlike referees, who are external to the game – they just arbitrate, so to speak – judges, being citizens, are also law-game players. Thus, they are not only players: they are players who, to solve disagreements, are expected «to bridge the gap between law and life's changing reality without changing the text [of the legal rule] itself».<sup>207</sup> However,

---

<sup>206</sup> Over time, several categorizations of the legal issues have been proposed. One of the simplest is the one suggested by Duncan Kennedy, who proposed to «classify legal issues in a rough way as involving either rule making (and interpretation) or fact finding, with a significant intermediate category of 'mixed' questions» [Duncan Kennedy (1997), *A Critique of Adjudication: Fin de Siècle*, cit., p. 39]. If we wanted to follow this classification, we should probably classify the issues relating to legal events in the "intermediate category" identified by the American author.

<sup>207</sup> Aharon Barak (2016), *On Judging*, in Martin Scheinin, Helle Krunke and Marina Aksenova (eds.), *Judges as guardians of constitutionalism and human rights*, Cheltenham: Edward Elgar Publishing, pp. 27-49, p. 31. Such a quotation, incidentally, seems to be a simple way of summarizing one of the main

since legal philosophers generally do not accord a great deal of attention on trial, in this section, I prefer to deal with them, rather than of judges.<sup>208</sup> Indeed, although «The iconic image of a court in legal theory is an enrobed judge presiding on the bench issuing rule-based decision to decide cases»,<sup>209</sup> courtrooms are more than this: they are the place of the judicial debate between litigants.

Over the years, many scholars have focused their analyses on those with the "burdens of judgment",<sup>210</sup> leaving aside investigations into judicial debates. However, a trial is principally a dialectical clash, a "speaking against". It is, in other words, an example of what the ancient Greeks considered an *agon*: «a contest bound by fixed rules and sacred forms, where two contending parties invoked the decision of an arbiter».<sup>211</sup> Thus, not taking into consideration judicial debates, the different positions and claims of the parties involved in legal proceedings, and, above all, what the various parties do in the courtroom means that one of the central aspects of modern legal practice will go unaddressed.

Of course, not all courts and trials are the same. They differ not only from state to state but also in terms of the subject matter of disagreements or the subjects involved in disputes. What remains constant is their primary purpose: «Courts are organizations that process cases».<sup>212</sup> However, how do courts process cases?

Often, we are so committed to analyzing how courts resolve disputes that we fail to consider how they process cases. Thus, in this section, based on the perspective of the

---

questions of this thesis: the issue regarding how to match events (particular) with event classes of the legal provisions (universal).

<sup>208</sup> On the figure of the judge, Cf. *Infra* Ch 2.7.

<sup>209</sup> Brian Z. Tamanaha (2017), *A Realistic Theory of Law*, Cambridge, Cambridge University Press, p. 142.

<sup>210</sup> I used this terminology improperly, borrowing it from John Rawls, who wrote that «The idea of reasonable disagreement involves an account of the sources, or causes, of disagreement between reasonable persons so defined. These sources I refer to as the burdens of judgment», which «should not be confused with the idea of the burden of proof in legal cases». John Rawls (2005), *Political liberalism 2<sup>nd</sup> Ed. Expanded*, cit., p. 55. In this work, by the "burdens of judgment", I mean the general "burden" on judging bodies to decide a legal dispute. The use of the word "burden" in this case is more in line with the concepts of "burden of proof" or "burden to going forward". On these concepts, cf. Juliane Kokott (1998), *The burden of proof in comparative and international human rights law: civil and common law approaches with special reference to the American and German legal system*, Boston: Kluwer Law International; Richard H. Gaskins (1993), *Burdens of proof in modern discourse*, New Haven: Yale University Press; Douglas Walton (2014), *Burden of proof, presumption and argumentation*, New York, NY: Cambridge University Press.

<sup>211</sup> Johan Huizinga (1949), *Homo Ludens*, cit., p. 97.

<sup>212</sup> Brian Z. Tamanaha (2017), *A Realistic Theory of Law*, cit., 143. This statement, despite vaguely recalling Alf Ross' observation that «bringing a suit is like pressing a button to set going the machinery of law» [Alf Ross (1959), *On law and Justice*, Clark: The Lawbook Exchange, Ltd., 2004, p.177.], at least has the merit of not falling into the unfortunate metaphor of depicting the law as a machine.



Paduan school of thought on legal philosophy,<sup>213</sup> I show how the "agonistic" conception of a trial – and judicial debate – can transform litigants into epistemic peers.

Data show that some countries are experiencing a decrease in the number of cases resolved by trial.<sup>214</sup> This outcome may be due to a managerial mentality on the part of certain judges that focuses on a pragmatic and cost-effective approach to managing legal disagreements: keeping disputes out of courts. This has led (at least in the United States) to an increase in arbitration procedures for civil justice<sup>215</sup> and in plea agreements for criminal cases.<sup>216</sup> It thus seems that the functions of courts are becoming increasingly alien to the state organization.

Nevertheless, it should be noted that even should the abovementioned data show that the number of courtroom trials is decreasing, they do not indicate that such trials are coming to an end. Furthermore, even should courts no longer be public or referees be referred to as arbiters or mediators instead of judges,<sup>217</sup> what would matter is that disputants would still be able to contest each other's positions in front of neutral subjects.<sup>218</sup>

Regardless of the manner in which a "legal dispute" is addressed, its competitive nature will be maintained as long as its competitive and rhetorical aspects can be preserved intact. If, then, a judicial debate, like all other kinds of debates, is a contest between "verbal athletes" whose aim is to win, «why should lawyers, judges and legal scholars

---

<sup>213</sup> The study of a legal dispute from a judicial point of view is the main product of Enrico Opocher's teaching. For a deeper understanding of this perspective, cf. Francesco Cavalla (1991), *La prospettiva processuale del diritto. Saggio sul pensiero di Enrico Opocher*, Padova: Cedam.

<sup>214</sup> In this regard, for example, Marc Galanter talks about "the vanishing trial". Cf. Marc Galanter (2004), *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, Journal of Empirical Legal Studies 1(3): 459–470.

<sup>215</sup> For an overview of the issue (particularly in the US and Canada), cf. Judith Resnick (2015), *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale Law Journal 2015; Yale Law School, Public Law Research Paper No. 543, <https://ssrn.com/abstract=2601132>; Trevor C.W. Farrow (2014), *Civil Justice, Privatization, and Democracy*, Toronto. University of Toronto Press.

<sup>216</sup> For a historical perspective on the evolution of plea agreements in the US, cf. Albert W. Alschuler (1979), *Plea Bargaining and Its History*, Columbia Law Review 79(1): 1–39; Anne R. Traum (2015), *Using Outcomes to Reframe Guilty Plea Adjudication*, Florida Law Review 66(2): 823–879; Lucian E. Dervan and Vanessa A. Edkins (2013), *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, Journal of Criminal Law & Criminology 103(1): 1–48.

<sup>217</sup> For a general introduction to issues concerning mediation, cf. Federico Reggio (2017), *Concordare la norma. Gli strumenti consensuali di soluzione della controversia in ambito civile: una prospettiva filosofico-metodologica*, Padova: Cleup.

<sup>218</sup> More serious is the problem of criminal justice. The increasing number of plea agreements seems to be opposed to judicial debate. This is because a defendant who pleads guilty (i.e., who refuses to debate) is often rewarded with more lenient outcomes and thus avoids paying the costs of a trial.

engage in these argumentative contests, which can only provide for victory but not for truth»?<sup>219</sup>

In my opinion, the main reason for engaging in this form of dialectical dispute is to define the scope of the disagreement. It is clear that the type of dispute under discussion concerns a legal event. However, judicial debates not only reveal the issues on which litigants have different opinions but also those upon which they agree. Furthermore, as Paolo Sommaggio rightly notes, judicial debate allows parties to establish, through the confrontation that occurs between them, a finite number of possibilities and choices.<sup>220</sup> Indeed, even if there is no hope of convincing our opponents, our arguments and, in particular, our counterarguments might force them to make their reasoning explicit – and they will do the same with regard to our claims. In fact, it is only by exposing our thinking to contrary arguments that we could test its merits. It is in this way that judicial debate defines the scope of a disagreement.

Moreover, even should we not succeed in convincing our opponent of our thesis, engaging in debate with an adversary may,

test one's own conviction, to engage our opponent in inferential commitments and to persuade third parties [...] To make our peace with Kant we could say that "there must be a hope of coming to terms" with someone though not necessarily with our opponent, but maybe only a third party or even just ourselves.<sup>221</sup>

Unfortunately, making peace with Kant is apparently not enough: we also need to make peace with some jurists. Indeed, some legal scholars argue that dialectical confrontation between parties is not necessarily an effective way of determining the truth of a matter (i.e., what really happened). In this sense, Michele Taruffo argues that an agonistic perspective on a legal debate would lead to a trial being considered as a sort of competition in which

1. it is not who is right who wins; rather, who wins is right
2. whoever can afford the best lawyer is favored;

---

<sup>219</sup> Ralf Poscher (2016), *Why we argue about the law: an agonistic account of legal disagreement*, cit., p. 209.

<sup>220</sup> Cf. Paolo Sommaggio (2012) *Contraddittorio, giudizio e Mediazione. La danza del demone mediano*, Milano: Franco Angeli, p. 135.

<sup>221</sup> Ralf Poscher (2016), *Why we argue about the law: an agonistic account of legal disagreement*, cit., p. 214.

3. the truth becomes irrelevant.<sup>222</sup>

With regard to the first point, it is not possible to disagree with Taruffo: the outcome of legal proceedings is in favor of the winning party, who is considered to be right precisely because he or she won. However, how else should one determine who is right? While actions such as flipping a coin, throwing dice, or voting could be used to determine who is "right", they cannot help parties to litigation to make explicit their ontological, epistemological, or semantic commitments, nor could such methods enable them to support their respective claims through making counterarguments. Of course, one could propose placing the burden of making such a decision on a judge's shoulders. The reasoning behind this choice 'would be based on litigants' tendency to pursue their "private" interests. In other words, since litigants pursue their own interests, they would be disinterested in revealing the truth. However, it is not clear what kind of skills a judge would need to possess to determine exactly how events transpired, completely ignoring the confrontation between parties.

