

Legal Reasoning as a Field of Knowledge Production: Luhmann, Bourdieu and Law's Autonomy

Robert van Krieken

This paper pursues an improved theoretical understanding of the particular position of legal rationality in relation to other, competing, modes of thinking about human behaviour and social institutions. Against the background of the existing literature on the role of scientific expert evidence in legal proceedings, the paper critically reconstructs Luhmann's arguments concerning the combined normative or operational "closure" and "cognitive openness" of the legal system, and relates these arguments to Bourdieu's work on the internal functioning of the juridical "field". It then puts those conceptual insights "to work" with reference to a number of empirical examples of the role of extra-legal forms of knowledge - in particular, history and anthropology - within the Australian High Court and Federal Court jurisprudence regarding native title.

[T]he king said, that he thought the law was founded upon reason, and that he and others had reason as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it. (Prohibitions del Roy 1608: 65 - Sir Edward Coke CJ of Common Pleas)

This exchange between Sir Edward Coke and James I captures nicely the concern consistently manifested in rationalities of sovereignty and governance to establish a distinction between the "reason of state" and other forms of thinking about the world, even if pursued by the King himself, and to maintain the independence of the former. The autonomy of legal reasoning, based on its capacity to manufacture its own conditions of existence, has been described as law's "amazing trick" (Scheiber 1984: 236-7), "the trick by which the law rebuilds itself in mid-air without ever touching down" (Fish 1993: 171). This paper reflects on a number of the core theoretical issues surrounding the means by which this "amazing trick" is performed, and on how a finer-grained empirical analysis of "law in action" in a variety of legal fields helps us to understand what it actually means to see law as a form of knowledge much like the natural and human sciences, albeit with a unique role to play both in relation to other forms of knowledge production and in relation

to the business of power, authority and governance (Nelken 1993; Rubin 1997; Valverde 2003; Collins 1997a).

One of the more important bases of law's "claim to truth" in relation to other human sciences is clearly its privileged institutional position within the "reason of state" (Aubert 1963; Tomlins 2000). There are many ways of responding to the question of what is specifically "legal" about legal reasoning (Greenawalt 1992; Jasanoff 1995: 7-10; Nelken 1998; 1993; Penner 2002) but one of the more important themes is the answer given by the US Supreme Court in *Daubert v Merrell Dow Pharmaceuticals, Inc* (1993), which was framed in terms of the differing functions of law and science, as seen from the legal perspective.¹ Science is understood as generalized pursuit of truth and "cosmic understanding" based on the persuasion, primarily, of a particular community of peers. Law, on the other hand, although also interested in "truth", is seen as *relating* that concern to the particularized resolution of disputes, involving the allocation of rights, obligations and duties, backed by sovereign authority and force but, to secure its legitimate authority, also requiring the capacity to persuade the lay public alongside the legal community.²

Law's relationship to other fields of knowledge is then organized around either (1) the *displacement* of alternative sources of explanatory authority,³ or (2) the *appropriation* of the knowledge produced by those other fields in order to enhance that privileged position, while surrendering the minimum degree of cognitive or normative authority to those other modes of knowledge production (Tomlins 2000). For example, in the Australian High Court's *Mabo* (1991-1992) native title decision, the pivotal impact of historian Henry Reynolds' (1987) research and arguments was subsumed within the High Court's rhetorical assertion of its own normative position on the position of Aboriginal people in Australian society and Australian common law (van Krieken 2000). However, this does not prevent us from approaching legal thought simply as a very *specific* form of knowledge: it certainly fits Nico Stehr's preliminary definition of knowledge as "a capacity for social action" (1994: 95), and can also usefully be seen as straddling the categories of "meaningful knowledge" (*Deutungswissen* or *Orientierungswissen*) and "action knowledge" (*Handlungswissen*) (1994: 100), despite his own exclusion of law from his survey of knowledge societies. At its most general level, then, the question driving this discussion is that of how we might understand the constantly-changing nature of legal reasoning in the context of its relationship to other modes of generating authoritative knowledge about human

¹ *Daubert v Merrell Dow Pharmaceuticals, Inc* (1993) at 596-97.

² As Posner (1990: 83) puts it: "Law is not characteristically 'open and curious', and it relies on force as well as persuasion. If you ask how we know that Venus exerts a gravitational pull on Mars, the answer is that the people who study these things agree that it does. If you ask how we know that the 14th Amendment forbids the states to prohibit certain abortions, the answer is that the people who have the political power to decide the issue - namely, the Justices of the Supreme Court - have so determined by majority vote."

³ At times to the irritation of the individuals and groups representing those other bodies of knowledge. Sheila Jasonoff, for instance, refers to the example of Charlie Chaplin being found liable for child support, despite the scientific evidence which appeared to establish that he was not the father (1995: 11).

behaviour and social relations, as well as the dynamic interrelationships between legal rationality and the human sciences more broadly.⁴

My discussion proceeds against the background of the extensive existing literature on the role of scientific expertise in legal proceedings (Faigman 1999; Foster & Huber 1999; Freeman & Reece 1998; Jasanoff 1995; Lipson & Wheeler 1986; Monahan & Walker 1985; Mosteller 1989; Nelken 2001a; Reece 1998; 1999; Ward 1997), but engages with a different set of concerns. The central focus of the majority of the work done on “science in court” is the question of expert evidence: what constitutes expert knowledge, the conditions under which it is and should be admitted into evidence, how the relationship between law and scientific expertise has changed over time, and so on. There is a growing awareness, however, that there are other kinds of arguments to be pursued in relation to law as a mode of knowledge-production, both in its own right and in competition with other forms of socially authoritative knowledge (Collins 1999: 58). Marianne Valverde (2003), for example, examines the forms of lay and administrative knowledge concerning virtue and vice which interweave with scientific knowledge within the processes of the legal system to constitute particular legal outcomes.⁵ My concern here is with taking a closer look at the conceptual and rhetorical strategies pursued by courts in managing the relationship between legal and extra-legal knowledge production, as well as the *competition* between different types of extra-legal knowledge.⁶ I will also focus more on the “social” sciences - in particular, history and anthropology - rather than medicine, psychiatry, information technology, environmental science, engineering, and so on.

The core conceptual reference points are, first, Niklas Luhmann’s (1992;1993) work on the combined normative or operational “closure” and “cognitive openness” of the legal system and, second, Pierre Bourdieu’s 1987 essay “The force of law: towards a sociology of the juridical field”. These theoretical accounts of law have highlighted the paradoxical nature of the relationship between law and society by suggesting that the autonomy of the legal “system” or “field” from other social sub-systems, institutions, fields and practices at the same time generates its interdependence with them. The paper pursues an improved critical and empirically-founded understanding of this paradox and the particular position of legal rationality within relations of tension and “agonism” in relation to other, competing, modes of thinking about human behaviour and social institutions. I will both utilise

⁴ Despite Richard Posner’s (1990: 459) belief, linked to the favour he bestows on the discipline of economics, that “there is no such thing as ‘legal reasoning’,” there remain “peculiarities” to the ways in which courts and lawyers assemble and communicate information (e.g., Rubin 1997).

⁵ See also Tony Ward’s (1997: 1998) discussion of the role of lay knowledge in relation to medicine and psychiatry in criminal law; and Dingwall, Eekelaar and Murray’s (1983: 179-206) examination of the central role of commonsensical reasoning, in opposition to strictly legal reasoning, in care proceedings.

⁶ Gunther Teubner (1997) has also suggested seeing law as a kind of “calibrator” of the “collision” of extra-legal discourses such as economics, health, science and technology, politics and ethics, along the same lines as private international law’s regulation of competing legal regimes in the conflict of laws.

the theoretical insights of Luhmann and Bourdieu regarding the internal functioning of the legal system/juridical field, and extend those insights with reference to a particular empirical example of the role of extra-legal forms of knowledge in one field of Australian law: native title.

