

## BRINGING ABOUT THE NORMATIVE PAST

Alessandra Tanesini

When discussing normative matters of law, meaning, and justification we can find ourselves talking in ways which suggest that our actions do not only affect the future, they can also affect the past. Judges and lawyers, who debate the fairness of *ex post facto* law, assume that legislation *can* have retroactive effect. Interpreters of older texts are often conscious of the ways in which later readers impose meanings on the pronouncements of earlier writers. Similarly, because assessments of whether our beliefs are justified depend on contextual standards, we are quite happy to say things which can be plausibly taken to imply that future developments affect the justification of past beliefs. Hence, we seem to treat justification as having retroactive effects. These considerations show that we do not find it immediately absurd to think that, in the realm of normative matters, what comes later can contribute to the determination of the normative status of what has come earlier.

The contrast with non-normative discourse is stark. The idea that one could do something now that determines the facts of what happened yesterday strikes the ordinary person as patently absurd. What happened, happened, and nothing in the future can make a difference to that.<sup>1</sup> It seems natural to think that the

present cannot causally influence the past.<sup>2</sup> Ordinary descriptive ways of talking simply reflect this idea that the facts about the past are fixed and that they cannot be influenced now, although we may, of course, wish that they had been different.<sup>3</sup>

This paper is first concerned with a variety of cases where, it is argued, our ordinary ways of speaking show that we take the present and future to contribute to the constitution of the normative features of the past. Section 1 offers some legal examples which are relatively uncontroversial. Subsequently, sections 2 and 3 present some more controversial examples concerning meaning and justification.

Section 4 describes some features of our linguistic and epistemic practices in light of the examples presented in the first three sections of the paper. It is argued that these practices exhibit what can be described as a “whiggish” temporality.<sup>4</sup> Some of the norms by which these practices are governed have contents that are partly determined by what happens in the future.<sup>5</sup> Sections 5, 6, and 7 offer arguments detailing some good reasons why our linguistic and epistemic practices should exhibit this kind of temporality. In particular, given human fallibility and ignorance, it is rational to treat our assertions and beliefs as the sort of things which are vulnerable to objections by future members of the linguistic

community. Further, given the requirement that legal, epistemic, conceptual and linguistic norms be determinate, the acknowledgment of future normative judgements implies that some of the norms by which our practices are currently governed have contents which are partly determined by future developments of the practices themselves.

### I. THE RETROACTIVE EFFECT OF LAWS

There are at least two clear ways in which laws can have retroactive effects. First, some laws are “*ex post facto*.” Second, laws that repeal other pieces of legislation can cancel out their authority altogether, so that they no longer apply even to situations that took place before they were repealed.

An “*ex post facto*” law is defined as a law which “makes an action a crime even though it was not a crime when it was committed,” or increases penalties for crimes after they were committed, or changes with retroactive effect the rules of evidence, thus making it easier to convict a person.<sup>6</sup> The Constitution of the United States prohibits both the federal government and State legislators from passing *ex post facto* criminal laws (Article 1, Sections 9 and 10). British Law does not include a prohibition of this sort, and the 1991 War Crimes Act is the only modern example of a *ex post facto* criminal law passed by the legislative body of a democratic country. Since legislators have thought it necessary to prohibit *ex post facto* laws, they have clearly assumed that such laws are possible.

Besides *ex post facto* laws and laws that repeal other laws, case law, sometimes labelled judge-made law, also have retroactive effects. Thus, Jerome Hall writes that case laws are capable of extending backward in time, and placing “the authoritative stamp of criminality upon the prior conduct.”<sup>7</sup> This manner of speaking is strongly suggestive of the idea that laws passed at a later date can determine the legal status of prior behaviour. The retroactive power of case laws and ordi-

nances could be seen as a consequence of the open-texture of their formulations. H. L. A. Hart, who developed the idea, presents the example of an ordinance prohibiting the use of vehicles in a public park. The formulation of the ordinance is open-textured because it is not clear whether it applies to, say, skateboards, bicycles, electric wheelchairs, or even electrically powered toy cars. The lack of clarity is not a problem unless for whatever reasons the issue of its application is raised. In such an instance there is room for discretion.<sup>8</sup> Nevertheless, once the decision has been made, it clarifies the initial meaning of the ordinance in question, and therefore, is seen as applying to past cases also.

In many of these cases there is more than one way in which the law could be clarified. For example, if gangs of youths on bicycles have become a real nuisance in parks, it might be decided that the ordinance prohibiting the use of vehicles in parks applies to bicycles. Alternatively, if children use bicycles in parks without damaging them or unduly disturbing other users, even though the question is raised by a particularly grumpy individual, it might be decided that bicycles do not count as vehicles for the purposes of the ordinance. In either case, it is plausible for the legislators to claim to have been faithful to the intentions with which the ordinance was originally drafted. In both instances, they could make a claim for having clarified rather than modified the ordinance. Thus, in the first scenario legislators could say that the ordinance always applied to bicycles, in the second they could say that it never applied to them. In either case the so-called clarification has retroactive effect.

In conclusion, in the realm of the law, it is commonly thought to be possible for a piece of legislation to have retroactive effects.

## 2. THE RETROACTIVE EFFECT OF MEANING ATTRIBUTIONS

When we read the works of authors, who have written in the past using what we consider to be the same language as ourselves, we normally take them to use their word-forms<sup>9</sup> with the same meanings they have when we use them. There are, of course, exceptions. We are aware that some words have undergone dramatic changes in their meanings.<sup>10</sup> But, generally, unless we have reasons to believe that a change in meaning has taken place, we take the words of our predecessors at face value, so to speak. Similarly, we also usually take them to have used these words to refer to the same kinds of things which we use these words to refer to now.