The second point, in contrast, seems to me to be the result of a misleading idea of debate, one that likely assumes that one can learn not only how to debate but also to win a debate. Indeed, one can learn many things in law schools, but how to win a legal dispute is not one of them. In other words, there are no procedures, rules, or "tricks" that ensure victory in a legal dispute. Otherwise, each party could simply employ the appropriate method, practice, or strategy required to win. However, should both sides in a legal dispute adopt such a strategy or method, then both would have to win, which would seem impossible in the majority of cases. As athletes (or players) of a game participate in the same match (or game) when they play and are subject to the same rules but employ different strategies, lawyers, while having roughly the same skills and knowledge, use different strategies in attempting to sway judges' opinions. Of course, it could be argued that this comparison between athletes (or players of games) on the one hand, and lawyers on the other, could lead to the view that, given that some athletes are better than others, some lawyers may be superior to their colleagues. For example, given that Magnus Carlsen is likely the best chess player alive today, why should not there be a lawyer who is better than others?

---

<sup>222</sup> Cf. Michele Taruffo (2009), *La semplice verità*, Roma: Laterza, pp. 108–111.

The superiority of particular lawyers is, of course, possible. However, while I do not dispute the concept of the existence of a lawyer who is better than others, I refuse to accept the view that holds that such a lawyer will inevitably win. Just as every chess game is different, so too is every legal dispute. Thus, even the best lawyers have the same likelihood of winning as do their less skilled opponents.

Finally, the last point seems to be more complex to understand. What is particularly complex is determining what is meant by the truth. If by truth we mean judicial truth,<sup>223</sup> it is not clear why it should be irrelevant. On the contrary, it is crucial. If, however, what is meant is that, in the trial, the occurrence of an event must in some way be proven, then the challenge posed by the associated epistemological challenge should be emphasized. Which kind of evidence could one provide to prove the real (true) occurrence of something in the world? Much has been written on this issue, starting with the debate between Moore and Wittgenstein,<sup>224</sup> yet it remains unresolved.

Of course, one might argue that what matters is not proving what truly happened but finding proof that could definitively settle a disagreement. Physicists, for example, have debated the existence of the Higgs Boson for years. However, they "knew" which kind of evidence would be required to prove its existence. They reached an agreement on what could be considered proof of the existence of the Higgs Boson, rather than knowing what evidence would actually count as proof of its existence. Sure, it seems more than what happens in the courtrooms where parties and judges do not even know what proof could settle the disagreement. However, that is also what the legal debate is for: to provide the criteria required for solving a case.

An in-depth and comparative analysis of the different "forms" of judicial debate in the various legal systems is beyond the scope of this work. In this work, it is sufficient to note that most legal systems allow for judicial debate, which generally requires each party to not only present his or her own thesis but also to counter the opponent's argument. In this way, each party does not merely state a hypothetical "you have to

---

<sup>223</sup> On this point, cf. Francesco Viola (1991), *The Judicial Truth*, *Persona y Derecho* 32: 249–266.

<sup>224</sup> I refer in particular to G.E. Moore (1939) *Proof of an External World*, London: H. Milford; Ludwig Wittgenstein (1969), *On Certainty*, trans. Denis Paul and G.E.M. Anscombe, Oxford: Basil Blackwell. For a general introduction to main issues in the field of epistemology, Cf. Ernest Sosa and Jaegwon Kim (2000), *Epistemology: an anthology*, Malden: Blackwell Publishers.

choose my thesis because..." but rather argues that "you have to choose my thesis *and not that of my adversary* because...".<sup>225</sup>

Moreover, the agonistic confrontation between the parties does not serve to increase the distance between the parties involved; rather, it brings them closer and, in a sense, "transforms" them. At the beginning of a trial, the parties involved may seem quite distant from each other, with each having its own claim, hypothesis, evidence, arguments, reasoning, and beliefs, with the only common point, is their being in a situation of "equality of arms".<sup>226</sup> During the trial, they will have opportunities to presents their reasoning, claims, hypotheses, and belief to their denial. While though the probability of reaching agreement on a particular topic may seem very low, the dialectical clash remains very helpful in terms of testing and improving the position of each party. Indeed, using this approach, almost every aspect of the parties' cases are strengthened or ruled out during the course of the judicial clash. At some stage in a trial, there may come the point in which each party will have shared all relevant information concerning the dispute at hand with his or her opponent and vice-versa. In other words, both parties will have access to the exact same information. Thus, by having access to the same information and the same capacities (to a lesser or greater extent), parties to a legal suit will not only achieve equality of arms but also become epistemic peers.

## 2.6. Peer-to-Peer

Of course, not all disagreements or legal disputes regarding legal events present an epistemological challenge to one's beliefs. For example, I believe that the assassination of John F. Kennedy occurred in Dallas on November 22, 1963, at 12:30 p.m. Indeed, I "know" very well what happened that day in Dallas.<sup>227</sup> Verifying the events that took

---

<sup>225</sup> It is in this regard that Paolo Sommaggio wrote that «The confrontation, in fact, serves to find out, or to provoke, a contradiction. However, it is conceivable only if you accept a different concept of contradiction. The oppositional confrontation has [...] the structure: A v. non-A. This formula, which represents the confrontation of an argument with its rebuttal (that is, a confrontation between an argument and its Socrates), constitutes a real contradiction, [...] This looks to be the ontological condition of the oppositional relationship between the parties in a legal proceeding, or rather the ontological condition of the adversarial model, despite the fact that it seems a paradoxical structure» Paolo Sommaggio (2014), *The Socratic Heart of the Adversarial System*, University of Leicester School of Law, Research Paper 14–21.

<sup>226</sup> Actually, this is a principle that does not yet seem to be explicitly recognized in many legal systems. For a general discussion of this principle, cf. Stefania Negri (2007), "Equality of Arms": *Guiding Light or Empty Shell?*, in Michael Bohlander (eds.), *International Criminal Justice: A Critical Appraisal of Institutions and Procedures*, London : Cameron May, pp. 13–73.

<sup>227</sup> The verb "know" in this case is written in quotation marks emphasize how, following the above-mentioned Wittgenstein's argument, [Cf. note 90] it might mean "to believe". The Austrian philosopher

place is simple: it is sufficient to consult a history book. I also know that many people (hopefully, not many) believe that Kennedy was not killed that day but survived and still lives today (he would be approximately 102 years old). This does not make me reconsider my belief regarding such a past event. I have checked my belief against a reliable source. However, I know that those who disagree with me concerning this event would not be willing to reconsider their beliefs even when confronted with the evidence I have. On the contrary, they would probably consider me and my history books to be part of a global conspiracy. Therefore, in this case, there is no equal epistemic position, as we both believe ourselves to be in a superior epistemic position.

There are other cases in which, while we agree on what happened, we do not agree on what has *legally* happened. For example, I may believe that the contract that my opponent and I concluded was a bailment agreement, whereas my opponent may believe that it was a lease.<sup>228</sup> No one questions what happened, but each party gives a different legal description of what occurred.

Some might even argue that, in some ways, there is not that much difference between the above examples. Even in the first case, nobody denies that history books can serve as evidence; however, while these sources prove my belief in the occurrence of the assassination of President Kennedy, those who doubt the veracity of the assassination may consider these books to be proof of the existence of a world conspiracy. Thus, from *such* point of view, the examples are quite similar.

Fortunately, however, that is not the perspective that I wish to explore. In the first example, I noted how, given the differences between my beliefs and my opponents one, my opponents and I consider ourselves to be epistemologically superior to one another. In contrast, as the second disagreement regards legal events that could be (legally) resolved in court, it involves entirely different considerations. Even in this case, however, parties may consider themselves to be epistemically superior to each other. In this case, however, they are also judicial equals. They have the previously mentioned equality of arms, which makes (at least at first) all the difference.

---

stressed how it is difficult to identify a criterion for establishing a demarcation between knowledge and opinion. For example, someone whom I trust and have no reason to doubt tells me that black holes have no mass. Since she is someone I trust, I would probably believe her. However, regardless of the extent to which I believe I “know” this fact, I will not be able to know it for the simple reason that it is not true that black holes do not have mass.

<sup>228</sup> On this example, Cf. *supra* Ch. 1.3.

Before proceeding to sketch out a framework of epistemic peerhood in the law,<sup>229</sup> let me clarify what those terms mean in the philosophical literature. While there are many distinct conceptions of epistemic peers in the philosophical literature,<sup>230</sup> most of these accounts require that relevant subjects ("S" and "T") satisfy the following conditions:

- (a) *The disagreement condition*: S believes P, while T believes  $\sim$ P.
- (b) *The same evidence condition*: S and T have the same P-relevant evidence, E.
- (c) *The dispositional condition*: S and T are equally disposed to respond to E in an epistemically appropriate way.
- (d) *The acknowledgement condition*: S and T have good reason to think conditions (a)–(c) are satisfied.<sup>231</sup>

Of course, condition (a) is not the only case in which individuals might disagree. In this case, the all-or-nothing condition should be understood as a mere simplification.<sup>232</sup>

The second condition (b) is satisfied only when parties' evidence is *shared*, which means that they have equally good evidence. Indeed, as noted by Jonathan Matheson, «Two bodies of evidence need not be identical to be equally good».<sup>233</sup> This point, however, is controversial since, as Nathan King argues, «A single piece of evidence may in some cases be the key piece».<sup>234</sup> In a way, however, such a disagreement concerning condition (b) is entirely irrelevant to the legal epistemic peerhood under analysis.

Therefore, once it has been established that disputants share the same body of evidence, it should then be determined whether they are also equal in terms of evidential processing (condition (c)). Epistemic peers should be equally likely to arrive at true beliefs based on a common body of evidence. However, it is not clear how similar two evidential processes should be to satisfy this condition. It seems that disputants should possess at least equally

---

<sup>229</sup> On this subject, cf. R George Wright (2017), *Epistemic Peerhood in the Law*, St. John's Law Review, 91(3): 663–702.

<sup>230</sup> In this sense, for example, cf. Thomas Kelly (2005), *The Epistemic Significance of Disagreement*, in John Hawthorne and Tamar G. Szabo (eds.), *Oxford Studies in Epistemology*, New York: Oxford University Press, pp. 167–196; David Christensen (2009), *Disagreement as Evidence: The Epistemology of Controversy*, *Philosophy Compass* 4(5): 756–767; Robert Audi (2008), *Rational Disagreement as a Challenge to Practical Ethics and Moral Theory*, in Quentin Smith (eds.), *Epistemology: New Essays*, New York: Oxford University Press, pp. 226–246.

<sup>231</sup> Nathan L. King (2012), *What's the Problem? Or A Good Peer is Hard to Find*, *Philosophy and Phenomenological Research* 85(2): 249–272, pp. 252.

<sup>232</sup> In fact, discussing  $\sim$ P means discussing everything that is not P – thus, Q, C, D, etc.