Niklas Luhmann: Law As An Autopoietic Social System

Niklas Luhmann is one of only a few leading sociological theorists to deal systematically and extensively with law, and his work has become a central reference point for many social scientific analyses of the legal system (Luhmann 1985; 1993; Cotterrell 1993; Nelken 1988; Teubner 1993; Ziegert 2002).⁷ For the purposes of this discussion, however, I will focus on only one particular aspect of his understanding of the legal system, namely the importance of his work for the more specific question of law as a field of *knowledge production*, which begins with his approach to the question of law's *closure* in relation to the rest of society. The idea that law might possess greater or lesser degrees of autonomy or closure in relation to the extra-legal world is not in itself particularly new (Kelsen 1934; Cotterrell 1993; Ewald 1988). However, Luhmann suggests that it is precisely the character of law as a system of *communication* which constitutes its autonomy, and that it is useful to treat law as an "autopoietic" or *self-reproducing* system of meaning and communication rather than as a set of institutional forms, structures or practices.

...the law differentiates out within society as an autopoietic system on its own, by setting up a network of function-specific communication which in part gives words a narrower sense, in part a sense incomprehensible for non-legal communication, in part adding coinages of its own (for instance, liability, testament), in order to make the transformations needed by law communicable. Whether thallium is necessary in the production of cement and what consequences this has is not a specifically legal question. It may however be the case (or else not) that an environmental law develops that gives this question additional legal relevance. (1988a: 340)

He sees the central problem of any theoretical understanding of the legal system as being the question of "*how to define the operation that differentiates the system and organizes the difference between system and environment while maintaining reciprocity between dependence and independence*" (1992: 1426). This means that the binary code of the legal/non-legal distinction is crucially significant *in itself* (Luhmann 1988a: 346), at an abstract level in addition to whatever substantive distinctions are represented through it. Luhmann argues that the autonomy of law is threatened only

⁷ Gunther Teubner's (1989; 1993; 1997) reconstruction of Luhmann's arguments has been a major vehicle for the introduction of their central concepts (e.g., Collins 1999), but here I will be concentrating on Luhmann himself.

when this “code” is challenged, when decisions are instead made in terms of other distinctions, such as benefit/harm, productive/unproductive, and so on (Luhmann 1988a: 347).

Before examining the significance of this argument, it is useful to say a little more about Luhmann’s overall approach and conceptual framework. He sees the world differentiated into distinct systems, each of which is faced with the problems of its own reproduction, its relationship to other systems, and its relationship to its environment. Law’s “environment” is not “society”, however (Luhmann 1992: 1425); the two relate to each other as a “system within a system”, with law’s autopoiesis an extension of the larger social system’s autopoiesis (1988a: 340).

What does it mean to describe the legal system as “autopoietic”? In Luhmann’s words:

A description of the legal system as an autopoietic system would require us to say that the states of the system are exclusively determined by its own operations. The environment can eventually destroy the system, but it contributes neither operations nor structures. The structures of the system condense and are confirmed as a result of the system’s own operations, and the operations are in turn recursively reproduced by structural mediation. (1992: 1424)

At another point he speaks of autopoietic, self-referential or self-reproducing systems as “systems which themselves produce as unity everything which they use as unity” (1988b: 13). In other words, although, from the outside, a system will appear and operate as if it were composed of unitary, indissoluble elements, those elements are in fact themselves constituted by that system itself. An autopoietic system, then, “constitutes the elements of which it consists through the elements of which it consists” (1988b: 14). The constitutive elements of any system, “whether its elements, its processes, or the system itself, has to be constituted by the system’ (1986b: 321). An analogy would be a building which makes its own bricks. In relation to law, everything that the legal system appears to be made up of - existing legal doctrine, particular patterns of professional training, a certain structure to the institutional framework of law - is in reality created by the legal system itself, and not by anything outside the legal system. Like many sociologists before him, Luhmann see society as inherently subject to processes of increasing functional differentiation, and for him the autonomy of functionally differentiated systems is simply a product of that differentiation. Autonomy, he declared “*is not a desired goal but a fateful necessity*” (1986a: 112).

This immediately casts a very particular light on the question of law’s autonomy in relation to the rest of the social world, posing an alternative to see it as a product of either some inherent quality, the instrumental use of law by powerful social groups, or a strategy of legitimation. To begin with, Luhmann’s perspective is a more generalized one, drawing our attention to the fact that in principle the legal system is only one of many, all of which possess the characteristic of autonomy. So the systems of politics and economics might be seen as being as autonomous from

law as law is from them. Luhmann himself gives the examples of politics, articulated most clearly by Machiavelli, and the pursuit of value-free science, as other instances of systemic autonomy (1986a: 123).⁸

What makes law different and gives its autonomy a distinct character is more its role as a *mediating* instance between all of these other systems, and its particular relationship to conflict. The binary distinction legal/non-legal is only *secondarily* concerned with the resolution of conflicts; a more primary concern (from the perspective of the legal system itself) is a positioning of law in relation to disputes so as to continue the legal system's own self-reproduction, and the "difficulty" of legal dispute resolution is accentuated by this. As Luhmann puts it, this benefit of running disputes through the binary legal/non-legal code for the reproduction of the legal system itself can be understood as "a kind of "surplus value" skimmed off for the benefit of the system" (1988b: 25). Law, writes Luhmann, constitutes "the exploitation of conflict perspectives for the formation and reproduction of congruently (temporally/objectively/socially) generalized behavioural expectations" (1988b: 27) which are subsequently "systematized by juristic skill, by comparisons of cases, by concepts, and by doctrine. The result becomes, and is experienced as, law" (1988b: 28).

The legal/non-legal distinction is also self-referential, in the sense that the distinction can itself be either legal or non-legal, generating the need to suppress or render invisible this second question. This paradox of the self-referentiality of the the legal/non-legal distinction is an on-going problem for courts which can never be resolved, it can only be managed or de-paradoxified. Luhmann gives the example of the inclination in judicial reasoning to turn to the "balancing of interests" as a way of dealing with the paradox, as a way of holding someone responsible for harm cause even though they have acted "lawfully" (1995: 294). The concept of balancing interests thus "acts as a medium for the reception of all possible preferences, value shifts and ideologies, which are not controlled by the legal system" (1995: 297).⁹

Normative/operational Closure - Cognitive Openness - Structural Coupling

⁸ Other examples provided by Teuber (1997) include economics, medical and health systems, the media, and societal norms.

⁹ For a critical discussion of the difficulties in how this argument actually works in relation to company law, where the law does work with third values, such as "for the benefit of the company as a whole", or "reasonableness", see Andrews 2000: 216-217. However, Alex Ziegert suggests that although it is not *impossible* for legal systems to operate with three or more values, the *effect* of this is to reduce the capacity of legal operations for selection, along with the appeal of law as a decision-making arena, and encourages other modes of binding people, the "rule of men" rather than the "rule of law" (2002: 67). The alternative is, over time, a gradual "reining in" of the third value to the binary code, just as equity has hardened over time into established doctrines, and alternative dispute resolution has become integral to the wider legal system (van Krieken 2001).

What does the idea of autonomy or closure mean, for Luhmann, in relation to law? It does not mean that the legal system proceeds as if there was no environment, or that it is not subject to external determination. It means that (1) *all* of its “operations” reproduce it as a system, and (2) *only* its own operations reproduce it as a system (1988b: 15; Ziegert 2002: 60-61). The core problem facing any social system is that of mediating between the inside and the outside of the system, and “the real operations which produce and reproduce such combinations are always internal operations. *Nothing else is meant by closure*” (1992: 1431). Given the distinction between the legal and the non-legal, the latter can have no authoritative and effective impact unless and until it has been transformed into the former, somehow “assimilated”. For example, Luhmann refers to the lack of connection between law and broader systems of morals, something of which the courts regularly remind naïve litigants. This does not mean, Luhmann emphasises, that the legal system does not incorporate moral restraints from outside of itself, but that “this has to be done within the system and has to be checked by the usual references to legal texts, precedents, or rulings that limit the realm of legal argument” (1992: 1429). An idea, event or process can only be effective within law, it only exists within the legal system, after it has been translated into legal terms.¹⁰ Within the legal system, the primary considerations are its own operations, the various sources of law (statutes, the common law, the constitution, principles of international law), and if sources such as religion, politics, policy considerations, or economic concerns are referred to, this means, argues Luhmann, that they have already become “legal norms, which *legally* legitimate block acceptance of external norms or decisions (of good morals, say, or sound management, or the majority decisions of political processes)” (1988a: 345).