When we read about marine life in old books, we take the word “fish” to have had the same linguistic meaning at the time as it has for us now. We believe this despite being fully aware that for a long time people used the word “fish” in sentences such as “whales are fish.” When we read about a past speaker’s utterance of a token of this sentence we are not usually tempted to apply the principle of charity, and to take the writer to express something true by means of this utterance. On the contrary, unless we have reasons to believe otherwise, we simply assume that the past speaker uses the word “fish” with the meaning and extension we attribute to it. We simply take the utterance to be false, because we take the word “fish” as used in the past to be true of something if and only if the word “fish” as used by us is true of it. That is, we take the past uses of “fish” to be true of something if and only if that something is a fish. In other words, we readily interpret cases such as this one as an instance of belief revision rather than meaning change.<sup>11</sup>

Linguistic use, however, could have developed otherwise. It is not impossible that once our ancestors discovered that whales are mammals, they could have opted to use the

word “fish” to apply to all creatures, with a backbone and fins, living exclusively in water. Had this usage been adopted, we would still be happy to assert sentences such as “whales are fish.” In our mouths, of course, this sentence would mean that whales are creatures with a backbone and fins living exclusively in water. Had linguistic practice developed in this alternative way, the word “fish” would have a different meaning and extension from that it actually has.

These considerations, however, quickly give rise to a dilemma. The actual case has been described as one in which the word “fish” has not changed its meaning or extension. However, if we consider the hypothetical scenario, we realise that in that case also speakers would describe the development of their practice as an instance of belief revision rather than meaning change. In that instance, they would express their discovery by stating sentences such as “some fish are mammals.”

Considerations of symmetry suggest that their attitude is justified. In either the actual or hypothetical case, when contemporary speakers put themselves in the shoes of their ancestors, they do not need to learn a new concept or meaning which those past speakers associated with their word “fish.” In either case, rather than learning something new, contemporary speakers must pretend to have forgotten some facts. They need to imagine that they do not know that whales are mammals. In other words, the development of the linguistic practice in either scenario is best explained in terms of the acquisition of a new piece of knowledge which has induced rational revisions of some previously held beliefs. The meanings of the words used have undergone no change.<sup>12</sup>

We appear to have ended up with a problem. Both in the actual and hypothetical scenario contemporary speakers read their ancestors as having used their words with the same meanings as they use theirs. They both seem

warranted in taking this attitude. However, the meanings so attributed certainly seem different from each other. Thus, the word as used in the past must have had a different meaning in each of the two scenarios.

It might be objected that the example presented above is far too vague to support this conclusion. In particular it has not been established that there are no differences between the dispositions of the speakers in the two scenarios which would explain their divergent decisions with regard to the correct use of the word “fish.” However, there are examples such as a thought experiment first presented by Mark Wilson, which have the same structure as the case presented above, and can be used to show that differences in past dispositions to behave play no explanatory role in the phenomenon highlighted here.<sup>13</sup>

Wilson asks us to imagine a colony of Druids, speaking an archaic version of English, and inhabiting an isolated island. One day the Druids see an aeroplane landing on their island. The aeroplane is the first flying thing, apart from the local avian population, the Druids have seen.<sup>14</sup> After the encounter, Druids use their word “bird” to refer to birds, planes, helicopters and so forth, whilst adopting the expression “feathered bird” to refer to birds. Call this scenario: A.

We can equally imagine that the aeroplane crashed on the island, and that none of the Druids witnessed the event. The Druids later meet the survivors of the crash camping around the hulk of the plane. After this encounter, Druids use the expression “house” to refer to houses and planes, and they adopt the expression “flying house” to refer to aeroplanes. The Druid word “bird” in this second scenario is applied to birds but not planes. Call this scenario: B.

In this thought experiment we are meant to think that provided that we describe the Druids’ disposition to behave in terms that make no reference to the future, their dispositions are the same in both scenarios; their behav-

our develops differently simply because of the differences between their respective first encounters with an aeroplane.

This thought experiment, and the other example discussed above, present the same puzzle. It seems natural to say that before the encounter with the first aeroplane, Druids in both scenarios A and B meant the same thing by the word “bird” (“house”); after all, there is no difference in their pasts or presents. There is no doubt, however, that contemporary Druids in A and B mean different things by “bird” (“house”). Were each of them to entertain the possibility of the other, they would readily agree that the Druid in B who utters the words “it is not the case that aeroplanes are birds” does not contradict the Druid in A who utters the words “aeroplanes are birds.”<sup>15</sup> There is no contradiction because their words “bird” (“house”) do not have the same meaning; they express different concepts. However, both in A and in B Druids would resist the claim that upon the encounter with the plane, they have changed the meanings of their word “bird” or of their word “house.” In either case they would say that the concepts they already possessed guided in A their classification of aeroplanes as birds, and in B as houses (and therefore not as birds). But if both groups of Druids are right to think that they have not changed the meanings of their words since the encounter with aeroplanes, since the meanings of their words are now different, they must have been different in the past also.

This conclusion is of course controversial and it is not conclusively established by these examples alone. The point of the examples is to suggest that one way of making sense of some features of ordinary linguistic practice is to treat meaning attributions as having retroactive effect.