<sup>233</sup> Jonathan Matheson (2015), *Disagreement and Epistemic Peers*, *Oxford Handbooks Online*, url = <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935314.001.0001/oxfordhb-9780199935314-e-13> (Retrieved 24 Sep. 2019)

<sup>234</sup> Nathan L. King (2012), *What's the Problem? Or A Good Peer is Hard to Find*, cit. p. 266.

good intellectual faculties (such as reasoning skill, memory, or knowledge of legal norms) and epistemic virtues (such as honesty, intellectual courage, and carefulness).

When the first three conditions are established, the fourth also arises. In other words, the parties are aware that they are epistemic peers: the disagreement between peers has been revealed. However, how is it possible that two or more individuals can «share everything relevant to a disputed proposition and still rationally disagree»?<sup>235</sup>

With regard to disagreements concerning legal events debated in court, it should first be stressed that it is usually difficult for a party to recognize his or her opponent as an epistemic peer. Indeed, at least at the beginning of a trial, the litigants are not epistemic but only judicial peers, which means that the judicial opportunities afforded to them (such as calling witnesses and being allowed to cross-examine witnesses presented by the opposing party) should be the same. However, as mentioned previously, during a trial, all parties' evidence is presented and shared with their opponents. In the game of courts, one cannot appeal to private evidence or special incommunicable insights to uphold a claim.<sup>236</sup> All one can do is share with others one's own body of evidence, support it, and defend it, while attempting to prevent such evidence from being ruled out from legal proceeding. Each party is also invited to provide reasons to exclude evidence submitted by the opposing party by proving that it is inconsistent or irrelevant or demonstrating how such evidence supports his or her own argument, not that of the opponent.

At some point, both sides should become aware that, while at first, they presented different evidence, they now share the same body of evidence. It is upon that body of evidence that the judge or jury's decision depends. However, is that really the case? Yes and no. At that point, litigants formally share a single set of evidence, but this does not mean that they ground their beliefs and claims on all of the remaining evidence. On the contrary, it may be the case that certain evidence has "stayed in the game" simply because no one was able to effectively contest it.<sup>237</sup> Hence, parties of litigation may be able to maintain two separate sets of evidence until the end of the trial.

---

<sup>235</sup> Earl Conee (2010), *Rational Disagreement Defended*, in Richard Feldman and Ted A. Warfield (eds.), *Disagreement*, Oxford: Oxford University Press, pp. 69–90, p 69.

<sup>236</sup> On the concept of special incommunicable insight, cf. Peter van Inwagen (1996), *It is Wrong, Always, Everywhere, and for Anyone, to Believe Anything, Upon Insufficient Evidence*, in Jeff Jordan and Daniel Howard-Snyder (eds.), *Faith, freedom, and rationality: philosophy of religion today*, Lanham: Rowman & Littlefield, pp. 137–154.

<sup>237</sup> Obviously, every single legal system and every single court system has its own rules of evidentiary exclusion. In other words, not all evidence is admissible in court. However, I would like to note that for a piece of evidence to be considered legally admissible, it must be proven that a particular "thing" counts as



Suppose, however, that they actually manage to share exactly the same body of evidence. At this point, they would satisfy conditions (a) and (b). However, would they recognize the presence of condition (c)? Would they consider their counterparts to be able to process evidence in the same way as they do?

If they did, they might reach an unhappy conclusion. Suppose, for example, that Peter and Ann are two lawyers who are arguing in court in an animated manner over the legal classification of an event. They are expert lawyers who have the same good evidence and ability to reason responsibly about evidence in that context. Ann's epistemic peer disagrees with her concerning a legal event. She can find no fault with his reasoning. This, according to Feldman, provides Ann with evidence that her belief concerning the subject matter is inadequate. Thus, it seems rational for her to suspend her beliefs. However, the epistemic situation of Peter is symmetrical; thus, he should also suspend his belief.<sup>238</sup> The problem that then arises is if both lawyers suspend their judgment, what will happen to the trial?

Of course, some philosophers argue that a moderate attitude is not the only option. One can adopt the opposite approach, according to which obtaining evidence that one is in disagreement with one's peers does not imply any need to revise or suspend one's beliefs.<sup>239</sup> Therefore, litigants could continue to debate. However, I think the problem between parties is different; and I agree with Nathan King when he stated that

In many such cases, it is clear that our dissenters have different evidence, or different methods or capacities for evidence assessment. What may be unclear is whether our evidence is more extensive or representative of the total available evidence than that of our dissenter. Likewise, it may be unclear which of us (if either) is better disposed to respond to evidence in a rational way; or which of us (if either) has in fact responded rationally to our evidence.<sup>240</sup>

---

a "legally admissible evidence" in the particular judicial circumstances in which it is produced. This is an issue similar to what is discussed in this thesis.

<sup>238</sup> On this point, cf. Richard Feldman (2006) *Epistemological Puzzle about Disagreement*, Stephen Hetherington (eds.), *Epistemology futures*, Oxford-New York: Oxford University Press, pp. 216–236, p. 229; Catherine Z. Elgin (2010), *Persistent Disagreement*, in Richard Feldman and Ted A. Warfield (eds.), *Disagreement*, Oxford: Oxford University Press, pp. 53–68, p. 56.

<sup>239</sup>In this sense, for example, Ralph Wedgwood argues that, while it is rational to trust in one's own intuition, it is not rational to trust in others' intuition. Cf. Ralph Wedgwood (2010), *The Moral Evil Demons*, in Richard Feldman and Ted A. Warfield (eds.), *Disagreement*, Oxford: Oxford University Press, pp. 216–246. On this point, cf. also Jonathan Matheson (2015), *Disagreement and Epistemic Peers*, cit.

<sup>240</sup> Nathan L. King (2012), *What's the Problem? Or A Good Peer is Hard to Find*, cit, p. 267.

Thus, it seems very unlikely that parties to a legal dispute will recognize their disputants as epistemic peers.

However, it is possible that, from another perspective, they could consider their opponents to be genuine epistemic peers. There may be cases in which, from the perspective of those who are subject to the "burden to judge", the persons involved in a lawsuit reach a point where

- a. the subject-matter of the disagreement is clear, and it is clear to litigants also;
- b. the body of evidence is well-defined and is, at least formally, shared by all subjects; and
- c. parties seem equally disposed to respond to evidence in an epistemically appropriate way;

Thus, at least from the perspective of a court,

- d. there are good reasons to think that conditions (a)–(c) are satisfied by the parties.

When one considers that disagreements between epistemic peers (even among members of juries) occur quite frequently, the situation becomes even more complicated.

Of course, as noted by George Wright,

criminal and civil trial juries can vary in the extent to which the jurors are, or regard themselves as, epistemic peers. And the degree of epistemic peerhood, actual and acknowledged, among jurors could make a difference to the quality of jury deliberation.<sup>241</sup>

Moreover, legal systems that provide for the presence of a jury frequently allow lawyers to participate in the selection of jurors, meaning that those who are judged may "choose" those who judge.<sup>242</sup>

This is not, of course, an appropriate venue for discussing legislative policy issues relating to the judicial system, particularly policies relating to the selection of jurors. Instead, I would like to turn to another point: the epistemic peerhood of jurors.

It might prove to be the case that many judicial disagreements relating to legal events satisfy the same evidence conditions for a jury, as jurors are equally unprepared when it comes to litigation. During a trial, they encounter the evidence put forward in support of

---

<sup>241</sup> George Wright (2017), *Epistemic Peerhood in the Law*, cit., p. 681

<sup>242</sup> For an introduction to this topic, . Valerie P. Hans and Neil Vidmar (1986), *Judging the jury*, New York: Plenum Press.

each litigant's arguments for the first time, and every single juror hears the same set of evidence. Jurors are generally not expert jurists, nor do they have personal interest in cases. Furthermore, despite the fact that they filter evidence «through their own experiences, expectations, values, and beliefs»,<sup>243</sup> their ability to process such evidence is more or less the same given their lack of the relevant specialized knowledge. Therefore, in the event of a disagreement among the members of a jury, it may frequently prove to be the case that disputing jurors rely on a common body of evidence – they only have limited knowledge of what was presented in court, and thus have little to share.<sup>244</sup> Thus, in the case of a disagreement among the members of a jury, such a disagreement would be among epistemic peers.

Fortunately, such a disagreement can be solved by means of a vote among the members of a jury. Through such a vote, a jury may collectively (but not necessarily unanimously) declare what legally occurred in a specific case. However, such a vote can also lead to a situation of equality. In such a case, another conflict would occur, but, unlike a dispute between litigants, it would be a conflict filtered from all those "insights" that parties, but no jurors, have.<sup>245</sup>

## 2.7. ...and Judges for All

Not all disagreements are challenging to resolve. Similarly, not all parties are epistemically equal in the eyes of those who judge, nor are all cases difficult to settle. On the contrary, in the majority of cases, the legal descriptions of events are so well supported by evidence, legal rules, and arguments that it is not difficult for a judge or jury to determine what particular legal event has occurred.

Of course, legal disputes and the agonistic spirit of judicial debate suggest the possibility of at least two distinct legal outcomes every time a lawsuit arises. In other words, there is always a choice. However, this does not mean that the proposed outcomes are equally reasonable in every case. There may well prove to be an obvious choice or an alternative that is clearly preferable to the other options.

---

<sup>243</sup> Brian H. Bornstein and Edie Greene (2011), *Jury Decision Making: Implications for and from Psychology*, *Current Directions in Psychological Science* 20(1): 63–67, pp. 64–65.

<sup>244</sup> Please note that what is produced in court does not necessarily reflect the evidence admitted during a trial.

<sup>245</sup> Conflicts among the members of a jury are certainly not only a contemporary problem. In Aeschylus' *Eumenides*, for example, we find a situation in which the votes of a sort of "jury" are tied, before Athena casts her deciding vote. Cf. Aeschylus, *The Eumenides*, trans. Hugh Lloyd-Jones, Englewood Cliffs: Prentice-Hal, 1970. For a legal-philosophical approach to some of the legal themes inspired by this tragedy, cf. Francesca Zanuso and Stefano Fuselli (2011), *Il lascito di Atena*, Milano: FrancoAngeli.

In some cases, however, it may be that the event debated in the courtroom is so complex and the parties involved so competent that, from the perspective of those who judge, the situation may appear to be one characterized by substantial epistemic and judicial equality between the the disputants and their respective claims. If both outcomes appear equally reasonable, how should one decide?

I am instinctively led to suggest using purely legal means to resolve this type of dispute. Indeed, many legal systems provide rules for solving precisely this type of problem –why not use them?