There are no extra-legal “truths” exempted from the juridical gaze and cross-examination, no facts which have any autonomous status, all knowledge is mere testimony in favour of one party or another. All science is merely “opinion”, the reliability of any area of knowledge is always open to the court’s critical scrutiny, and what any expert is actually expert in is a matter for the court to decide, guarding the boundary around the territory which belongs to the “trier of fact”, either the judge or the jury. Knowledge, as Luhmann puts it, has a different “credibility

¹⁰ In relation to contract law, see Collins 1999: 52. For a discussion of the phenomenology of this process, and especially the violence of its impact on participants, see Conklin 1998, and in relation to family law, Berns 2000. Max Weber also made a similar point: “[T]he expectations of parties will often be disappointed by the results of a strictly professional legal logic. Such disappointments are inevitable indeed where the facts of life are juridically ‘construed’ in order to make them fit the abstracted propositions of law and in accordance with the maxim that nothing can exist in the realm of law unless it can be ‘conceived’ by the jurist in conformity with those ‘principles’ which are revealed to him by juristic science. The expectations of the parties are oriented towards the economic and utilitarian *meaning* of the legal proposition. However, from the point of view of legal logic, this *meaning* is an ‘irrational’ one”...such conflicts ...are the inevitable consequence of the incompatibility that exists between the intrinsic necessities of logically consistent formal legal thinking and the fact that the relevant agreements and activities of private parties are aimed at economic results and oriented towards economically determined expectations” (Weber 1978: 885).

profile" within the legal system, and before they can take effect within law, facts have to be "legally constituted":

Legal facts are made to fit the legal framework; they have to facilitate as much as possible the deductive use of legal norms. They have to support the presentation of legal validity by conveying the impression that, given the rules, the decision follows from the facts of the case. They have to be certified facts. (1992: 1430)

Experts merely *assist* the trier of fact, and this concept itself is revealing: facts are to be subject to trial, they do not simply exist. "Interpretations" are clearly on even shakier ground, and any discipline which sees itself as essentially contested, such as sociology, anthropology or (today) history, correspondingly increases its vulnerability to judicial scrutiny.

Luhmann refers to the autonomy of the legal system in terms of both *operational* closure (only internal operations reproduce the system) and *normative* closure. This is because he defines "norms" as the means by which greater control is achieved over the future through reduction of the range of possible actions (Ziegert 2002: 63-64). Normativity consists of an individual, unit or system either failing or refusing to learn from its environment: so, instead of simply observing that people murder each other and learning how that might be relevant to one's own behaviour, one refuses simply to learn, and holds to a norm that murder should not be committed. He defines "normativity", then, as "a clinging to expectations despite disappointments" (1988b: 22). Within any given system, norms refer to whatever constitutes the system's distinctiveness from other systems and its environment and in turn serve its self-reproduction. Norms, write Luhmann, "are purely internal creations serving the self-generated needs of the system for decisional criteria without any corresponding "similar" items in its environment. Nothing else is meant by "autopoiesis"" (1992: 1430). This also has a particular significance for the self-understood history of any system, because it means that they can be no origin, no starting point, only a historical past (not the same as "history") which has to be constantly reconstructed (1992: 1428). Luhmann also comments on the distinct sense of time in law, in which past present and future are interrelated in a very particular way. The understanding of the relation between past and present cases is driven by the fact that the present case is always understood as the past of a future case (Baxter 1998: 2023). The doctrine of *stare decisis*, then, is as much a way of indicating what relationship the present decision will have to *future* cases as it is a way of exercising the influence of past cases on the present case.

The law's normative and operational closure is reflected in the nature of legal reasoning, in which the legal system "observes itself not as a system (in an environment) but as a collection of texts referring to each other" (1995: 287): statutes, case law, authoritative legal texts, and so on. Legal practice thus constitutes argumentation preceded by and organised around the (speedy) location and (appropriate) utilization of the range of possible relevant texts, with "relevance"

being defined by the opposing team's likely strategy and an estimation of the judge's expectations. This "invention" of the topical traditions is one of the more important competencies which Luhmann sees as specific to the legal profession and as sustaining the legal profession as a distinct field of knowledge and professional practice (1995: 287).

At the same time, however, the legal system, like any other, also has to coordinate itself with other systems and with its environment,¹¹ and this raises the question of exactly what the relationship is between the legal system's self-reproduction and the interactions between itself and its environment (1988a: 335). Luhmann suggests that this relationship produces a corresponding requirement for cognitive responsiveness, adding to the normative closure of law a second dimension or aspect of "cognitive openness". Every operation in the legal system - procedure, interpretation, judgment - is both normatively or operationally closed and cognitively open at the same time, each serving a different function: the first the self-referential reproduction of the system, the second its coordination with its environment, inevitably generating "perturbations, irritations, surprises, and disappointments" for the legal system to cognitively process, reconstruct and assimilate (Luhmann 1992: 1432).¹² Luhmann refers to the parallel example of the economic system to illustrate this point:

The economic system is also differentiated as an autopoietic system. It ties all operations to payments and is, in monetary terms, a closed system. Outside the economy there are no payments, not even as input or output of the economic. Payments serve the exclusive purpose of making other payments possible, ie they serve the autopoiesis of the system. But precisely this closure is also the basis of the wide-ranging openness of the system, because every payment requires a motive which is ultimately related to the satisfaction of a demand. (Luhmann 1988b: 20)

The legal system's environment is incorporated within legal communications and does produce change in the legal system (in contrast to formalist approaches), but it is not true to say that it has a determining effect, given the legal system's "processing" of all external input.

However, Luhmann also posits a hierarchical relation between the two, in that the legal system's normative closure is never "overpowered" by the requirement of cognitive openness. The mechanism by which this is achieved is a concern with "relevance" and the very flexible capacity to exclude what is defined as irrelevant to the legal issues in particular cases. In other words, for the legal system to change, some internal elements of the system have to be aligned with that change, and without this factor it is highly resistant to its environment. The legal system's cognitive openness thus has to be understood as secondary to its normative closure,

¹¹ As Karl Lewellyn (1931) and the legal realists had pointed out in the 1930s.

¹² See also Rubin 1997. For a discussion of an example of cognitive openness as "irritation", see Teubner 1997

that is, its self-reproduction (Luhmann 1988a: 341). A core manifestation of the distinction between normative closure and cognitive openness is, then, the parallel distinction between “law” and “facts”, the former being determined entirely internally according to the legal system’s own rules and procedures, and the latter determined in responsiveness to the law’s environment. Luhmann expresses this as the distinction between “was a crime committed?” which requires cognitive openness, and “is this act a crime?” which requires normative and operational closure (1992: 1427).

Luhmann uses the term “structural coupling” to capture the way in which the legal system is structurally interlinked with other social systems, in which particular concepts, institutions or events have at least a dual function in more than one system, and thus acts as linkage or coupling points between them. The ideas and practices surrounding property and contract thus operate as a structural coupling between the economic and law, and the idea of the state links political and legal sovereignty. Other examples are financial payments, which possess both economic and legal meaning (1988a: 342), and judicial decisions, which can play as important, sometimes more important, a role within the political system as within law (Baxter 1998: 2079). Constitutions are particularly important as overall frameworks for both separating systems and structurally coupling them:

The ultimate paradoxes and tautologies of the legal system (that law is whatever the law arranges to be legal or illegal) can be unfolded by reference to the political system (for example, the political will of the people giving itself a constitution), and the paradoxes and tautologies of the political system (the self-inclusive, binding, sovereign power) can be unfolded by reference to the positive law and by supercoding the legal system with the distinction of constitutional and unconstitutional legality. (1992: 1436-7)

The operation of structural coupling is also reflected in the particular structuring of legal reasoning, specifically the distinction which Luhmann acquired from American political scientist, Martin Shapiro (1972), between *redundancy* and *information*.