### 3. THE RETROACTIVE EFFECT OF JUSTIFICATIONS

We often treat justifications as being sensitive to context. The same grounds that in one context provide sufficient grounds for a belief are not sufficient in a different context. Further, the difference between the contexts need not concern the existence of other evidence relevant to these grounds. The difference could be exclusively a matter of the relative importance of getting things right. In some cases, a change in future context contributes to the determination of whether or not we were justified in holding a belief in the past.

Imagine that I intend to travel from London to Cardiff in the early evening. I possess a copy of the published timetable, and I check it. I notice that there is a train scheduled to depart from London Paddington to Cardiff Central at 5:00 p.m. Thus, I form the belief that there is a train at 5:00 p.m. that will take me to Cardiff. In these circumstances, I would be prepared to say that my belief is justified.

Now imagine that I remember that I have made an arrangement to have dinner with a friend in Cardiff that evening, and that it is crucial that I am there on time. Being in Cardiff before 8:00 p.m. has suddenly become quite important to me. At this point, being well aware that the British railway system is not as efficient as it should be, and knowing that they do cancel trains, I feel less certain that there is a train scheduled to depart London to Cardiff at 5:00. Hence, I call the information line for confirmation. Further, depending on how important it is to be in Cardiff for this dinner, I might even mistrust the information provided by the information service, since they are renowned for getting things wrong quite often, and decide to take an earlier train in order to make sure that I am in Cardiff on time.

The change of context has contributed to determining the epistemic status of my past

belief. Once the time of arrival becomes important, I do not take myself to have been justified when I formed my belief simply on the basis of the timetable. In other words, I do not say that the belief was justified when it was formed, but subsequently became unjustified. Rather I think that the belief was unjustified all along. But clearly I take this attitude only because at a later stage it became quite important to rule out the possibility of cancellations. The new context has raised the threshold for justification, so that the old belief is now shown to have always fallen short of it.

However, even in Britain, it is appropriate in ordinary circumstances to take the published timetable as providing adequate grounds for forming beliefs about train departures. Thus, had I remembered about the dinner engagement only when I was already travelling on 5:00 hour train to Cardiff, I would not have said that I went to Paddington station not knowing whether there was a train at 5:00; after all, I had checked the timetable. Thus, what makes these two scenarios different is the development subsequent to the formation of the belief. The intervening circumstances contribute to the determination of the past belief as either justified or unjustified. Thus, the determination takes place retroactively.<sup>16</sup>

We can show retroactively that some beliefs have always been unjustified, but we can also show in the same way that beliefs have always had justification. Thus, I might give much importance to a deadline for the submission of a document, and think that the deadline is, say the 1st of March, because I vaguely remember reading something to that effect. In this case, I will seek to gain firmer evidence about the precise deadline. But suppose I learn instead that the deadline is very flexible. In such a case, I shall not go through the trouble of trying to chase the matter up. Instead, I tell myself that my memory is pretty good, and thus re-evaluate my grounds for belief, as being, in the circumstances, good

enough. I now come to see myself as having been justified all along.

Discovering that the deadline was flexible did not provide grounds for or against it falling on 1 March. Thus, the subsequent development is not one in which new evidence relevant to the belief is uncovered. Rather, the new development, by determining the threshold of justification, makes it the case that the belief was already justified. But, it gained such a justification retroactively.<sup>17</sup>

#### 4. THE WHIGGISH TEMPORALITY OF OUR PRACTICES

The previous sections have presented examples from the realms of law, meaning and justification, and offered arguments that in all of these cases our ordinary practices seem to permit a determination of the normative features of the past by present and future developments. These examples share some common features. First, they all present branching scenarios. Second, the branching always takes place when some combination of accidental and unforeseeable events has as a consequence a change in the range of alternatives that become relevant, and forces a novel assessment of the situation at hand. Third, although the future normative assessments made about the past in each scenario are mutually incompatible, nevertheless they both appear to be correct.

This section provides an argument based on the branching examples discussed above for the conclusion that that ordinary linguistic and epistemic practices exhibit a whiggish temporality. They are governed by norms whose contents are partly determined by the future developments of these practices. The argument proceeds in two stages: first, evidence is offered for the conclusion that, contrary to appearances, the two branches in branching scenarios do not share the same normative past; second, reasons are given for the claim that given the privileged epistemic

status of ordinary judgements about sameness (or difference) of normative status, the best explanation for this past divergence in branching scenarios, is that the future plays a role in the constitution of its past and present.

The first stage of the argument begins by considering four incompatible theses concerning our hypothetical branching examples:

1. The normative status of an instance or occurrence of X before the branching took place is the same in both scenarios A and B.
2. After branching the normative status of an instance or occurrence of X in A is not the same as the normative status of an instance or occurrence of X in B.
3. The normative status of instances or occurrences of X in A is the same before and after branching.
4. The normative status of instances or occurrences of X in B is the same before and after branching.

In these theses X stands for a type of thing, like a word, an action, or a belief, whose instances are the bearers of normative statuses. Thus, if X is the word "fish," and its normative status is its meaning, the four theses would respectively claim that the past meaning of instances of the word in both scenarios is the same, that present meanings differ, that in the first scenario the meaning has not undergone changes, and that in second scenario the meaning has not undergone a change either.

These theses seem all true. Yet, they are incompatible, because the negation of 1 is entailed by 2, 3, and 4 given the transitivity of identity. The truth of 2 is, however, in every example totally uncontroversial;<sup>18</sup> hence, there only remain four ways to avoid inconsistency. The first is to deny thesis 3, the second is to deny thesis 4, the third is to deny both theses 3 and 4, the fourth is to deny

thesis 1. In what follows the adoption of this final option is defended.