Consider, for example, all the legal rules that express the principle of *in dubio pro reo*, according to which, in a criminal case, should there be any doubts as to the accused's guilt, then it is better to decide in favor of him or her.<sup>246</sup> Alternatively, consider all of the standards of proof, such as the "preponderance of evidence" and "beyond a reasonable doubt", according to which if a legal event is not "sufficiently" proven, then the decision should be in favor of the defendant (in civil cases) or the accused (in criminal cases), respectively.<sup>247</sup> These are legal instruments designed to resolve even the most challenging cases. Therefore, once a judge acknowledges that the claims of both parties, despite being completely different, are well-argued and proven, he or she should decide in favor of a specific party – namely the defendant or the accused – based on purely legal reasons. At this point, however, it could be argued that substantive justice would be affected were a court to rule in this way on all cases in which the judicial debate seems to be even. Indeed,

---

<sup>246</sup> Much has been written about this maxim. It is now common knowledge that it means that a defendant may not be convicted by a court when doubts about his or her guilt remain. An interesting historical point of view on this maxim is, for example, that of James Whitman, who stressed how this «rule was indeed a rule of moral theology just like the private knowledge rule: it too offered counsel about how to act when you find yourself, in Innocent III's constantly cited phrase, "in dubiis", "facing case of doubt"» James Q. Whitman (2008), *The origins of reasonable doubt: theological roots of the criminal trial*, New Haven: Yale University Press, p. 123.

<sup>247</sup> The issues relating to standards of proof are many and very complex. In U.S. civil proceedings, for instance, "preponderance of evidence" is the typical standard of proof, even if it is not clear at all what this expression means. Thus, since the quantum of evidence constituting a preponderance cannot be reduced to a simple number, a «preponderance of evidence has been described as just enough evidence to make it *more likely than not* that the fact the claimant seeks to prove is true» [Jeffrey Lehman and Shirelle Phelps (2005), *West's encyclopedia of American law 2nd Edition*, Vol. 8, Detroit: Gale Division of Cengage Learning Inc, p. 68, my italics]. In contrast, the history and the functioning of the standard of proof referred to as "beyond a reasonable doubt" are completely different. Indeed, the «demand for a higher level of persuasion in criminal cases was recurrently expressed from ancient times, but its crystallization into the formula "beyond a reasonable doubt" seems to have occurred as late as 1798» [Charles T. McCormick (1984), *McCormick on evidence 3<sup>rd</sup> Ed.*, Edward W. Cleary (eds.), St. Pau: West publishing, p. 962]. Obviously, I refer to the common law system (on which Cf. Barbara J. Shapiro (1991), *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley: University of California Press). In other legal systems (such as, for instance, that of Italy), this standard of proof was only formalized in 2006.

if cases in which it is not clear what took place were all judged according to these legal instruments, the resolution of these disputes may not be based on what actually occurred. However, what is the alternative?

An alternative solution could be the following: once epistemic equality between parties has been established, the relevant judicial authorities could decide according to their idea of how they want the legal dispute in question to come out.<sup>248</sup> After all, as litigants are judicial and epistemic peers, why not settle a dispute based on the will of a judge? It would not even take a great deal of effort on his or her part; the judge would only have to highlight the points in support of his or her view and underestimate those against it. If the parties involved have excellent lawyers, a judge will be able to rely on relevant arguments and evidence, and no one will notice that a judgment has been affected by a judge's opinion as to how he or she desires the legal dispute in question to be resolved. This approach, however, would only work should the judge avoid introducing arguments and hypotheses that the litigants did not mention. Otherwise, he or she would add the role of "player" to the one of "arbiter".

The difference between choosing one party and taking sides is far from subtle. In the first case, indeed, the judge merely agrees with the argument of one party over that of the other and arrive at a democratic solution to the dispute.<sup>249</sup> In the second case, he or she would not choose between the solutions advanced by the parties but instead based on his or her initial impression of the legal event in question and views concerning how the case should be resolved, which would mean to arrive at a despotic solution of the dispute. This difference is very similar to that between a football referee who grants a penalty following a dubious action and a football referee who scores a goal for a team instead.

Less problematic seems to be those legal disputes in which parties appear to be neither epistemically nor judicially equal. However, it might be the case that, although a party provides better arguments and evidence in support of his or her claims, the judge is instinctively inclined to take the side of the party with the weakest argument. Fortunately, while, in Western societies, judges have a wide margin of freedom in resolving disputes, this does not mean that they are not constrained in some ways. Indeed, following

---

<sup>248</sup> This possibility is inspired by the work of Duncan Kennedy. Cf. Duncan Kennedy (1986), *Freedom and Constraint in Adjudication*, in Duncan Kennedy (eds.), *Legal Reasoning: Collected Essays*, 2008, pp.12–85.

<sup>249</sup> In this case, I mean that when a judge decides to side with one party rather than the other, that decision is democratic because it creates a sort of majority within the court.

Kennedy's model of constraint, one can identify at least two different kinds of constraint.<sup>250</sup>

First, it is not in the interest of a court to make a decision that is not based on a proper legal argument, as a higher court may reverse the outcome.<sup>251</sup> This constraint thus binds judges to base their judgments on reasonable legal arguments. In other words, a judge must provide a description of the events that occurred and an interpretation of the law according to which the dispute in question could be resolved.<sup>252</sup> Of course, a judge could provide excellent legal arguments in favor of the party that did not excel during a trial by bolstering that party's lack of arguments with his or her own legally valid arguments. However, claiming that one party was superior to the other during a trial and that the judge provided his or her arguments in favor of the weaker disputant would be partisan and malicious. There are no reasons to doubt that, from a judge's point of view, the best party "won" a legal dispute when such a victory is based on good legal reasoning. However, what is contested here is not the fact that a party won but that it did so based on the legal arguments provided by a judge. In such circumstances, the magistrate in question would indeed be both judge and party.

Second, various people within a judge's community might sanction him or her if he or she does not provide the expected ruling in a particular case. The latter, however, seems to be a useless, if not even dangerous, constraint. It would be useless if by "community" we mean the community of judges, since, in that case it be assimilated to the previous constraint. Indeed, the most severe sanction that the community of his or her colleagues can impose upon a judge is reversing one of his or her judgments. Alternatively, if by the term "community" we mean the group of people living in the area in which a court exercises its jurisdiction, rather than the entire community under the legal system, it could be dangerous.<sup>253</sup>

---

<sup>250</sup> The American author actually proposes more than two constraints. However, I believe that some of them are specific to common law systems. Cf. Duncan Kennedy (1986), *Freedom and Constraint in Adjudication*, pp. 26–27

<sup>251</sup> However, higher courts can reverse the outcome of a case even in the face of good legal arguments.

<sup>252</sup> If this were not the case, we might also see decisions utterly unrelated to events and the law. Suppose, for example, that a judge decides to ground her judgment on her friendship with one of the lawyers involved in a case, rather than on legal arguments. In this case, the total absence of legal arguments would likely render the judgment not only easy to appeal but also wholly invalid. Cf. Francesco Cavalla (2007), *Retorica Processo Verità*, Milano: FrancoAngeli, p. 31.

<sup>253</sup> However, even this latter conception is problematic since, in the contemporary world, it is not so easy to shape the boundaries of a legal system. Certainly, the state still has a privileged position in the production of legal rules. However, simultaneously, it no longer seems conceivable that a legal system can be defined within precise territorial limits. Economic relations, new technologies, and a new global consciousness concerning some issues appear to have led to a worldwide community.

Therefore, even considering these two constraints, one can infer a certain amount of freedom in the decision-making of a judge. One reason for this might lie in our apparent need to conceive of justice as a dispute between what is right and what is wrong. In this sense, it is no more a matter of defining what legal event occurred but instead of determining the legal event that really happened. However, generally speaking, each party to a legal dispute is convinced as to what really took place; indeed, they are so convinced of their claims that they are willing to debate them in court.

The concept behind a legal dispute appears to be that those who are right are more likely to demonstrate the truthfulness of their point of view. However, the outcome of such a confrontation can often provide a confusing and vague account of what happened. In a sense, a legal event can be considered as a "gestalt situation" in which the same event can be seen differently.<sup>254</sup> In any case, however, a confused or vague representation of an event does not involve the representation of a vague or confusing event and, with the help of a judge, it is possible to determine what happened at least conventionally. The judge, in other words, concurs with one or more parties concerning the settlement of a legal dispute.

After all, if, on the one hand, the law «is a social construction that exists owing to the meaningful actions of people and groups»,<sup>255</sup> on the other hand, these actions are legally meaningful because of judges. Ultimately, it is judges who determine what legally took place when attempting to resolve a dispute. This is because, according to this event-based perspective of law, the law is not manifested in events; rather, events are manifestations of the law.

---

<sup>254</sup> On the so-called gestalt situation see footnote n. 117

<sup>255</sup> Brian Z. Tamanaha (2017), *A Realistic Theory of Law*, cit., p. 80.





## CONCLUSION

Though there be no such thing as Chance in the world; our ignorance of the real cause of any event has the same influence on the understanding, and begets a like species of belief or opinion.

(David Hume<sup>256</sup>)

During his lectures, Francesco Cavalla used to say that the judicial truth lasts as long as the trial ends.<sup>257</sup> Likewise, in this doctoral thesis, many concepts, issues, and argument exposed are doomed to dissolve after its conclusion: some refuted, other ignored.

In this respect, I suggest starting from the concept of legal worlds. Indeed, now that the general overview of legal events is more comprehensive – even if it probably still not clear – do we still need the legal world?

I think the answer should be negative. We all live in the same reality, and everything that happens is here that occurs. In the narrow sense, thus, it makes no sense to assume the existence of a legal world as a separate entity alongside the ordinary world.

Of course, at the beginning of this work, it was suggested that the difference between what is possible and what is lawful well fits with a differentiation of the worlds: one for events that may occur, the other for legal events that occur. However, if one thinks that the killing of Caesar is something distinct from the murder of Caesar, it follows that there could have been a murder without any killing. Then, since this conclusion is unacceptable,<sup>258</sup> it appears that we should review our conception of the worlds.

Even if two descriptions of the same event were like to be inconsistent with each other, it could not be concluded that there two different events occurred in the same spatiotemporal region of the world, nor that they happened in two distinct worlds. In other words, two different descriptions of the world do not necessarily determine two separate

---

<sup>256</sup> David Hume (1748), *An Enquiry concerning Human Understanding*, New York: Dover Publication Inc., 2012, p. 35.

<sup>257</sup> Cf. Francesco Cavalla (2017) *L'origine e il diritto*, cit., p. 411.