Shapiro uses the concept of redundancy because a typical form of legal argumentation is to argue that the facts and law of case are identical to all previous cases, based on a step-by-step layering of citations which could, in themselves, tell a skilled lawyer what the argument was: this is why the current legal argument is in fact redundant, and in law the more redundant the argument, the more powerful and persuasive it is. A “leading” case is precisely one which has been repeated and cited in numerous other cases. Shapiro approaches the legal system “as if” it were a large, decentralised, non-hierarchical organisation faced with the problem of coordinating the actions of a widely dispersed and otherwise dissociated set of actors (lawyers and judges) (1972: 130). Because of the absence of either a directly imposed, hierarchical structure characteristic of classic organizations or a consciously structured communications network, the legal system is one with a high level of “noise”, in the sense of communications which have the capacity to lead to

uncoordinated outcomes. Shapiro sees the concept of a litigational “market” as best capturing the mechanisms of the coordination process, much like the “invisible hand” of an economic market. Communication is the means by which this invisible hand works, specifically the systematic coding of communication, with lawyers both highly trained in particularly coding rules, and constantly carrying message to each other (via case law and citations) to coordinate those coding rules (1972: 131). Shapiro interprets the phenomenon of “string citations” in judicial decisions (in which the same string of citations will be cited and simply added to in most decisions in that field of law) as part of a “flow of a very large number of *confirmation* messages between independent decision-makers, reassuring each other that the others have been agreeing with it” (1972: 131). As Shapiro points out, the practice of citation itself serves the function of saying “I am not saying anything new, it’s already been said” (the more often the better). The central place of the doctrine of *stare decisis* within legal communication thus indicates “an instance of communication with extremely high levels of redundancy” (1972: 129).

In contrast, information provides the basis for a critical attack of legal positions based on redundancy, by arguing that the judgment cited actually say something different from the current case, that they should be “distinguished”, or that there are internal distinctions within the set of cases cited, so that they do in fact contain information about the issues at stake. Another way in which information is introduced into legal communications is through a recognition of changed social conditions, changed community standards, economic constraints, or external policy considerations deriving from the legislature. However, the legal system is heavily biased towards redundancy, with informational input always minimised, explained away as not “really” major changes, and so on (1972: 131-2).¹³ As Shapiro points out, there is a very clear and simple hierarchy in the chances of success enjoyed by legal communications with differing relations to redundancy and information: the argument with the best chance of success is that the court should continue doing what it has always done; next best is arguing for the same thing other courts have been doing; next is arguing for only a slight change from what it and other courts have been doing, or a “change=continuity” argument - the court is being most faithful to preceding decisions by coming to a different one within a changed environment - and the toughest prospect is arguing for major change (1972: 131). If redundancy = closure and information = cognitive openness, then, it is clear that the workings of *stare decisis* within legal communications provides for both, but with the heaviest emphasis on redundancy/closure, driven again primarily by the self-reproduction of the legal system.¹⁴

¹³ See also the Australian High Court decision in *Mabo and Ors v Queensland* (1991-1992).

¹⁴ See, for example Michael King’s (1991) observations on how the law’s cognitive openness to an extra-legal body of knowledge, child welfare science, still ends up “enslaving” the other field of knowledge production in the service of the legal system’s self-reproduction. For a development of the use of Luhmann to understand the operation of law in relation to child welfare, see King (2000). But for a different perspective, see White 1998; Dingwall, Eekelaar and Murray (1983) also provide evidence which supports another construction, observing that in proceedings concerning children at risk, in comparison with the modes of understanding of social workers and medical practitioners, the

It is also important to note that the same arguments are also relevant in at least two other senses *internal* to “the legal system”: first, to the operations of the various *sub*-systems of law, such as contract, tort, equity, family law, company law, discrimination and equal opportunity law, and so on, and their communications with each other (Collins 1997a; 1997b; 1999; Andrews 2000: 180-181). Collins suggests three distinct ways in which the operational closure of legal sub-systems can be identified: (1) differing interpretations, drawing different conclusions of the same events; (2) divergent approaches to the same concepts (e.g., “reliance” in contract and negligence); and (3) “blindness” to the implications of decisions in one subsystem for those of another (Collins 2000: 61-62). Second, across national boundaries, in the form of legal transfers or transplants from one country’s legal system and legal culture to another. Gunther Teubner’s proposition, for example, that the concept of “good faith” is extremely difficult to transplant from the German context into the body of English law, and in any case will be transformed into a completely different idea, can be read as an argument for the “operational closure” of national legal systems and legal cultures vis-a-vis those of other countries and cultures,¹⁵ whereas Alan Watson’s (1974; 1983; 1991; 1996) and William Ewald’s (1995) arguments for the frequency and success of legal transplants provide support for seeing national legal systems as cognitively open, to each other more than to non-legal forms of knowledge.¹⁶

Of all the criticism which Luhmann’s account of law as an autopoietic system has encountered,¹⁷ I would like to focus on two as being most relevant to my specific concern here with law as a field of knowledge production. The first is Roger Cotterrell’s argument that the closure of the legal system, whether analysed with Luhmann’s categories or Kelsen’s (1934: 474), should be seen more as a product of that legal system itself rather than some inherent characteristic of law, and particularly as a core feature of lawyers’ pursuit and support of their own legitimacy (Cotterrell 1993; 1995: 92). There are clear functions which the idea of closure serves for both practising and academic lawyers, in terms of defending their professional boundaries against competition from outside law, and the social and political order more broadly also gains important benefits from the idea of *legality*, that conflicts are to be resolved in an orderly fashion, through the legal system, and the outcomes of

courts “are making much the same sorts of judgments on much the same sorts of issues using broadly commonsensical rather than strictly legal criteria” (1983: 205). In relation to contract law, see Collins 1999, and for a perspective which emphasises both this point *and* law’s colonisation, if not “enslavement”, by other discourses, see Teubner 1997.

¹⁵ See also the strong version of this position in the culturalist arguments of Pierre Legrand (1995; 1997).

¹⁶ See also Nelken’s (2001c) discussion of Teubner’s arguments, as well as his overview of the general question of legal adaptation (2001b).

¹⁷ For a discussion and disposal of many of them, see King 2001.

those conflicts are then not amenable to further and different forms of challenge (Cotterrell 1995: 91-4).¹⁸

Cotterrell suggests that a specifically sociological approach to the idea of legal closure would be to see it as only a partial perspective on the legal system, and thus ideological. His preferred intellectual strategy is:

to explore the conditions and the limitations of the varieties of legal closure; ceaselessly contextualizing and relativizing law's knowledges, exploring the conditions of their truth claims and, through a permanently self-critical, reflexive sociological perspective, attempting to open possibilities for productive confrontations between discourses. (1995: 110)

The problem being pointed to here is that rather than simply being an observation which sociologists can make of law, closure is itself part of the legal system's representation of itself both to itself and to its environment, and thus needs to be seen as yet another operation of the legal system, a central element of the form of knowledge and communication which characterizes law and sets it apart from other fields of knowledge production.