For reasons of symmetry neither of the first two options offers a viable solution. The same sort of considerations that can be offered in favour of or against 3 can also be used to support or undermine 4.<sup>19</sup> Hence, the only genuinely viable solutions to this problem are the third and fourth which treat both scenarios in the same way.

Supporters of the third option could defend their view by claiming that in either scenario the intentions of past individual members of the community settled what they meant by the words, and the range of application of their legislation. Since their intentions about what to do in the unforeseeable cases that brought about the branching were somewhat nebulous, they differ from the intentions of individuals in either scenario after the branching has taken place. Thus, it makes sense to conclude that in both instances normative statuses have undergone a change.<sup>20</sup>

The argument has little plausibility with regard to legal examples where although it might be granted that the intentions of the initial legislators might have been somewhat nebulous on some matters, it is thought that the task of successive judges is to clarify what the law has always prescribed (permitted). The argument has more plausibility with regard to examples concerning meaning, but it is ultimately unconvincing in those cases also.<sup>21</sup>

The intentions of past speakers, as they would formulate them, do not determine the meanings (and references) of their expressions. To see this, consider the following example. Those who coined the word “jade” might have done so with the intention of naming a natural kind.<sup>22</sup> However, in 1863 Alexis Damour discovered that the word “jade” was used to name samples of two distinct minerals which are now known as “jadeite” and “nephrite.” If the intentions of those who introduced the word determined its meaning and its

reference, we should conclude that Damour discovered that “jade” did not refer. But we are not at all tempted by this conclusion. Instead, we say that Damour discovered that jade is not a natural kind.<sup>23</sup> Examples such as this one undermine the idea that present intentions alone determine present meaning. Hence, the argument offered by supporters of the third option is not convincing.

There is a further consideration which undermines the third solution to the problem of the incompatibility of the four theses mentioned above. This solution presupposes that in both scenarios words have changed their meanings, laws their range of application, and beliefs their epistemic statuses. However, this conclusion is inconsistent with the sort of descriptions of the relevant practices which the practitioners themselves could be expected to provide.

For example the Druids in scenario A could point out that when they write about the history of their community, they describe the past before they saw the first plane as a time when it was unknown that some birds are not living entities. In other words, in their view, they put themselves in the shoes of their ancestors by pretending ignorance, not by thinking of them as employing a different concept.<sup>24</sup>

In conclusion, if we want to be faithful to ordinary linguistic and epistemic practices, the incompatibility among the four theses listed above is best solved by denying the first thesis. In other words, we must conclude that scenarios A and B in each example do not have a shared normative past.<sup>25</sup> Rather, the past in the two scenarios is always different.

It might be objected that, contrary to what has been claimed, this solution is not faithful to our ordinary practices since the idea that the two branches of a branching scenario do not share a normative past clashes with our intuitions about these cases. The existence of this clash cannot be denied. However, the

objection relies on a conflation between our folk beliefs about our ordinary practices and the features of the practices themselves. The proposed solution aims to make sense of some features of our linguistic, legal and epistemic practices, and in this respect it is superior to the other available options. It does clash with some folk beliefs about our practices, but this is not a problem since the folk theories to which such beliefs belong should not be granted any special epistemic privilege.

The next stage in the argument for the claim that our linguistic and epistemic practices exhibit a whiggish temporality consists in showing that the two branches in each example could have different pasts only if future developments partly constitute the normative features of the past and present. This section of the argument relies on the observation that in our linguistic and epistemic practices judgements of sameness of normative status within a community across time have a kind of default status. That is, unless we have reasons to the contrary, we implicitly and explicitly take past utterances to have the same meaning that current utterances of the same words would have, past applications of a law to carry the same set of commitments and responsibilities associated with current applications of the law, and past beliefs to have the same epistemic status as current beliefs with the same content and based on the same evidence. It is argued that the default status of these judgements of sameness of normative status is a consequence of their constitutive role in determining the normative statuses of the words, actions or beliefs the judgements are about. Hence, the future developments of a practice partly determine the normative features of its past.

The expression “judgement of sameness or difference of normative status” is used here to include the implicit judgements people ordinarily make when they treat each other’s words at face value, since to do so is implicitly to judge that others are using their words

with meanings that are the same as those one attributes to those words. These judgements have a privileged epistemic status of being justified by default.

Our attitudes to the utterances of other people and to inscriptions in texts illustrate this point. Unless there is something unusual about the situation, we simply take these words at face value. This is what we do when we listen to people and we read books. Of course, if in a particular instance this attitude leads to attributing to the other person or to the book’s author patently false or absurd views, we will consider whether they used their words with unusual meanings. Thus, taking others’ words at face value is part of our ordinary linguistic practice. Implicitly, we think of ourselves as entitled to attribute to words as used by others the same meanings those words have for us without needing any specific evidence for this attribution. In other words, we think of ourselves as entitled to these judgements by default.