<sup>258</sup> This is not just unacceptable but also unfair. Indeed, a murder without a killing might imply the conviction of an innocent person, while a killing without a murder might imply an unsolved (or unpunished) crime. In both cases, it would be unfair.

worlds. Thus, it is permissible to assume that there is a plurality, not of worlds, but modes of reference.

At this point, someone might wonder whether it would not be appropriate to let the notion of legal events go too. One might think that, as the legal world does not exist, there is no event taking place there. However, if as the legal event, we only mean a way to describe an event, then it has not necessary to do without them. Of course, there are many ways to describe an event, and the same legal language allows you to describe the same action in different ways. Yet there is at least one thing we should be sure about: something has happened. The problems, if anything, are how to understand if it is legally meaningful and describe it in legal terms.

In the first part of this research, it has briefly been mentioned how some (modern and contemporary) legal philosophies might address the legal events. Since it was a notion they had never really addressed, their point of view is the result of a subsequent elaboration and, as such, it is hypothetical. However, one thing seems to be clear: each philosophy of law is different from others even as regards this subject. If this differentiation is accepted, then a more heterogeneous picture of philosophical and legal discussion will emerge. There will be some legal philosophers according to whom the variety of the world corresponds to the variety of the regulatory languages and other legal philosophers according to whom it is the world itself that is varied. And among those who think in that second way, some believe that the variety of the world is only quantitative while others believe that the variety of the world is also qualitative. Therefore, while according to the first group there would be many different things of the same kind (e.g., many murders, many marriages, and many leases), for the others there would be universal and particulars entities.

Of course, it is not easy to bring in the legal field such a problematic differentiation as the one between universal and particular entities. As we have seen, to outline events as particulars entities which may occur but not recur might lead directly into the problem of universals. Specifically, in the legal theory, that problem would lead to a doubtful match between what happened in the world (particulars), and the universal legal properties (universal) expressed by the legal rules.<sup>259</sup> However, such a perspective offers also new

---

<sup>259</sup> I have already pointed out, but I think it is good to repeat, that this position derives from the metaphysical realism according to which events exists in reality independently of our legal description of them. For further information, Cf. Alexander Miller (2014), item "*Realism*", *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/realism/>

horizons both for the interpretation of legal rules and for the legal description of what happens. Speaking of omissions, for example, we have seen how an ontological and metaphysical confusion on the so-called "negative events" leads to a consequent confusion concerning how to juridically address them. The law, as we have tried to illustrate, cannot solve this kind of issues unless we clarify first what an omission is. However, if there is one suggestion that can be drawn from this work, this is undoubtedly not the uselessness of the law, but instead its convenience.

On the one hand, it is not easy to provide an idea of the law which does not just involve the static description of the legal texts or the simple narration of case law. On the other hand, the entire complex legal phenomenon cannot even be reduced only to the mere interpretation activity of written rules. The law is much more than that. The metaphor of the game, in this sense, could be helpful, as it tries to capture some often-ignored characteristics of the legal phenomenon, such as its dynamism and its conventional nature. The latter, in particular, seems to be such a vital aspect of the law that the existence of a law does not seem possible without some collective acceptance. We have observed, indeed, how every legal event can be described as something (legally) constituted, rather than something pre-constituted by a legal rule. The difference, as explained, is not insignificant: while in the first case we climb to the legal event from the event through abductive reasoning, in the second we descend to the legal event from the legal rules through deductive reasoning.<sup>260</sup> The puzzle of legal events, therefore, seems to be manageable through specific abductive reasoning involving legal rules. The problem is that such inference may cause several disagreements.

Therefore, considering the particular problematic nature of the disagreement, specific attention has been paid to it in the final part of the thesis. Legal and philosophical theories are not based on experimentation, but they are grounded on argumentation and imagination. No laboratory experiment will ever reveal whether a particular action constitutes a marriage, or whether a specific other activity is a conclusion of a contract. No empirical investigation will ever tell us if the killing of Caesar is also a murder case.

---

<sup>260</sup> Toulmin's model would perfectly capture this difference. Indeed, while in the first case from the Data (D) representing the event to the Claim (C) representing the legal event we pass through abductive reasoning concerning the Warrants (W) representing the legal rules, in the second case from the legal rules (D) to the legal event (C) we pass through deductive reasoning concerning the event (W). Cf. Stephen Toulmin (1958), *The Uses of Argument*, Cambridge: Cambridge University Press, 2003. For a legal point of view of Toulmin's model, Cf. Paolo Sommaggio (2011), *La logica come giurisprudenza*, in Francesca Zanuso and Stefano Fuselli (eds.), *Il lascito di Atena*, Milano: FrancoAngeli, pp. 95-105.

And to be credible, any theory not only must consistently account for the evidence available, but it must also demonstrate the weakness of the opponents' claims.

In this sense, we have argued that the trial and judicial debate might be still today the best way to settle legal disputes. Equality of arms, compliance with the rules of the legal proceedings guaranteed process of the presence of a referee (the judge) allow the parties that specific dialectical and agonistic clash that puts them in the best position to support their claims. And even when the legal dispute seems to lead the parties to an epistemic parity situation, it is the judge the one who can resolve the issue and establish in fact what happened and its legal meaning.

In the standard legal theory image, legal events are often ignored, and everything seems to be more straightforward. When the legal norms collectively recognized by the community match the legal standards collectively recognized by judges, the legal system is considered to be alive and healthy. Yet something happens. Society and law are constantly evolving, reflecting every time new social circumstance, and again no one seems to investigate what this circumstance concretely are and if they are legally relevant. This thesis, in a sense, is an attempt to change this perspective. It is an opportunity to see the world from another point of view. Of course, some of the issues have been barely mentioned, while others have not even been appointed and, more generally, this thesis seems far from being complete or exhaustive. It is, of course, a very open theme; even more so if we consider that what has been said about the philosophy of law could extend to the reflection on other institutional phenomena. However, from the outset, this work was evident in its purpose to provide a perspective of law based on the legal events.

Of course, it is very likely that the vision that emerges from this perspective might still be blurred, and even short-sighted. Nevertheless, I hope that the mental horizon may be open. That is where we can really see if we can go beyond what is obvious and have a different view of the law and legal phenomena.

## BIBLIOGRAPHY

- Aliseda, A. (2000), *Abduction as Epistemic Change: A Peircean Model in Artificial Intelligence*, in Peter A. Flach and Antonis C. Kakas (eds.), *Abduction and Induction: Essays on their Relation and Integration*, Dordrecht: Springer, pp. 45-58.
- Alschuler, A.W. (1979), *Plea Bargaining and Its History*, Columbia Law Review 79(1): 1-39;
- Anfinsen, J.T. (2005), *On particulars and universals*, HonestThinking.org, Retrieved from [http://www.honestthinking.org/en/pub/HT.2005.JTA.Particulars\\_and\\_universals.html](http://www.honestthinking.org/en/pub/HT.2005.JTA.Particulars_and_universals.html)
- Audi, R. (2008), *Rational Disagreement as a Challenge to Practical Ethics and Moral Theory*, in Quentin Smith (eds.), *Epistemology: New Essays*, New York: Oxford University Press, pp. 226-246.
- Austin, J. (1832), *The Province of Jurisprudence Determined*, London: John Murray.
- Austin, J.L. (1962), *How do things with words*, Cambridge: Harvard University Press, 1975
- Barak, A. (2016), *On Judging*, in Martin Scheinin, Helle Krunke and Marina Aksenova (eds.), *Judges as guardians of constitutionalism and human rights*, Cheltenham: Edward Elgar Publishing, pp. 27-49.
- Barberis, M. (2002), *Seguire norme giuridiche, ovvero: cos'avrà mai a che fare Wittgenstein con la teoria dell'interpretazione giuridica?*, *Materiali per una storia della cultura giuridica* 1:245-273.
- Barberis, M. (2017), *Una filosofia del diritto per lo stato costituzionale*, Torino: Giappichelli.
- Beccaria, C. (1754), *Dei delitti e delle pene*, Milano, Feltrinelli, 2007
- Beebe, H. (2004), *Causing and Nothingness*, in Collins, J.; Hall, N.& Paul, L.A. (ed.), *Causation and Counterfactuals*, Cambridge: MIT Press, pp. 291-308.
- Bennet, J. (1988), *Events and their Names*, Oxford: Clarendon Press.
- Bentham, J. (1827), *Rationale of Judicial Evidence Vol 1*, New York: Garland Publishing, 1978.
- Berto, F. (2010) *L'esistenza non è logica. Dal quadrato rotondo ai mondi impossibili*, Roma: Laterza.
- Besson, S. (2005), *The morality of conflict: reasonable disagreement and the law*, Oxford-Portland: Hart Pub;

- Bianchi, C & Bottani, A. (2003), *Introduzione: metafisica, ontologia e significato*, in Claudia Bianchi and Andrea Bottani (eds.), *Significato e Ontologia*, Milano: Franco Angeli, pp. 7-23.
- Biletzki, A. & Matar, A. (2018), item "*Ludwig Wittgenstein*", *The Stanford Encyclopedia of Philosophy*, URL = <https://plato.stanford.edu/archives/sum2018/entries/wittgenstein/>
- Bix, B. (2000), *On the Dividing Line between Natural Law Theory and Legal Positivism*, *Notre Dame Law Review* 75: 1613-1624.
- Blackburn, S. (1996), item '*modus ponens*', in *Oxford Dictionary of Philosophy*, Oxford-New York: Oxford University Press, p. 237.
- Blocq, D. & van der Woude, M. (2018), *Making Sense of the Law and Society Movement*, *Erasmus Law Review*, 2: 134-141.
- Bobbio, N. (1958) *Teoria della norma giuridica*, Torino: Giappichelli.
- Bochenski, J.M; Church, A. & Goodman, N. (1956), *The Problem of Universals: A Symposium*, Notre Dame: University of Notre Dame Press.
- Bogen, J. (2017), item "*Theory and Observation in Science*", *The Stanford Encyclopedia of Philosophy*, URL = <https://plato.stanford.edu/entries/science-theory-observation/>
- Bonino, G. (2014), *On Russel's Robust sense of Reality*, in Bonino, G.: Jesson, G. & Cumpa, J. (ed.), *Defending realism: ontological and epistemological investigations*, Boston: De Gruyter, pp. 363-378.
- Borghini, A. (2009), *Che cos'è la possibilità*, Roma: Carocci.
- Bornstein, B.H. & Greene, E. (2011), *Jury Decision Making: Implications for and from Psychology*, *Current Directions in Psychological Science* 20(1): 63-67, pp. 64–65.
- Brand, M. (1977), *Identity Conditions for Events*, *American Philosophical Quarterly* 14 (4): 329 – 337.
- Brickhouse, T.C & Smith, N.D. (1989), *Socrates on Trial*, Princeton: Princeton University Press.
- Broad, C.D. (1923), *Scientific Thought*, New York: Harcourt Brace and Co.
- Burges, G. (2010), *The Mammoth Book of Chess*, Philadelphia: Running Press.
- Caillois, R. (1958) *Man, Paly and Games*, tran. Meyer Barash, London: Thames and Hudson, 1961.
- Carcattera, G. (1974), *Le norme costitutive*, Milano: Giuffrè.
- Carcattera, G. (1979), *La forza Costitutiva delle norme*, Roma: Bulzoni.
- Carnap, R. (1936), *Testability and Meaning*, *Philosophy of Science*, 3: 419-471.
- Carnap, R. (1946), *Modalities and Quantification*, *Journal of Symbolic Logic* 3: 420-471.