Second, like all varieties of theoretical anti-humanism, structuralist or systems theory Luhmann's work stands in the shadow of a possible mis-recognition of the messy and dense fabric of the ways in which knowledge production and utilisation actually takes place. Although it is important and useful to identify a social system's "functional requirements", the human beings making up those systems do not feel, think and act *only* in terms of those "requirements", and indeed the change which has taken place in social systems and their needs can be explained in terms of a dynamic interactivity between those systems and the particular ways which their human members have "lived" them. This is partly why Luhmann's work can appear ahistorical (Roach Anleu 2000: 48), even though it very clearly does have its own historical story to tell (Luhmann 1993) about the evolution and increasing differentiation of society. It is not necessary to frame this issue in terms of a supposed opposition between Luhmann's systems-theoretical approach and his critics' "humanism" (e.g. Wolfe 1992; Bankowski 1996; Mingers 2002), which is really largely a distraction (Luhmann 1986b; Paterson 1996; King & Thornhill 2003; Teubner, Nobles & Schiff 2002: 914). His critique is not of the recognition that individuals act, but of the idea that individual actors can be "the subject" of their social world, for the simple reason that they cannot be both part of that social world and its "base" or "foundation" (Luhmann 1986b: 320). The way one can put the point which is consistent with Luhmann's own vocabulary and approach would be to say that if one sees the legal system as constituted by the on-going *production* of communication and knowledge, then an understanding of that production process requires a more detailed empirical understanding than Luhmann himself provides of

¹⁸ However, Cotterrell's own proposed, sociologically-founded, response to this characteristic of legal thought is itself vulnerable to criticism, to the extent that the discipline of sociology is seen as epistemologically privileged (Nelken 1996; 1998).

exactly how the psychic, personal or individual systems (human actors, individual minds) are “structurally coupled” - in ever-changing ways - with surrounding social systems like the legal system .

There are numerous ways of responding to these and other observations on Luhmann’s approach to law, but my suggestion here is that many of these concerns can usefully be engaged with by considering the observations made by another sociologist, Pierre Bourdieu (1987), on law as a “field” of practices pursued by competing actors mobilising different forms of “juridical capital and constructed with particular forms of legal “*habitus*”. Bourdieu’s work provides a particularly sharp ethnographic sense of law as a form of work, as a living production process, as well as adding his own rich and dense conceptual vocabulary to our understanding of law.

Pierre Bourdieu and the Juridical Field

Pierre Bourdieu frames his contribution to a sociological understanding of law in terms of seeking an alternative to what he identifies as the two major strands of jurisprudence, formalism and instrumentalism, between a conception of legal institutions and practices as almost entirely autonomous from the social and political world around them, or as the mere tools or reflections of dominant interests and groups outside law itself (1987: 814). He argues that law should instead be seen as a “juridical field” which is indeed relatively autonomous of external determinations, *but also* determined by, first, the power relations structuring it and the competitive struggles constituting it and, second, an “internal logic of juridical functioning” setting the limits to the range of possibly “legal” solutions to the problems emerging within it (1987) 816). It is the structure and logic of the juridical field which constitute its operation and development, rather than some mechanical addition of the activity of its actors, or an organised plan, in opposition to instrumentalism. Bourdieu’s criticism of Luhmann’s approach is that he sees Luhmann as placing too much emphasis on law as *communication*, at the expense of law as *a set of material social relations and practices*. Luhmann, suggests Bourdieu, concentrates on a “symbolic order of norms and doctrines” which is not transformed from within itself, but subject to another order of “objective relations between actors and institutions in competition with each other for control of the right to determine the law” (1987: 816). The imagery and associated thought patterns of the concept “field” are also immediately different from that of the “system”: more open, like a playing field or a battle field, across which players or combatants have to move, their movements determined by the interplay of strategies they pursue, rather than by the “needs” or “requirements” of the system. Indeed, observing how inappropriate it sounds to

speak of the “requirements” of a “field” already provides a good sense of the difference between the two writers’ approaches.¹⁹

The autonomy of legal thinking and practice, argues Bourdieu, is based on a number of features of the juridical field’s functioning, beginning with its internal protocols, culture, codes and self-sustaining values. The very fact that legal judgment arises from careful consideration of a closed body of doctrine and rules does establish a real independence from the everyday normative assessment of justice and fairness, and the function of mobilising legal rules in relation to particular concrete situations (applying “law” to “facts”) inherently gives enormous discretion to the juridical field (judges) as to *how* those rules are to be mobilised (properly questionable only by other lawyers), which is also in turn a basis for autonomy. At the same time, however, the paradox is that the existence of extensive juridical discretion needs to be *disguised* to maintain the recognition of law *as* autonomous, its arbitrariness and indeterminacy has to remain invisible:

Thus, one of the functions of the specialized juridical labor of formalizing and systematizing ethical representations and practices is to contribute to binding lay people to the fundamental principle of the jurists’ professional ideology - belief in the neutrality and autonomy of the law and of jurists themselves. (1987: 844)

Lay people are in turn bound to this fundamental principle of juridical neutrality and autonomy not simply by law itself, but also by their own dependence on law as a particular mode of managing conflicts and disputes. The indeterminacy of law is able to withstand all the unmasking efforts of critical legal scholars, then, because it is not a weakness, but precisely a *strength* of the juridical field, both for the field and its players themselves and for all those without juridical capital needing access to it for their particular purposes.²⁰

The “codes” of the juridical field, its social, economic, psychological and linguistic practices are in turn patterned by legal tradition, education and daily professional experience reflecting particular deep structures of legal perception, judgment and behaviour - or legal *habitus* - which have a specific power and influence of their own (Bourdieu 1987: 833), playing a large part in how legal processes will unfold in any particular case. It is this legal *habitus* which is in turn responsible for whatever predictability and calculability remains intact beyond its indeterminacy, rather than the doctrine of *stare decisis* (1987: 833). Neil Andrews

¹⁹ See also Bourdieu’s more general observations on how his approach differs from Luhmann’s, where he emphasises that fields are “the locus of relations of force - and not only of meaning - and of struggles aimed at transforming it, and therefore of endless change”, and that he does not see fields as having parts or components; rather, every subfield has “its own logic, rules and regularities”, its borders are dynamic and “the stake of struggles within the field itself” (Bourdieu and Wacquant 1992: 102-104).

²⁰ A point also made by Stanley Fish 1993: 170. In relation to company law, see Andrews 2000: 164.

gives the following example of the meaning of the concept of *habitus* in relation to company law:

The company law habitus is a set of structures and habitual ways of understanding which are characteristic and constitutive of company lawyers. It structures their social dispositions or propensities. It organises, but does not govern, their practice. It is their strategy generating principle, rather than a principle which seeks to govern the forms of their strategies in advance. It is an immanent law not only for 'the coordination of practice but also for practices of coordination'. (Andrews 2000: 176)²¹

The autonomy of law is enhanced both by the resultant *resistance* to competing forms of social practice or professional intervention and by its articulation with two other fields: the political, which merely establishes friends and enemies, but not arbitrators (the closest it gets is "alliance") and the scientific, in which authority is granted to those specialists who agree on the "truth", without addressing the problems of disputes between specialists and the lay population (1987: 831). What Luhmann refers to as "closure" is thus itself an *effect* of the functioning of juridical field: its categories of perception can not be translated back into those of non-lawyers, and this also underlies the power relation between lawyers and non-lawyers (1987: 834).

The juridical field is also "the site of a competition for monopoly of the right to determine the law" (1987: 817), marked by extensive internal competition between "holders of different types of juridical capital" (1987: 823). Bourdieu is particularly interested in the competition between legal *theorists* most concerned with conceptual coherence and autonomy, and *practitioners* (lawyers and judges) who are more concerned with how to put legal principles to work in relation to real situations, to the exigencies and demands of legal *practice* (1987: 824-5),²² as well as between the legal *avante garde* and traditionalists, a tension which is central to the "structural coupling", to use Luhmann's terminology, of law with other fields such politics and economics (Bourdieu 1987: 852). One could add to this the competition between different parts of the legal system, such different courts at different levels, between the courts and the common law on one hand and the legislature and its statutes on the other, or between different fields of law (Collins 1997a: 58-60). The mechanism of appeal can thus be understood as a means of regulating this competition so as to establish the legitimacy of the state or sovereign (Shapiro 1980), as well as to ensure a hierarchical ordering beneath the central institution of the High Court (and behind that the Parliament and the Constitution). This competition is both the internal source of ongoing transformation, the juridical field's *Wandlungsimpetus*, and also another basis of its autonomy (Bourdieu 1987: 820), because a corollary of the

²¹ As Andrews goes on to say, this resonates with H.L.A. Hart's concept of the internalisation of law, except that it is not law itself which is internalised, the "the strategy of the practice of company law, which may include being seen to be in conformity with the law", and with Karl Llewellyn's focus on legal practice as opposed to legal doctrine (2000: 177).