Similarly, we attribute by default the same epistemic status to beliefs with the same content based on the same evidence. If I take myself to be justified in believing something on the basis of specific reasons, I take those reasons to provide other people also with a justification for the same belief. Otherwise, it would seem that the reasons in question are not genuine justificatory reasons. Thus, I am by default justified in believing that if you hold the same views as I do, and for the same reasons I have, our beliefs have the same epistemic status. There are cases in which such judgements of sameness would be mistaken. But typically we are entitled to take them to be correct unless we have reasons to believe otherwise. Legal cases exhibit the same feature. We attribute by default the same legal status to actions of the same kind. There might, of course, be problems with settling what counts as being actions of the same kind, but the general point stands. We are entitled to assume by default that the



law gives the same verdict on all relevantly similar cases.<sup>26</sup>

To say that judgements of sameness of normative status have a default status is not of course to say that no such judgements could be mistaken. Clearly, they can. We might take a word as appearing in an old book to have the same meaning we attribute to it, and discover that we are mistaken. The point rather is that we are entitled to assume that they are correct unless we have grounds for suspicion. We could say that these judgements are not vulnerable to bare challenges.<sup>27</sup> It would not, for example, be appropriate to challenge my assumption that the word “fish” as used in an old book means fish, by merely asking “how do you know?” Instead, in order to challenge my assumption, you need to provide some reason for thinking that the word was used with a different meaning.

Judgements of sameness of normative status, it has been argued, have the special epistemic status of being justified by default. This is a fact which requires some explanation. We need to find out why these judgements are epistemically privileged. The best explanation for the special epistemic role possessed by practical judgements of sameness (and difference) of normative status is that at least some of these judgements play a role in the constitution of the normative statuses themselves. If judgements that two uses of a word, applications of a law, instances of a belief have the same normative status contribute to the constitution of the statuses themselves, it would be no surprise that the judgements are justified by default.

The claim that these judgements have a constitutive role which explains their epistemically privileged status is based on the thought that we have no grasp of what counts as two words, actions or beliefs having the same (or a different normative) status independently of the judgements that they do.<sup>28</sup> We do not have any idea of what it is for a word to have a given meaning independently

of the fact that it has been used with that same meaning in a variety of occasions. And we have no idea of what it is for a word to have been used with same meaning on a variety of occasions independently of judgements that it has been used in this way. Again, this is not to deny that these judgements could be mistaken. Rather, the point is that our grip on the notion of the meaning of an expression depends on our grip on the idea that the expression is used with the same or a different meaning in different occasions, and our grip on this second idea depends on our judgements of sameness and difference.

More specifically, any attempt to ascertain whether one word has been used with the same meaning on a variety of occasions will ultimately terminate with taking some judgements made by some speakers about the meaning of that word, or of other words, at face value. Ultimately, there is no other court of appeal. This last point is most obvious in legal examples where not much sense can be made of the idea of legal status independently of the judges’ judgements when making decisions about the application of laws.

To summarise the argument, it has been concluded that the future developments of our linguistic and epistemic practice contribute to determining their normative pasts. This conclusion has been derived from a first argument which shows that in the so-called branching scenarios, the two branches have different pasts. Given the observation that our judgements of sameness of normative status are justified by default, the best explanation for differences with regard to the past is that the different futures constitute what their respective pasts have always been.

Two clarifications are in order at this point. Firstly, it is not the view proposed here that in the realm of the normative the future can change the past. Rather, the point is that the future contributes to the determination of what the past has always been. Thus, for example, the future cannot change the mean-

ings of the words as they have been used in the past. But, what those words in those uses have always meant is not something that is fully determinate independently of the future developments of linguistic practice.<sup>29</sup>

Secondly, although in the argument presented in this section the role of future judgements in the constitution of the normative past has been singled out for emphasis, a variety of other factors could play such a constitutive role in different practices. Thus, for example, in some practices the mere formulation of some future judgements could contribute to the constitution of the past, in other practices only future judgements to which one is genuinely entitled may play a constitutive role. A taxonomy of all these different factors is beyond the scope of this paper.<sup>30</sup>

Having made a case for the claim that the normative future contributes to the constitution of the normative past, in what follows it is argued that there are good reasons why our practices exhibit a whiggish temporality. The argument is based on considerations concerning two factors relevant to our practices. The first is human fallibility and the fact that we often operate in conditions of ignorance. This factor makes it necessary that formulations of the law, actual uses of language and attributions of justification be open-textured. The second is a consequence of the requirement that our norms be determinate. The next three sections present an argument that open-texture and determinacy can be combined only within a context of a practice which allows for the normative future to constitute its past.

##### 5. THE DETERMINACY OF NORMS

In this section the view that legal, epistemic, conceptual or linguistic norms must be precise—that is, fully determinate—is defended. Also, it is assumed that norms or rules are the sort of thing that can be dropped or adopted but which is not in itself subject to changes. There is no doubt that we commonly talk of rule changes, but all such talk is best

read to mean that we have changed which rules we choose to apply. Rules themselves do not change, but we can abandon a rule in favour of the adoption of a new one. For example, when FIFA changed the rule for off-side in soccer, they dropped the old rule and introduced a new one.

There are two dimensions to the determinacy of norms. Norms can be determinate both with regard to their range of application and to the verdict they issue in each application. Norms are fully determinate or precise if and only if they are both application-determinate and verdict-determinate.<sup>31</sup> A norm is application-determinate if and only if there is no indeterminacy as to whether it applies to any given case. It is verdict-determinate if and only if there is no indeterminacy about the verdict issued by the norm in each specific case to which it applies. Of course, many norms do not apply to every case. So, for instance, the rules of soccer do not apply to games of chess. An application-determinate norm is not one that applies to every case; it is a norm whose range of application is determinate. The norm is also verdict-determinate if its verdict is equally determinate.