- Carnap, R. (1947), *Meaning and necessity, a study in semantics and modal logic*, Chicago: University of Chicago Press.
- Casati, R. & Varzi, A.C. (2014) item "*Events*", The Stanford Encyclopedia of Philosophy, URL=<https://plato.stanford.edu/entries/events/>
- Cavalla, F. (1991), *La prospettiva processuale del diritto. Saggio sul pensiero di Enrico Opocher*, Padova: Cedam.
- Cavalla, F. (2007), *Retorica Processo Verità*, Milano: FrancoAngeli, p. 31.
- Cavalla, F. (2011), *All'origine del diritto. Al tramonto della legge*, Napoli: Jovene.
- Cavalla, F. (2017) *L'origine e il diritto*, Milano: Franco Angeli,
- Chisholm, R.M. (1970), *Events and Propositions*, *Noûs* 4:15–24
- Chisholm, R.M. (1976), *Person and object: a metaphysical study*, London: G. Allen & Unwin.
- Christensen, D. (2009), *Disagreement as Evidence: The Epistemology of Controversy*, *Philosophy Compass* 4(5): 756-767;
- Cicero, *De Oratore*, tran. Edward W. Sutton and Harris Rackham, Cambridge: Harvard University Press, 1957, (De Or., II, 170)
- Cicero, *Topica*, tran. Tobias Reinhardt, Oxford: Oxford University Press, pp. 150-151, 2003 (Top. XVIII, 67).
- Cleland, C. (1991) *On the Individuation of Events*, *Synthese* 86 (2): 229 - 254.
- Condello, A. & Searle, J.R. (2017), *Some Remarks about Social Ontology and Law: An Interview with John R. Searle*, *Ratio Iuris* 30(2): 226-231.
- Conee, E. (2010), *Rational Disagreement Defended*, in Richard Feldman and Ted A. Warfield (eds.), *Disagreement*, Oxford: Oxford University Press, pp. 69-90,
- Conklin, W.E. (2001), *The invisible origins of legal positivism: a re-reading of a tradition*, Boston: Kluwer Academic Publishers.
- Conte, A.G. (1983), *Analisi della regola in Wittgenstein*, in Aldo Giorgio Gargani, Amedeo G. Conte and Rosaria Egidi (eds.) *Wittgenstein: momenti di una critica del sapere*, Napoli: Guida Ed., pp. 37-82.
- Copeland, B.J. (2002), *The genesis of possible worlds semantics*, *Journal of Philosophical Logic* 31(2): 99-137.
- Copi, I.M; Cohen, C. & McMahon, K. (2014), *Introduction to logic 14<sup>th</sup> edition*, Harlow: Pearson Education Limited.

- Davidson, D. (1969), *The individuation of Events*, in Rescher, N. (ed.), *Essays in Honor of Carl G. Hempel*, Dordrecht: Reidel, pp. 216-234.
- Davidson, D. (1970), *Events as Particulars*, *Noûs* 4: 25–32.
- Davidson, D. (1980), *Essays on Actions and Events*, Oxford: Clarendon Press.
- Davidson, D. (1985), *Reply to Bruce Vermazen*, in Vermazen, B. and Hintikka, M.B. (ed.), *Essays on Davidson: Actions and Events*, Oxford, Clarendon Press, pp. 172–176.
- Davies, H. & Holdcroft, D. (1991), *Jurisprudence: Text and Commentary*, London: Butterworths.
- De Vecchi, F. (2012), *Ontologia sociale e intenzionalità: quattro tesi*, *Rivista di estetica*, 49, <http://journals.openedition.org/estetica/1707>
- Dervan, L.E. & Edkins, V.A. (2013), *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, *Journal of Criminal Law & Criminology* 103(1): 1-48.
- Descartes, R. (1641), *Meditations on First Philosophy*, trans. Michael Moriarty, Oxford: Oxford University Press, 2008.
- Di Lucia, P. & Passerini Glazel, L. (2019), *La realtà è una sola, ma le ontologie sono due*, in Searle, J.R., *Il mistero della realtà*, Milano: Raffaello Cortina Editore, IX-XXIV.
- Doherty, M. (2001), *Jurisprudence: the Philosophy of Law*, London: Old bay press.
- Dworkin, R. (1977), *Taking Rights Seriously*, Cambridge: Harvard University Press.
- Dworkin, R. (1986), *Law's Empire*, Cambridge: Belknap Press.
- Elgin, C.Z. (2010), *Persistent Disagreement*, in Richard Feldman and Ted A. Warfield (eds.), *Disagreement*, Oxford: Oxford University Press, pp. 53-68, p. 56.
- Endicott, T.A.O. (1996), *Linguistic Indeterminacy*, *Oxford Journal of Legal Studies* 16(4): 667-697.
- Evans, J. St. B. T. & Elqayam S. (2018), *How and why we reason from is to ought*, *Synthese*, <https://doi.org/10.1007/s11229-018-02041-4>.
- Farrow, T.C.W. (2014), *Civil Justice, Privatization, and Democracy*, Toronto. University of Toronto Press.
- Feis, G. (2015), *Impossibilità nel diritto*, Pisa: Edizioni ETS.
- Feldman, R. (2006) *Epistemological Puzzle about Disagreement*, in Stephen C. Hetherington (eds.), *Epistemology futures*, Oxford: Oxford University Press, pp. 216-236.
- Finnis, J. (1980), *Natural Law and Natural Right*, Oxford: Clarendon Law Series.
- Flach, P.A. & Kakas, A.C (2000), *Abduction and Induction: Essays on their Relation and Integration*, Dordrecht: Springer.



- Foucault, M. (1984), *Of Other Spaces: Utopias and Heterotopias*, in Leach, N. (ed.) (1997), *Rethinking architecture: a reader in cultural theory*, New York: Routledge, pp. 330-336.
- Frankel, L. (1986), *Mutual Causation, Simultaneity and Event Description*, *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 49(3): 361.-372.
- Friedman, L.M. (1986), *The Law and Society Movement*, *Stanford Law Review*, 38(3): 763-780.
- Frixione, M.; Iaquinto, S & Vignolo, M. (2016), *Introduzione alle logiche modali*, Roma: Laterza.
- Gaius, *The Institutes of Gaius*, trans. Gordon W. M. & Robinson O.F, London: Duckworth, 1988.
- Galanter, M. (2004), *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, *Journal of Empirical Legal Studies* 1(3): 459-470.
- Galgano, F. (2011) *Il contratto 2<sup>nd</sup> Ed.*, Padova: CEDAM.
- Gaskins, R.H. (1993), *Burdens of proof in modern discourse*, New Haven: Yale University Press;
- Gifis, S. H. (2008), item "Murder", *Dictionary of Legal Terms 3<sup>rd</sup> ed.*, New York: Barron's Educational Series.
- Gilbert, M. (1989), *On Social Facts*, Princeton: Princeton University Press.
- Girle, R. (2003), *Possible worlds*, Montreal: McGill-Queen's University Press.
- Girle, R. (2009), *Modal logics and philosophy 2<sup>nd</sup> Ed.*, Montreal: McGill-Queen's University Press.
- Golding, M.P. (1975), *Philosophy of Law*, Englewood Cliffs: Prentice-Hall, p.1.
- Gómez Dávila, N. (1970), *De iure*, trans. Luigi Garofalo, Milano: La nave di Teseo, 2019, pp. 239-246.
- Gorgias, *Su ciò che non è*, trans. Roberta Ioli (eds.), Hildesheim: Olms, 2010.
- Green, M.S. (2005), *Legal Realism as Theory of Law*, *William & Mary Law Review* 46(6): 1915-2000.
- Grossmann, R. (1992), *The existence of the world: an introduction to ontology*, London: New York, Routledge.
- Habermas, J. (1998), *The inclusion of the other: studies in political theory*, Cambridge: MIT Press.

- Hage, J. (2013), *The deontic furniture of the world. An analysis of the basic concepts that embody normativity*, in Stelmach, J; Brozek, B. & Hohol, M. (ed.), *The many faces of normativity*, Krakow: Copernicus Center Press, pp. 73-114.
- Hans, V.P & Vidmar, N. (1986), *Judging the jury*, New York: Plenum Press.
- Hanson, N.R. (1958), *Patterns of Discovery: An Inquiry into the Conceptual Foundations of Science*, Cambridge: Cambridge University press.
- Hart, H.L.A. (1994), *The Concept of Law 2nd Ed*, Oxford: Clarendon Press.
- Hatzis, A. N. & Mercuro, N. (ed.) (2015) *Law and economics: philosophical issues and fundamental questions*, London-New York: Routledge.
- Higginbotham, J. (2000), *On Events in Linguistic Semantics*, in Higginbotham, J.; Pianesi, F. & Varzi, A.C. (ed.), *Speaking of Events*, New York: Oxford University Press, pp. 49-79.
- Hintikka, J. (1961), *Modality and Quantification*, *Theoria* 27: 119-138.
- Hintikka, J. (1963), *The Modes of Modality*, *Acta Philosophica Fennica* 16: 65-79
- Holmes, O.W. (1897), *The path of the Law*, *Harvard Law Review*, 10: 457-462.
- Huizinga, J. (1949), *Homo Ludens*, London: Temple Smith.
- Hume, D. (1738), *A Treatise of Human Nature*, Oxford: Clarendon Press, 1975.
- Hume, D. (1748), *An Enquiry concerning Human Understanding*, New York: Dover Publication Inc., 2012.
- Jackson, B.S. (1991) *Towards a semiotic model of the games analogy in Jurisprudence*, *Droit et Société* 17-18: 99-123;
- Jacob, P. (2019), item "*Intentionality*", *The Stanford Encyclopedia of Philosophy*, <https://stanford.library.sydney.edu.au/entries/intentionality/>
- Jensen, O.C. (1957), *The Nature of Legal Argument*, Oxford: Blackwell.
- Jori, M. & Pintore, A. (2014), *Introduzione alla Filosofia del Diritto*, Torino: Giappichelli.
- Kant, I. (1790), *Critique of Judgement*, tran. James Creed Meredith, Oxford: Oxford University Press, 2007, p.166
- Kelly, T. (2005), *The Epistemic Significance of Disagreement*, in John Hawthorne and Tamar G. Szabo (eds.), *Oxford Studies in Epistemology*, New York: Oxford University Press, pp. 167-196;
- Kelman, M. (1987), *A Guide to Critical Legal Studies*, Cambridge: Harvard University Press.
- Kelsen, H. (1960), *Pure Theory of Law 2nd Ed.*, Knight M. (ed.), Clark: The Lawbook Exchange LTD, 2005.