²² See also Edwards 1992.

competition between different holders of juridical capital is that it constitutes an effect barrier to outsiders playing any role in determining legal outcomes. An analogy would be a game of football: the more intense the competition between the two teams, the more difficult it would be for anyone outside those teams of players to have any impact on the game. Bourdieu also suggests that it is this competition and the power relations between legal professionals which it constitutes that is the primary determinant of the meaning of legal communication: "The juridical effect of the rule - its real *meaning* - can be discovered in the specific power relation between professionals" (1987: 827).²³

Legal reasoning as a form of knowledge production thus revolves around techniques which "tend to maximise the law's elasticity, and even its contradictions, ambiguities, and lacunae" (1987: 827), in other words, its indeterminacy, such as *restrictio* (narrowing or distinguishing), *extensio* (broadening, the expansion of the common law), analogy, distinction of the "letter" and "spirit" of the law, all within a particular structure of legal reasoning as identified by Austin, such as the imperative to come to a black or white decision (Luhmann's binary legal/non-legal distinction), conformity to recognized legal procedures (procedural justice), and reference to and conformity with precedent (*stare decisis*). One could add the always-indeterminate articulation of "the rule" with "the exception",²⁴ and the equally uncertain application of "two limb tests", in which the judge always has a certain degree of discretion in determining how the two "limbs" of the test relate to each other, not to mention the very nature of a legal "test". All of these conceptual and rhetorical strategies, techniques and procedures can be mobilised in differing combinations within juridical reasoning, producing an almost infinite array of possibilities, the outcome of which is determined, as Bourdieu emphasises, not from the outside of the juridical field or some unchangeable logic as the formalists would claim, but solely by the interplay of competitive strategies between all the relevant players in the juridical field. Like Luhmann, Bourdieu also notes the particular temporality of law. Legal reasoning is organized around a particular memory of historical sources, which are constantly adapted to changed circumstances, revisited to discover new interpretations of them, or displaced and discarded when found to be obsolete, generating what Bourdieu calls a "*historicization of the norm*" (Bourdieu 1987: 826-7). The doctrine of *stare decisis* "ties the present continuously to the past" which in turn provides a sort of guarantee that "the future will resemble what has gone before" (1987: 845).

A distinctive feature of law as a form of knowledge, notes Bourdieu, is that it is "the quintessential form of "active" discourse, able by its own operation to produce its effects". Although it is true that the law is socially constituted, it is equally true to say that once so created, law then in turn creates the social world

²³ For more detailed discussions, using Bourdieu, of the dynamics of the competitive interrelationships between different actors in the juridical field, see Dezalay & Garth 1995; 1996; Madsen & Dezalay 2002).

²⁴ As Posner puts it: "We thus have the paradox that a legal question might be at once determinate and indeterminate: determinate because a clear rule covers it, indeterminate because the judge is not obligated to follow the rule" (1990: 47).

(1987: 839), producing a dual, interactive relationship of creation and constitution between law and society.²⁵ More specifically, lawyers are important in linking disputes to formally recognized rights and entitlements in the process of translation of lay experience into legal categories and procedures. The juridical field is thus important in the *expansion* or *amplification* of disputes, in which particular, individual cases become included into larger categories and classes (not just what this doctor has done, but “negligence, sub-category “failure to warn””) (1987: 833, n. 48). The law functions to displace conflict from one arena (the real world) to another (the field of law), to convert direct conflict between particular parties into “juridically regulated debate between professionals acting by proxy,” in which violence is, above all, renounced as a means of addressing conflict (1987: 831), and this “transformation of irreconcilable conflicts of personal interest into rule-bound exchanges of rational arguments between equal individuals is constitutive of the very existence of a specialized body independent of the social groups in conflict” (1987: 831). This in turn produces a “spiral effect”: the “juridification” of conflicts in turn generates new “juridical needs”, a new market for the juridical field and a new target for competition from those in possession of juridical capital (1987: 836).²⁶

Such juridification of conflict also operates, argues Bourdieu, as an “instrument of normalization”: over time, it provides the institutional framework for the transformation of an explicit exercise of power into a self-evident and normal dimension of everyday *habitus*:

As such, *given time*, it passes from the status of “orthodoxy”, proper belief explicitly defining what ought to happen, to the status of “doxa”, the immediate agreement elicited by that which is self-evident and normal. Indeed, doxa is a normalcy in which realization of the norm is so complete that the norm itself, as coercion, simply ceases to exist as such. (1987: 848)

The intersections of the juridical field with the social world as well as individual behaviour patterns can thus also be seen as integral to what Norbert Elias (2000) analysed in terms of processes of “civilization”, in which the balance between external, socially- constituted constraints and internal psychic constraint moves over time towards the latter.

There are significant resonances between Bourdieu and Luhmann’s understanding of the legal system and the juridical field: they both identify a degree of autonomy or closure while also seeing law as interlinked in various ways with the rest of the social world, they see law’s operations is primarily concerned with the

²⁵ Using Luhmann’s terminology, this means that the reproduction of the legal system is less a process of self-reproduction, and more one which arises from a mutual interaction between the legal system and its environment, crossing the apparently binary divide between the inside and the outside of law.

²⁶ This would be another account then, of both the “juridification of the lifeworld” as identified by Habermas, (1987: 357-73; see also Teubner 1987) and of the supposed increasing litigiousness of contemporary Western societies.

“conversion” or “translation” of conflicts and disputes from the arena of their emergence to the more controlled environment of the legal system, they see the character of legal reasoning in itself in similar terms, they see other fields of knowledge production as only having effect after having been translated and assimilated by legal reasoning, and they are equally keen to transcend both formalism and instrumentalism.

The differences in vocabulary and conceptual framework, however, are also important and suggestive. Bourdieu’s approach adds a number of important conceptual and empirical concerns, such as the existence of a division of labour within the legal field underpinning relations of competition and power, which in turns draws our attention relations of competition and power between the juridical field and the surrounding social world; the concept of “juridical capital” and the question of its uneven distribution throughout the juridical field, as well as the implications of that unevenness; the use of the concepts “field” and “strategy”, instead of “systems” and their “requirements”, which renders us more sensitive to the active involvement of real human beings as either individuals or groups, placing action at the level of actors like particular groupings within the legal system instead of the system as a whole; the concept of a legal *habitus* also playing a constitutive role in determining the directions taken by legal reasoning; an approach to the practice of law as a form of “labour” or work, sensitising us to the active and ongoing creation of the world of law.

These reflections on the interconnections between legal and other fields of knowledge have no doubt arisen from observations of the workings of the law, but they can clearly also be further developed by being “returned to the field”, as it were, with a more detailed examination of how these theoretical constructions work in relation to a range of particular and ever changing empirical examples. This is useful both to help develop our understanding of changing legal systems, and also to identify possible modifications of our theoretical concepts, depending on exactly how they “work” in relation to the world of existing legal institutions and practices. Luhmann said of the question of the relationship between his ideas and empirical research:

There could be many empirical projects exploring the sensitivity (or limits thereon) of the autopoiesis of the legal system to social and political changes. There are no fundamental incompatibilities between the theory of self-referential systems and empirical research, but there is an uncomfortable tension between theoretical conceptions and the present possibilities of empirical research. Instead of rejecting theory as unverifiable, critics should see the insufficiencies on both sides. (1992: 1439)

Let us treat this as an invitation, then, despite the warning about inadequacies on both sides, to take some steps towards seeing how the particular operation of law in relation to other forms of knowledge production might be understood using both Luhmann’s and Bourdieu’s arguments about the legal system and the juridical field. The example I would like to reflect on here is the relatively high profile area of

Indigenous interests in land in Australia, a field of law which has prompted a great deal of thought, discussion and argument about the position of law and the courts within Australian society and politics.