Legal norms are both application and verdict determinate. If they were not, we would have to admit that in some instances there is no fact of the matter as to whether some action is legal or illegal. Such a state of affairs would clearly not be acceptable. For this reason, we require that our laws are both application and verdict determinate. Of course, we can acknowledge that in some situations we are unclear about what the law permits or prohibits. However, these are cases in which we are ignorant about the precise nature of the law. They are not cases in which the law is actually indeterminate.

Determinacy is also a feature of norms governing the meaning of linguistic expressions. If these norms were not fully determinate, there would be cases in which there is no fact of the matter as to whether the norm applies

or what its verdict is. In these circumstances the norm would fail to provide a determinate meaning for the expression it governs. Thus, for example, no meaning has been supplied for the expression “frabble” if we are only told that it does not apply to fish, but it does apply to philosophers. Instead, if an expression is to count as a predicate, it must be governed by a norm which determines whether or not it applies to any object whatsoever.<sup>32</sup> Again, this is not to deny that in many cases we might not know whether the norm applies to the situation, or which verdict it issues. To say that the norm itself is fully determinate is not to say that we are always able to discriminate the situations to which it applies from those to which it does not.

Finally, determinacy is a feature of those epistemic norms governing the practice of asking and offering reasons for our beliefs. These norms prohibit inconsistencies, they require that we offer reasons for our views, if they have been appropriately challenged, they permit ignoring some remote possibilities, and so forth. If these norms were indeterminate there would be instances in which they would offer no guidance in reasoning.

It has been argued so far that our legal, conceptual and epistemic norms be precise or fully determinate. Arguably, all genuine norms must be precise in this way. This claim is not defended here, nevertheless it is worth pointing out that what might seem to be obvious counterexamples to this view are not ultimately convincing. There are norms which seem to be application-indeterminate. Consider, for example, the off-side rule in soccer. It appears indeterminate whether or not it applies to games of soccer played by children in parks. There seems to be no fact of the matter as to whether any specific children’s game is governed by this rule. Thus, the off-side rule would be application-indeterminate.<sup>33</sup>

This conclusion seems plausible only if we ignore that such games are played for recre-

ational purposes. Once it is kept in mind that children play these games for the sheer fun of it, it is apparent that in these games it does not really matter much whether or not some of the rules are transgressed. Thus, it is quite plausible to think that all the rules apply to these games unless the children have implicitly or explicitly decided not to acknowledge them. We mistake for indeterminacy the lack of sanctions against transgressions which originate in the purely recreational purposes of these games.

## 6. OPEN-TEXTURE: WHAT IT IS AND WHY IT IS NECESSARY

Our legal, linguistic and epistemic practices are characterised by the phenomenon of “open-texture.” This section provides an argument that “open-texture” is a consequence of our fallibility, and that it is a feature of our normative attitudes, rather than of the norms themselves.

Waismann, who first introduced the idea of open-texture, argues that our empirical terms or concepts are open-textured because they “are not delimited in all possible directions.”<sup>34</sup> He further adds that when a concept is introduced, we define it so as to limit its application “in *some* directions.” But, “there are always other directions in which the concept has not been defined.”<sup>35</sup> He illustrates the point by presenting the example of a thing that purrs like a cat, and looks like a cat, but has grown to a gigantic size. Waismann notes that we would be unsure as to whether it was a cat, and hence whether the term “cat” applies to it. The possibility that such a creature might exist has not been considered when providing a definition of “cat.”

In the context of the law H. L. A. Hart has adopted Waismann’s idea of open-texture and applied it to legal formulations. Thus, Hart interprets the example presented above of the ordinance prohibiting the use of vehicles in the park as an example of the open-tex-

ture of the law. Open-texture is for Hart a positive feature of legislation. He points out that, even if it were possible, it would not be advisable to avoid open-texture when drafting legislation. A piece of legislation lacking the flexibility which open-texture permits will without doubt lead to bad consequences. Hart notes that we could freeze the definitions of words in a rule of law, but in this manner we would only secure predictability at the cost of settling in the dark “issues which can only reasonably be settled when they arise and are identified.”<sup>36</sup>

Waismann and Hart might have had different conceptions of open-texture, but there is a common core to their view. For Hart, a formulation of a law is open-textured when we have not settled whether or not it applies to a range of cases. The reliance on open-texture makes it possible to endorse a formulation which might express any of a variety of rules of law without having to settle on endorsing a specific one of them. Thus, open-texture could be described as a feature of our structure of normative attitudes. It involves acknowledging one rule or norm through the adoption of a formulation that expresses it whilst acknowledging that one has no other way of precisely determining the nature of that norm.<sup>37</sup>

Hart makes a convincing case that for many ordinances and other pieces of legislation it would be very ill-advised to try to settle in the dark which among a variety of rules that only differ with regard to yet unexplored circumstances we wish to endorse. The open-textured formulation of the law allows us to suspend judgement on this matter without thereby failing to acknowledge the law which will turn out to have been the one expressed by the open-textured formulation among the many that that formulation was equally capable of expressing.

Waismann’s talk of definitions associated with open-textured terms can be understood along similar lines. For Waismann, a term

is open-textured if it has a definition which does not delimit some features of its use. These definitions are nothing but explicit formulations of what we *take* to be the rules governing the use of the term.<sup>38</sup> By endorsing incomplete definitions we avoid having to settle in advance and in the dark about relevant empirical matters which norms among many possible candidates govern our use of the empirical terms and constitute our concepts. The open-texture of language allows us to acknowledge the rule which, when the empirical evidence is in, will turn out to have governed our use of the term all along, without having to be able to single out that rule now.