- Kelsen, H. (1979), *General Theory of Norms*, tran. Hartney, M., Oxford: Oxford University Press, 1991.
- Kennedy, D. (1986), *Freedom and Constraint in Adjudication*, in Duncan Kennedy (eds.), *Legal Reasoning: Collected Essays*, 2008, pp.12-85.
- Kennedy, D. (1997), *A critique of adjudication: fin de siècle*, Cambridge: Harvard University Press, p. 161.
- Kim, J. (1973), *Causation, Nomic Subsumption, and the Concept of Event*, *The Journal of Philosophy* 70 (8): 217-236.
- Kim, J. (1976), *Events as Property Exemplifications*, in: Brand, M. and Walton, D. (ed.), *Action Theory. Synthese Library (Monographs on Epistemology, Logic, Methodology, Philosophy of Science, Sociology of Science and of Knowledge, and on the Mathematical Methods of Social and Behavioral Sciences)* Vol. 97, Dordrecht: Springer, pp. 159-177.
- King, N.L. (2012), *What's the Problem? Or A Good Peer is Hard to Find*, *Philosophy and Phenomenological Research* 85(2): 249-272, pp. 252.
- Klima, G. (2017), item "*The Medieval Problem of Universals*", *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/universals-medieval/>.
- Kokott, J. (1998), *The burden of proof in comparative and international human rights law: civil and common law approaches with special reference to the American and German legal system*, Boston: Kluwer Law International;
- Kramer, M.H. (1999), *In defense of legal positivism: law without trimmings*, Oxford: Oxford University Press.
- Kreuzbauer, G. (2006), *Die Norm im Völkerrecht: eine rechtsphilosophische und rechtstheoretische Untersuchung*, Wien: LIT Verlag.
- Kripke, S.A. (1959), *A Completeness Theorem in Modal Logic*, *Journal of Symbolic Logic* 24: 1-14;
- Kripke, S.A. (1963), *Semantical Considerations on Modal Logic*, *Acta Philosophica Fennica* 16: 83-94.
- Kripke, S.A. (1980), *Naming and Necessity*, Cambridge: Harvard University Press.
- Kripke, S.A. (1982) *Wittgenstein on Rules and Private Language*, Cambridge: Harvard University Press.
- Kuhn, T.S. (1962), *The Structure of Scientific Revolution*, Chicago; London: University of Chicago Press.
- Lehman, J. & Phelps, S. (2005), *West's encyclopedia of American law 2nd Edition*, Vol. 8, Detroit: Gale Division of Cengage Learning Inc,

- Leiter, B. (2005), *American Legal Realism*, in Golding, M.P. & Edmundson, W A. (ed.), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Oxford: Blackwell.
- Leiter, B. & Sevel, M. (2017), item 'Philosophy of Law', in Encyclopedia Britannica, <https://www.britannica.com/topic/philosophy-of-law>.
- Lessig, L. (2006), *Code: version 2.0*, New York: Basic Books.
- Lewis, D. (2002), *Convention: A Philosophical Study*, Cambridge: Harvard University Press. However, I do not agree with Lewis on this point.
- Licata, I. (2013), *Incertezza. Un approccio sistemico*, in Ulivi, L.U. (ed.), *Strutture di Mondo 2. Il pensiero sistemico come specchio di una realtà complessa*, Bologna: il Mulino, pp. 35-71.
- Lorini, G. (2008) *Praxeografia. Descrivere un'azione Vs. descrivere un atto costituito-da-regole*, in di Nuoscio, E. & Heritier, P. (ed), *Le culture di babele. Saggi di antropologia filosofico-giuridica*, Milano: Medusa, pp. 115-134.
- Lowe, E. J. (2008), *Essentialism, Metaphysical Realism, and the Errors of Conceptualism*, *Philosophia Scientiae* 12: 9-33.
- MacCormick, N. (2005), *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*, Oxford: Oxford University Press.
- Magnani, L. (2001), *Abduction, reason, and science: processes of discovery and explanation*, New York: Kluwer Academic, p. XI.
- Maris, C.W. & Jacobs, F.C.L.M. (2011), *Law, order and freedom: a historical introduction to legal philosophy*, Dordrecht-New York: Springer.
- Marmor, A. (2006), *How Law is like Chess*, *Legal Theory* 12: 347-371.
- Mason, H.E. (1996), *Moral dilemmas and moral theory*, New York: Oxford University Press.
- Matheson, J. (2015), *Disagreement and Epistemic Peers*, Oxford Handbooks Online, <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935314.001.0001/oxfordhb-9780199935314-e-13> (Retrieved 24 Sep. 2019)
- Mazzei, A. (2011), *Un'incursione trasversale nella dottrina della natura della cosa*, in Mazzei, A & Opocher, T. (ed.), *Fondazione ontologica del Diritto e «natura della cosa»*, Padova: CEDAM, pp. 1-43.
- McCormick, C.T. (1984), *McCormick on evidence 3<sup>rd</sup> Ed.*, Edward W. Cleary (eds.), St. Pau: West publishing, p. 962].
- Meinong, A (1904), *Über Gegenstandstheorie*, in Alexius Meinong (ed.), *Untersuchung zur Gegenstandstheorie und Psychologie*, Leipzig: Johann Ambrosius Barth, pp. 1-50.

- Mellor, D.H. (1995), *The Facts of Causation*, London: Routledge.
- Menzel, M. (2016), item "*Possible Worlds*", *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/possible-worlds/>
- Miller, A. (2014), item "*Realism*", *The Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/realism/>
- Moore, G.E. (1939) *Proof of an External World*, London: H. Milford;
- Morena, L. (2004), *Oggetti Convenzionali*, *Rivista di estetica* 44(2): 115-128.
- Morena, L. (2002), *I confine delle cose*, *Rivista di estetica* 42(2): 3-22, pp.19:20;
- Negri, S. (2007), "*Equality of Arms*": *Guiding Light or Empty Shell?*, in Michael Bohlander (eds.), *International Criminal Justice: A Critical Appraisal of Institutions and Procedures*, London : Cameron May, pp. 13-73.
- Nietzsche, F.W (1967), *The Will to Power*, trans. Walter Kaufmann and Reginald J. Hollingdale, New York: Vintage Books.
- Opocher, E (2011), *Considerazioni su alcuni equivoci inerenti al significato assiologico della nozione di «natura della cosa»* in Mazzei, A & Opocher, T. (ed.), *Fondazione ontologica del Diritto e «natura della cosa»*, Padova: CEDAM, pp. 167-175.
- Ost, F. (1987), *Between Order and Disorder: The Game of Law*, in Gunther Teubner (eds.) *Autopoietic law: a new approach to law and society*, Berlin; New York: W. de Gruyter, pp. 70-97.
- Parenti, M. (2003), *The assassination of Julius Caesar: a people's history of ancient Rome*, New York: New Press.
- Pavlakos, G. & Coyle, S. (2005), *Jurisprudence or Legal Science?*, Oxford: Hart Publishing.
- Peirce, C.S. (1931-66), *Collected papers of Charles Sanders Peirce, vol. I-VIII*, Charles Hartshorne, Paul Weiss and Arthur W. Burks (eds.), Cambridge: Harvard University Press,
- Peirce, C.S. (1982-2010) *Writings of Charles S. Peirce: a chronological edition vol. I-VIII*, Max H. Fisch (eds.), Bloomington: Indiana University Press,
- Peirce, C.S. (1992), *The essential Peirce: selected philosophical writings*, Nathan Houser and Christian Kloesel (eds.); Bloomington: Indiana University Press.
- Pizzi, C. (2009), *Diritto Abduzione e Prova*, Milano: Giuffrè, 2009.
- Placani, A. (2017), *Constitutive and regulative rules: a dispute and a resolution*, *Phenomenology and Mind* 13: 56-62.

- Plato, *Crito*, In *Plato, Euthyphro; Apology; Crito; Phaedo; Phaedrus*, trans. Harold N. Fowler, Cambridge-London: Harvard University Press, 1914, pp. 147-192.
- Poscher, R. (2016), *Why we argue about the law: an agonistic account of legal disagreement*, in Paweł Banaś, Adam Dyrda and Tomasz Gizbert-Studnicki (eds.), *Metaphilosophy of law*, Oxford: Hart Publishing, pp. 191-226, p. 202.
- Putnam, H. (1981), *Reason, Truth, and History*, Cambridge: Cambridge University Press, pp. 1-21.
- Quine, W.V.O. (1948), *On What There Is*, *Review of Metaphysics*, 2: 21-38.
- Quine, W.V.O. (1960), *Word and Object*, Cambridge: MIT Press.
- Quine, W.V.O. (1986), *Philosophy of Logic 2<sup>nd</sup> Ed.*, Cambridge: Harvard University Press.
- Radbruch, G. (1923), *Rechtsidee und Rechtsstoff. Eine Skizze*, *Archiv für Rechts- und Wirtschaftsphilosophie*, 17(3): 343-350.
- Radbruch, G. (1946), *Gesetzliches Unrecht und übergesetzliches Recht*, *Süddeutsche Juristen-Zeitung Jahrg*, 1(5): 105-108.
- Radbruch, G. (1948), *Die Natur der Sache als juristische Denkform*, in Hernmarck, G.C. (ed.) *Festschrift zu Ehren von Prof. Dr. jur. Rudolf Laun*, Hamburg: Toth, pp. 157-176.
- Ramírez Ludeña, L. (2016), *Legal disagreements*, *Revus* 28: 11-32, p. 17.
- Rawls, J. (2005), *Political liberalism 2<sup>nd</sup> Ed. Expanded*, New York: Columbia University Press.
- Raz, J. (1999), *Practical reason and norms*, Oxford: Oxford University Press (First published 1975).
- Raz, J. (2005), *Can There Be a Theory of Law?*, in Martin P. Golding and William A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory*, Oxford: Blackwell, pp 324-342, p. 325.
- Raz, J. (2009), *Between Authority and Interpretation*, Oxford: Oxford University Press.
- Rea, M. C. (1997) *Material Constitution: A Reader*, New York: Rowman & Littlefield.
- Reggio, F. (2017), *Concordare la norma. Gli strumenti consensuali di soluzione della controversia in ambito civile: una prospettiva filosofico-metodologica*, Padova: Cleup.
- Rescher, N. (2006), *Metaphysic: The Key Issues from a Realistic Perspective*, Amherst: Prometheus Books.
- Resinck, J. (2015), *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *Yale Law Journal* 2015; Yale Law School, Public Law Research Paper No. 543, <https://ssrn.com/abstract=2601132>;