Anthropology and History: From *Milirrpum* to *Mabo* and Beyond

If one were to ask how questions of cognitive openness, structural coupling and the epistemic competition between the juridical field and other fields of knowledge production look from within the legal system, the two most obvious arenas in which these dynamics are at play are *legislation*, possibly the clearest avenue for the legal system to absorb knowledge produced in other fields and for that knowledge to have real legal effect, and *evidence law*. In this arena, there are essentially three ways in which legal knowledge might be said to be “structurally coupled” with other fields of knowledge production; first, the rules of evidence regarding “expert opinion”. The knowledge produced in fields outside the law is constructed as one of the exceptions to the *opinion rule* - evidence of opinion in order to prove the existence of facts is generally excluded.²⁷ Scientific knowledge is understood within legal reasoning as opinion which the law *allows* to escape inadmissibility because it is “based on the person’s training, study or experience” and if the opinion is “wholly or substantially based on that knowledge”.²⁸ Apart from law itself, only two other forms of knowledge have effect within the juridical field, “facts” and “opinions”, and only the first can have any effective *authority* in relation to law. The knowledge produced in fields outside the juridical thus have effect within law only to the extent that it can be rescued from being mere “opinion” and re-constructed as “fact”. Essential to this is the *coherence* and *unity* of the field of knowledge production itself, which can include, the study of seat-belts and car accidents (*Eagles v Orth* 1976), spectrographic analysis (*R v Gilmore* 1977) or odontological evidence (*R v Carroll* 1985),²⁹ as well as the acceptance of particular propositions within that field of knowledge production.³⁰ But any internal differences, any lack of unanimity within a field of knowledge production will generally render it ineffective within the juridical field.³¹

²⁷ In Australia: s76 *Evidence Act* 1995 (Cth & NSW). The others are opinion relevant to a purpose other than proving the existence of a fact (s77), or opinion based on direct observation and “necessary to obtain an adequate account or understanding of the person’s perception of the matter or event” (s78).

²⁸ s79.

²⁹ The evidence was admissible but still “unsafe” because of the degree of dispute within the field.

³⁰ Examples would include whether the concept of a “battered woman syndrome” was indeed broadly accepted in the discipline of psychology: *R v Runjanjic* (1991) at 119; c.f. O’Donovan, 1993.

³¹ See, for example, Valverde 1996: 207-8. But for a counter example, see Nelken 1993: 149-53.

Second, the taking of judicial notice of “matters of common knowledge”,³² sometimes referred to as adjudicative facts” (Davis 1955), such as what day of the week Christmas Day fell on in 1932, the longitude and latitude of Beijing (Carter 1982), the location of the Sydney Harbour Bridge (Odgers 2000: 387), school hours and the ages at which children start and finish school (*Sullivan v Gordon* 1999), the “general facts of history as ascertained or ascertainable from the accepted writings of serious historians” or the tenets and doctrines of the political philosophy of communism, “ascertained or verified, not from the polemics on the subject, but from serious studies and inquiries and historical narratives” (*Australian Communist Party v Cth* 1951: 196). Judicial notice can also be taken of what are actually the products of social science research, but treated within law as “facts”, such as the effects of long working hours on women (*Muller v Oregon* 1908), the harm inflicted by segregated education on black children (*Brown v Board of Education* 1954), “the notorious fact that Australian aboriginals have no writing and that therefore all matters of tribal custom and organization must be discussed and communicated orally” (*Milirrpum v Nabalco & Cth* 1971: 156) or the nature of “native customs” more broadly (*Angu v Atta* 1916; Allott 1957).

Third, the judicial “absorption” of legislative facts, that is, facts related to questions of law or policy:

the facts that enter into [the courts’] thinking process are frequently either highly disputable or inseparably fused with questionable or uncertain judgment. The courts often take notice of legislative facts in circumstances in which they would not take notice of adjudicative facts. (Davis 1955: 982)

This refers to a kind of “background knowledge” which judges can rely on either explicitly or implicitly, and in which they have almost unlimited discretion, not being restricted even by the modest expectations in relation to adjudicated facts that the parties concerned have some entitlement to argue about the court’s interpretation. As Morgan pointed out in 1944, judges are unfettered: they can accept or reject any proposition, make independent search for data or rely on what the parties produce, agree with what the vast majority of the data indicates or not (Morgan 1944: 270-1), and Kenneth Davis observes that “restrictions on use of

³² *Evidence Act 1995*, s144

- (1) Proof is not required about knowledge that is not reasonably open to question and is:
 - (a) common knowledge in the locality in which the proceeding is being held or generally; or
 - (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- (2) The judge may acquire knowledge of that kind in any way the judge thinks fit.
-
- (4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as necessary to ensure that the party is not unfairly prejudiced.

legislative facts are almost non-existent but when they exist they are loose and liberal" (Davis 1980: 146).³³

In Australia, all of these aspects of evidence law, in addition to legislative questions, have been at play in relation to one of the leading examples of a field of law where forms of knowledge outside the law have played a pivotal role, the area of native title, with the two effective extra-legal fields being anthropology and history. However, the ways in which each of these disciplines have communicated with law have also changed over time, and the rough periodisation I would like to work with here is organised around three successive cases and sets of case: (1) the Yirrkala (Gove) Land Rights Case (*Milirrpum v Nabalco* 1971), (2) *Mabo* (1991-1992) and *Wik* (1996), and (3) the more recent native title cases around 1998-2001 (*Ward v Western Australia* 1998; *Western Australia v Ward* 2000; *Anderson v Wilson* 2000; *Yorta Yorta v Victoria* 2001). The development in the juridical approach to native title from 1971 to 2001 shows continuities but also a changing relationship between the disciplines of anthropology and history, both to legal reasoning and to each other in the context of their mobilisation within a legal setting. Much of what Luhmann and Bourdieu say about the operation of legal knowledge can be used better to understand these developments, but the empirical examples also in turn cast a particular light on how the theoretical formulations work in particular settings, a light which I will argue points the way to further development in our theoretical understanding of legal reasoning as a form of knowledge production.

Milirrpum v Nabalco (1971)

The *Milirrpum* case was the first Australian Aboriginal land rights case, in which the concept of *terra nullius* actually played an insignificant role, despite the claims later made about *Mabo's* overturning of a long-standing "doctrine of *terra nullius*".³⁴ It was also a case in which "a number of people remarked that never before had there been so much "anthropology" in a courtroom" (Williams 1986: 158), including the testimony of Professors RM Berndt, WEH Stanner and, at an earlier stage, Les Hiatt. The sequence of reasoning leading to giving any effect to these scholars' anthropological knowledge was: first, in general terms, their testimony is opinion, but is it excepted from the opinion rule by virtue of their special training, study or experience? Berndt's and Stanner's authority as anthropologists was unquestioned, although Berndt was challenged because he had not done much work among the Yolngu themselves, but Blackburn J felt that it was well within any judge's powers to "grasp the nature of the expert's field of knowledge, relate it to his own general knowledge, and thus decide whether the expert has sufficient experience of a particular matter to make his evidence admissible". It was a process,

³³ For a critical analysis of how this has worked in relation to the judicial reception of the "best interests of the child" concept in family law, see Davis 1987.

³⁴ The term itself never appears in Blackburn J's judgment; Ritter 1996; Beattie 1998; van Krieken 2000.

wrote Blackburn J, involving “an exercise of personal judgment on the part of the judge, for which authority provides little help” (*Milirrpum v Nabalco & Cth* 1971: 160).