Open-texture is also a feature of our epistemic practice. We often put forward statements to which we take ourselves to be entitled without having to settle in advance which alternatives will be relevant in any given context and must be ruled out in order to gain entitlement to that claim. Instead, by putting forward the claim one acknowledges one’s responsibility to provide a justification that satisfies the appropriate standards whatever those standards turn out to have been, independently of whether one could now spell out what these standards are.

It is no surprise that our linguistic and epistemic practices have this feature. Given our ignorance of what the future might bring it would be unwise to develop legislation which prejudices our decisions while being in the dark about the relevant facts. Similarly, it would seem foolish to use terms in ways that settle what we are to say of cases about whose details we are as of yet ignorant. It appears equally rash to decide in advance the required standards for justification before we know anything about the contexts within which novel justifications might be required.

## 7. THE RATIONALITY OF WHIGGISHNESS

The argument that given our fallibility and ignorance, and the determinacy of the norms

governing our practices we would expect these practices to exhibit a whiggish temporality if they are to be capable of rational revision and development is quite simple.<sup>39</sup> It would be pure dogmatism, if given our fallibility we were not to treat our assertions as being vulnerable to criticism by future members of our community. Such an attitude would prevent any progress. We would be unable to learn from previous errors. Consequently, it is rational to take our views to be open to future emendation and correction.

It is equally rational, given our ignorance, not to try to settle once and for all and in the dark which determinate norms should govern our legal, linguistic, and epistemic practices.

Instead, we grant future members of our community, who might be less ignorant than we presently are, the authority to contribute to the determination of which norms always governed the practices of the community. In light of the constitutive role of at least some judgements of sameness and difference of normative status (as discussed in section 4 above) and of the requirement that norms be determinate, deferrals to future authority entitle future practitioners to determine the norms that already govern current practice. And this is the rational thing to do, for finite creatures like us, whose practices are always subject to emendation and correction.

*Cardiff University*

## NOTES

Earlier versions of this paper were read at the Central Division of the APA and at the Welsh Philosophical Society. I am indebted to audiences on both occasions for several helpful comments. My greatest debt is to Mark Lance and Henry Jackman whose comments on earlier versions forced me to clarify my views.

1. As Michael Dummett noted there is an exception to this attitude. We seem to be able to make sense of the idea of praying to God, asking him to have spared a loved one. Despite this exception, the general point still stands. Cf. Dummett, "Bringing About the Past," in *Truth And Other Enigmas* (Cambridge Mass.: Harvard University Press, 1978), pp. 333–350.
2. There are philosophers who defend the coherence of the notion of backward causation, and nothing said here rules out the possibility that they might be right. After all, even Huw Price—a supporter of the idea of backward causation—claims that "it is true... that *from our perspective*, we can't affect our past." See *Time's Arrow and Archimedes' Point. New Directions for the Physics of Time* (Oxford: Oxford University Press, 1997), p. 167.
3. Thus, sense can be made of the idea that the past could have been different. What we cannot make sense of is the idea of changing the past so that what has been is now changed so as not to have been.
4. The label was used in a pejorative sense by Herbert Butterfield in *The Whig Interpretation of History* (London: G. Bell & Sons, 1959).
5. The view that normative practices have a structure of this kind has been discussed by supporters of temporal externalism. See for example, Henry Jackman, "We Live Forwards but Understand Backwards: Linguistic Practices and Future Behavior," *Pacific Philosophical Quarterly*, vol. 80 (1999), pp. 157–177. Similar views have also been addressed by Mark Lance in "The Word Made Flesh: Toward a Neo-Sellarsian View of Concepts, Analysis, and Understanding," *Acta Analytica*, vol. 15 (2000), pp. 117–135.
6. John J. Patrick, Richard M. Pious, and Donald A. Richie, "Ex Post Facto Law," *The Oxford Guide to the United States Government*. Oxford: Oxford University Press, 2001. *Oxford Reference Online*, <http://www.oxfordreference.com/views/Entry.html?subview=Main&entry=t89.e325>, accessed 9 Feb-

ruary 2004. This definition seems to be, strictly speaking, incoherent, since if it is true that the action was not a crime when it was committed, then it is not a crime full-stop. But it is clear that the thought behind this definition is that the law passed at a later date makes the earlier action a crime.

7. Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis: Bobbs-Merrill, 1960), p. 61.

8. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), pp. 121–127.

9. The expression “word-form” is used to indicate a sign irrespective of its semantic features. Thus, concatenations of the letters “f,” “i,” “s,” and “h” are instances of the word-form “fish.” Hereafter, “word” is used as a shorthand of “word-form.”

10. “Objective” is an example. In the early modern period this adjective was said to pertain to that which is mind-dependent. Currently, it has a meaning which implies mind-independency.

11. It might be objected that this phenomenon can be explained by the fact that “fish” was originally introduced as a natural kind term. This would be a mistake. Exactly the same phenomenon occurs when we consider terms which do not purport to stand for natural kinds. A good example is presented by Mark Lance and John Hawthorne when they consider the possibility that our practices might have developed so that the term “wedding” was reserved only for what we think of as “religious wedding” while a new term such as “joining” was introduced to cover what we call “civil weddings.” In either case, practitioners would think of their notion of wedding as being faithful to the original conception. See Mark Norris Lance and John Hawthorne, “From a Normative Point of View,” *Pacific Philosophical Quarterly*, vol. 71 (1990), pp. 28–46, esp. p. 34. It is plausible that if legislation permitting gay marriage is eventually put on the statute books, it will eventually be treated as spelling out what marriage has always meant.