- Ross, A. (1959), *On law and Justice*, Clark: The Lawbook Exchange, Ltd., 2004.
- Roversi, C. (2012), *Costituire. Uno studio di ontologia giuridica*, Torino: Giappichelli.
- Roversi, C. (2016), *Intenzionalità collettiva e realtà del diritto*, in Buongiovanni, G.; Pino, G. & Roversi, C. (Ed.), *Che cosa è il diritto. Ontologie e concezioni del giuridico*, Torino: Giappichelli, 255-294.
- Ruben D.H. (1997), *John Searle's The Construction of Social Reality*, *Philosophy and Phenomenological Research* 57(2): 443-447.
- Russell, B. (1905), *On denoting*, *Mind* 14(56): 479-493.
- Russell, B. (1919), *An Introduction to Mathematical Philosophy*, London: George Allen & Unwin.
- Sarra, C. (2010), *Lo scudo di Dioniso: Contributo allo studio della metafora giuridica*, Milano: FrancoAngeli.
- Searle J. R. (1969), *Speech Acts. An Essay in the Philosophy of Language*, Cambridge: Cambridge University Press.
- Searle, J.R. (1979), *A Taxonomy of Illocutionary Acts*, *Minnesota Studies in the Philosophy of Science* 7: 344-369.
- Searle, J.R. (1989) *How Performatives Work*, *Linguistic and Philosophy*, 12: 535-558.
- Searle, J.R. (1995) *The construction of Social Reality*, New York: Free Press.
- Searle, J.R. (2005), *What is an institution?*, *Journal of Institutional Economics*, 1: 1-22.
- Searle, J.R. (2008), *Philosophy in a new century: selected essays*, Cambridge: Cambridge University Press.
- Searle, J.R. (2010) *Making the Social World: The Structure of Human Civilization*, Oxford: Oxford University Press;
- Searle, J.R. (2017), *Money: Ontology and Deception*, *Cambridge Journal of Economics*, 41(5): 1453–1470.
- Searle, J.R. (2019), *Il mistero della realtà*, Milano: Raffaello Cortina Editore.
- Shapiro, B.J. (1991), *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, Berkeley: University of California Press
- Sinha, S.P. (1976), *The Fission and Fusion of Is-Ought in Legal Philosophy*, *Villanova Law Review* 21: 839-859.
- Smith, A. (1982), *Lectures on Jurisprudence*, edited by Ronald L. Meek, David D. Raphael and Peter G. Stein, Indianapolis: Liberty Found, p. 314.

- Smits, J.M. (2017), *Contract law: a comparative introduction 2<sup>nd</sup> Ed.*, Cheltenham: Edward Elgar.
- Sommaggio, P. (2011), *La logica come giurisprudenza*, in Francesca Zanuso and Stefano Fuselli (eds.), *Il lascito di Atena*, Milano: FrancoAngeli, pp. 95-105.
- Sommaggio, P. (2012) *Contraddittorio, giudizio e Mediazione. La danza del demone mediano*, Milano: Franco Angeli, p. 135.
- Sommaggio, P. (2014), *The Socratic Heart of the Adversarial System*, University of Leicester School of Law, Research Paper 14-21.
- Sommaggio, P. (2016), *Filosofia del Biodiritto. Una proposta socratica per società postumane*, Torino: Giappichelli.
- Sommaggio, P. & Mazzocca, M. (2016), *The only impossible Solution. The case of the Parking Lot*, in Paolo Sommaggio, *Philosophy, Law & Society. Seven simple samples*, Padova: libreriauniversitaria.it.
- Sommaggio, P.; Mazzocca, M.; Gerola, A & Ferro, F (2017). *Cognitive Liberty. A first step towards a Human Neuro-Rights Declaration*, *Biolaw Journal* 3: 27-45.
- Sosa, E. & Kim, J. (2000), *Epistemology: an anthology*, Malden: Blackwell Publishers.
- Tamanaha, B. Z. (2017), *A Realistic Theory of Law*, Cambridge: Cambridge University Press.
- Taruffo, M. (2009), *La semplice verità*, Roma: Laterza, pp. 108-111.
- Thalberg, I. (1971), *Singling out Actions, their Properties and Components*, *Journal of Philosophy* 68(21): 781–787.
- Toulmin, S. (1958), *The Uses of Argument*, Cambridge: Cambridge University Press, 2003.
- Traum, A.R. (2015), *Using Outcomes to Reframe Guilty Plea Adjudication*, *Florida Law Review* 66(2): 823-879;
- Tuomela, R. (1995), *The Importance of Us: a philosophical study of basic social notions*, Stanford: Stanford University Press.
- Tuomela, R. (2013), *Social Ontology: Collective Intentionality and Group Agents*, New York: Oxford University Press.
- Tuzet, G. (2006), *La prima inferenza: l'abduzione di C.S. Peirce fra scienza e diritto*, Torino: Giappichelli;
- Tuzet, G. (2010), *Dover decidere: diritto, incertezza e ragionamento*, Rome: Carocci.
- Tuzet, G. (2013), *The Omission Dilemma*, Bocconi Legal Studies Research Paper No. 2887393, <http://dx.doi.org/10.2139/ssrn.2887393>.



- Van de Kerchove, M & Ost, F. (1993), *The Legal System between Order and Disorder*, tran. Iain Stewart, Oxford: Clarendon Press.
- van Inwagen, P. (1996), *It is Wrong, Always, Everywhere, and for Anyone, to Believe Anything, Upon Insufficient Evidence*, in Jeff Jordan and Daniel Howard-Snyder (eds.), *Faith, freedom, and rationality: philosophy of religion today*, Lanham: Rowman & Littlefield, pp. 137-154.
- Varzi, A.C. (2001), *Parole, Oggetti, Eventi e altri argomenti di metafisica*, Roma: Carocci.
- Varzi, A.C. (2005), *Ontologia*, Roma: Laterza.
- Varzi, A.C. (2006), *The Talk I was Supposed to Give...*, in Bottani, A. & Davies, R. (ed.), *Modes of Existence. Papers in Ontology and Philosophical Logic*, Frankfurt: Ontos, pp. 131–152.
- Varzi, A.C. (2007), *Omissions and Causal Explanations*, in Castellani, F. & Quitterer, J. (ed.), *Agency and Causation in the Human Sciences*, Paderborn: mentis Verlag, pp. 155–167.
- Varzi, A.C. (2008), *Metafisica*, Roma: Laterza.
- Varzi, A.C. (2008), *Patterns, Rules and Inference*, in Adler, J. E. and Rips, L.J. (ed.), *Reasoning: Studies of Human Inference and Its Foundations*, Cambridge, Cambridge University Press, pp. 282-290.
- Varzi, A.C. (2010), *Il mondo messo a fuoco. Storie di allucinazioni e miopie filosofiche*, Roma, Laterza.
- Varzi, A.C. (2010), *Kripke: modalità e verità*, in Borghini, A. (ed.), *Il genio compreso. La filosofia di Saul Kripke*, Roma: Carocci Editore, pp. 23–78, 186–191.
- Varzi, A.C. and Ferraris, M. (2010), *Che cosa c'è e che cos'è*, in Achille C. Varzi, *Il mondo messo a fuoco. Storie di allucinazioni e miopie filosofiche*, Roma, Laterza, pp. 5-27.
- Vetter, W.V. (1999), *The Parking Lot Cases Revisited: Confusion at or About the Gate*, *The Santa Clara Law Review*, 40: 27-64.
- Viola, F. (1991), *The Judicial Truth*, *Persona y Derecho* 32: 249-266.
- Voltolini, A. & Calabi, C. (2009), *I problemi dell'intenzionalità*, Torino: Einaudi.
- Waldron, J. (2004), *Law and disagreement*, Oxford-NY: Oxford University Press.
- Walton, D. (2014), *Burden of proof, presumption and argumentation*, New York, NY: Cambridge University Press.
- Wedgwood, R. (2010), *The Moral Evil Demons*, in Richard Feldman and Ted A. Warfield (eds.), *Disagreement*, Oxford: Oxford University Press, pp. 216-246.

- Whitman, J.Q. (2008), *The origins of reasonable doubt: theological roots of the criminal trial*, New Haven: Yale University Press, p. 123.
- Williams, D.C. (1953), *On the Elements of Being*, *Review of Metaphysics* 7(1): 3-18.
- Wittgenstein, L. (1921), *Tractatus Logico-Philosophicus*, trans. Pears, D.F. & McGuinness, B.F., London-New York: Routledge, 2001.
- Wittgenstein, L. (1953), *Philosophical Investigations*, trans. Gertrude Elizabeth Margaret Anscombe, Oxford, Basil Blackwell, 1986.
- Wittgenstein, L. (1956) *Remarks on the Foundations of Mathematics*, trans. Gertrude Elizabeth Margaret Anscombe, Oxford: Basil Blackwell, 1967.
- Wittgenstein, L. (1969), *On Certainty*, trans. Denis Paul and, G.E.M. Anscombe, Oxford: Basil Blackwell.
- Woozley, A.D. (1979), *Law and Obedience: The Arguments of Plato's Crito*, Chapel Hill: University of North Carolina Press.
- Wright, R.G. (2017), *Epistemic Peerhood in the Law*, *St. John's Law Review*, 91(3): 663-702.
- Zabeeh, F. (1966) *Universals: A New Look at an Old Problem*, Dordrecht: Springer Netherlands;
- Zanetti, F. (2017), *I limiti del diritto. Aspetti del dibattito contemporaneo*, *Rivista di filosofia del diritto*, VI, special number: 25-40.
- Zanuso, F. & Fuselli, S. (2011), *Il lascito di Atena*, Milano: FrancoAngeli.