12. Ordinary linguistic practice is being described here. Some philosophers of language might wish to hold that any change in belief results in meaning change of the words involved. What matters here is that our linguistic practice does not connect talk of meaning and belief in this manner. Instead, ordinarily when we say that we have changed our views, we would deny that we have thereby also changed the meanings of our words.

13. Mark Wilson, “Predicate Meets Property,” *The Philosophical Review*, vol. 91, no. 4 (1982), pp. 549–589.

14. Imagine that there are no insects on the island.

15. For the same reason the utterance of “aeroplanes are houses” by Druids in B does not contradict the utterance of “it is not the case that aeroplanes are houses” by Druids in A.

16. In these examples, although future developments do not provide evidence for or against a belief, they nevertheless contribute to determining its epistemic status. When future developments bring to the fore new evidence, the epistemic statuses of beliefs can obviously change. In these cases, the epistemic statuses of beliefs might not be constituted retroactively, but rather undergo a change over time.

17. Contextualists typically draw a different lesson from examples of this sort. In their view these beliefs do not acquire or lose their justification retroactively; rather, in these cases beliefs possess justification-relative-to-S1 and lack justification-relative-to-S2, where S1 and S2 refer to two different standards. This strategy is not plausible but an argument for this claim cannot be offered in this paper. Suffice to say that if epistemic statuses were indexed to context in this way we would need to keep track of these indexes in argumentation. But this is not what we do, in a given context we treat claims as *prima facie* or all things considered justified, we do not treat them as justified relative to a specific context.

18. With regard to the linguistic examples, reasons for this claim have been provided in sect. 2 above.

19. Reasons for this claim have been offered in sect. 2 above when describing the Druids example. The same kind of considerations can be readily applied to all other examples.
20. This argument has been developed by Jessica Brown for examples concerning linguistic meaning. See “Against Temporal Externalism,” *Analysis*, vol. 60, no. 2 (2000), pp. 178–188.
21. The argument has no application to the epistemic examples of branching.
22. Alternatively, one could say they might have intended to name the stuff or stuffs of which some specific samples were made. But now suppose that all the original samples were made of one of the two materials, jadeite for instance. At a subsequent time, however, the term is used also in the presence of nephrite samples. Finally, it is discovered that jadeite and nephrite are two distinct minerals. In this instance also, what is discovered is that jade is not a natural kind. But if original intentions determined meaning, this case would be one in which what was discovered is that “jade” had been systematically misapplied to nephrite.
23. This example is discussed by Tom Stoneham in “Temporal Externalism,” *Philosophical Papers*, vol. 32, no. 1 (2003), pp. 97–107, esp. pp. 97–98.
24. A similar point is made by Wilson, “Predicate Meets Property,” p. 586. Considerations in favor of this claim have been offered in sect. 2 above. A similar point can be made with regard to the legal examples.
25. Physically speaking they clearly share the same past, but this fact is no impediment to thinking that the normative features of this past could be different in the two cases. In itself this is possible even if the normative supervenes on the physical provided the supervenience is global.
26. The privileged epistemic status of these normative judgements offers further reasons in favour of thinking that theses 3 and 4 presented above are true. Hence, this consideration offers further ammunition for the view that thesis 1 is false.
27. This terminology was first introduced by J. L. Austin “Other Minds, Part II,” *Proceedings of the Aristotelian Society*, supplementary vol. 20 (1946), pp. 148–187.
28. This idea has been developed by Gary Ebbs but also in a different guise by Lance and Hawthorne that we have no grasp of the notion of sameness of normative status independently of our practical judgements of sameness of normative status across time. Gary Ebbs, “The Very Idea of Sameness of Extension across Time,” *American Philosophical Quarterly*, vol. 37, no. 3 (2000), pp. 245–268; and Lance and Hawthorne, “From a Normative Point of View.”
29. This claim does not imply that meanings are currently indeterminate. Instead, the meaning could now be determinate even though what determine it are the normative features of future claims, actions or institutions.
30. The idea that different practices might differ in which aspects of the future contribute to the constitution of its past has been pressed by Mark Lance.
31. This terminology has been suggested to me by Mark Lance.
32. In effect, it is claimed that all conceptual vagueness is a matter of ignorance. This view has been defended by Timothy Williamson, *Vagueness* (London: Routledge, 1996), chap. 7.
33. Mark Lance has pressed this point in conversation.
34. Friedrich Waismann, “Verifiability,” in *Logic and Language* (First Series), ed. and with an intr. by Antony Flew (Oxford: Basil Blackwell, 1963), pp. 117–144, esp. p. 120.
35. *Ibid.*, p. 120
36. Hart, *The Concept of Law*, p. 126.

37. Similarly one can acknowledge the truth of some propositions—e.g., those constituting the general theory of relativity—without being able to spell out what they are. Instead, one can rely on the truth predicate, and claim that the general theory of relativity is true.

38. For Waismann, “[a] term is defined when the sort of situation is described in which it is to be used,” “Verifiability,” p. 122.

39. The idea that accepting that norms are fully determinate forces one to adopt the view that the future plays a role in the constitution of the normative past has been discussed by Henry Jackman in “Temporal Externalism and Epistemic Theories of Vagueness,” *Philosophical Studies*, vol. 117, nos. 1–2 (2004), pp. 79–94.