However, second, since their knowledge was based on what Aboriginal people had said to them, did this not make their testimony vulnerable to the hearsay prohibition,³⁵ which would require those informants themselves to be made available to cross-examination? Justice Blackburn did not think so. The hearsay prohibition would rule out testimony along the lines of “Munggurawuy told me that this was Gumatij Land”, but not testimony in the form of:

I have studied the social organization of these aboriginals. This study includes observing their behaviour; talking to them; reading the published work of other experts; applying principles of analysis and verification which are accepted as valid in the general field of anthropology. I express the opinion as an expert that proposition X is true of their social organization. (*Milirrpum v Nabalco & Cth* 1971: 161)

Justice Blackburn saw clearly that any study of human behaviour and social relations was dependent on speech, and such an approach to the hearsay rule would have privileged the sciences of the non-human world over the human sciences. The analogy Blackburn J used was that of a medical evidence which might also be based on what a patient had said to the medical practitioner giving evidence. Applying the analogy, just as a patient’s state of health was a “fact” partly ascertained by what they tell their doctor, so too the social organization of the Yolngu people was a “fact” which could be determined by what they told European anthropologists. “The “facts”,” wrote Blackburn J, “are those selected and deemed significant by the expert in the exercise of his special skill” (*Milirrpum v Nabalco & Cth* 1971: 162).

Admitting the evidence of extra-legal experts is one thing, but accepting it is another, and for Blackburn J no amount of scholarly authority would outweigh considerations such as the internal consistency of the testimony and, above all, how it stacked up against the testimony of the Aboriginal witnesses. His Honour rejected, for example, the argument put by both Stanner and Berndt that each “band” would have a consistent core membership. What impressed His Honour was:

that not one of the ten aboriginal witnesses who were from eight different clans, said anything which indicated that the band normally had a core from one clan, or that they thought of the band in terms of their own clan, and all of them indicated that within the band it was normal to have a mixture of people of different clans. I cannot help feeling that the absence of such an indication from the evidence of no less than ten witnesses must have considerable weight. Had the composition of the band for which Mr. Woodward contended been the normal one, I find it difficult to believe that ten aboriginal witnesses would give no evidence of it. (*Milirrpum v Nabalco & Cth* 1971: 169)

³⁵ s59 *Evidence Act* 1995.

The same issue came up in relation the question of whether there was a close relationship between any given clan and a fixed body of land, whether there was a linkage between band and clan membership, and whether the Yolgnu's relationship to land was an economic one or solely a religious one, and again the live witnesses told a different story from the anthropologists, and it was their version - or rather Blackburn J's understanding of their version³⁶ - which was held to be authoritative (*Milirrpum v Nabalco & Cth* 1971: 169-71).

The case is also important in relation to the positioning of *history* as a field of knowledge, in that it is excluded from the realm of expert testimony altogether, and appears to have a presence only in the realm of "background" and undisputed "matters of common knowledge". In response to the challenge from the defendants that testimony could not be admitted concerning matters that witnesses had no direct experience of, namely, the relationship between the Yolgnu people and their land in 1788, Blackburn J had no difficulty accepting that anthropology as a discipline was quite capable of generating expert knowledge on "the permanence of a social group and of its relationship to a particular piece of land, and therefore on the likelihood that such a relationship existed in 1788" (*Milirrpum v Nabalco & Cth* 1971: 163). Justice Blackburn's own history of the land at issue consisted of a descriptive narrative of the sequence of events constituting contact between the Yolgnu people and Europeans, its charting by Tasman in 1644, Phillip's claiming of all of the Australian continent in 1788, making Yolgnu land part of New South Wales, its charting by Matthew Flinders in 1803, its annexation to South Australia in 1863, the acquisition of a pastoral lease by John Arthur Macartney including Yolgnu land in 1886, the establishment of the Northern Territory in 1911, the creation of the Arnhem Land Reserve, including Yolgnu land, in 1931, the founding of the Yirrkala Mission in 1935, the use of the land by the Royal Australian Air Force during World War II, the passage of the *Minerals (Acquisition) Ordinance (NT)* in 1953, vesting ownership of bauxite in the Crown, and the granting of a lease to Nabalco to mine that bauxite in 1968.

In deciding on the central question of *fact*, whether the plaintiff's relationship to their land constituted a *proprietary* relationship, Blackburn J was certainly "cognitively open" in the sense of admitting the evidence of the anthropologists, but also cognitively *autonomous*, in the sense of testing that body of knowledge against other sources of information, particularly the testimony of live Aboriginal witnesses. The rules and techniques governing the kind of testing of anthropological knowledge found in the *Milirrpum* case may not be particularly unique to law, but it may be that lawyers have a particular interest in mobilising them, driven by the competitive dynamics of the adversarial structure of the courtroom interaction. Social scientific knowledge is generally tested by other, competing, produces of that knowledge, not through a dialogue with its subjects, and it may be that the legal arena is one of the very few places providing the structural conditions for that kind of assessment of the validity of any body of knowledge. On the important question of *law*, whether

³⁶ For a critical discussion of that understanding, see Williams 1986.

Anglo-Australian law recognized a doctrine of communal native title, His Honour came to one position - no it did not, and to interpret the existing body of law differently was not within his powers as a single Judge in the NT Supreme Court - and others have come to the position that it did. What is important for our purposes is the possibility that a particular "background" understanding of Australian social and political history may have coloured Blackburn J's understanding of or approach to the *legal* history, conditioning the way in which his discretion was applied. However, it can be argued that at this level of the Australian court system, Blackburn J had less discretion than, say, the High Court, and that only at that level could a different approach to both social and legal history in Australian settler-colonialism be developed, as it did in the later *Mabo* decision.

Two political events followed the *Milirrpum* judgment: first, the establishment of the Woodward Royal Commission (AE Woodward was the QC acting for the plaintiffs in *Milirrpum*) and the passage of the *Aboriginal Land Rights (NT) Act 1976*, providing the statutory establishment of Aboriginal land ownership in the Northern Territory. It also produced, from *within* the legal system, an argument for the importance of history, in Justice Woodward's 2nd Report as Aboriginal Land Rights Commissioner (Woodward 1974). As Virginia Watson has pointed out, Woodward J argued that any conception among the non-Indigenous population of an effective Indigenous interest in land, as well as of any capacity to *act* on those interests, required as much a revised approach to Australian history as a change in the current form of relationships between Indigenous and non-Indigenous Australians (Watson 2001: 223). Justice Woodward argued for government intervention into the poor understanding in the Australian community of the basic facts of "the white settlers" occupation of the most fertile and useful parts of the country [which] had taken place since 1788 with scant regard for any rights in the land, legal or moral, or the Aboriginal people" (Woodward 1974: para 42). An understanding of the history of colonial dispossession was integral to any proper understanding of both the basis and the future significance of Aboriginal claims to land, and Woodward J was among those arguing that "to address the injustices of the past and their continuing effects" was central to the promotion of "social harmony and stability". As Watson puts it, Woodward J "argued that Indigenous disadvantage diminished the life of the whole Australian community" (2001: 224), both domestically and within the international community. This understanding of the role of history became particularly effective when joined by the contributions of Henry Reynolds (1987) and subsequently taken up by the High Court.

Mabo and Wik (1991/1996)

There appears to be a consensus in Australian legal theory and practice that a particular approach to Australian history played a key role in the emergence of the concept of native title as a part of Australian law:

The gist of *Mabo* lay in the holding that the long understood refusal in Australia to accommodate within the common law concepts of native title

rested upon past assumptions of historical fact, now shown to have been false. (*Wik Peoples v Queensland* 1996: 80.)

Indeed, Christos Mantziaris identifies the *Mabo* judgment as a key example of the combination of normative closure and cognitive openness (1999: 292), suggesting that a conception of native title was incorporated within Australian property law in response to changed community attitudes towards the dispossession of the Aboriginal people, but only if it was possible to do so without fracturing any “skeletal principle of our legal system” (*Mabo and Ors v Queensland (No. 2)* 1991-1992: 43). The influence of Henry Reynolds’ work on the *Mabo* and *Wik* judgments is clear, not least because, as a historian, he examined the history of Australian *law* as well as society and culture, and this provided the High Court with a wider range of conceptual resources in dealing with questions concerning Aboriginal interests in land and their relationship to state sovereignty. If *Milirrpum* was striking because there had never been so much anthropology in the courtroom, *Mabo* stands out for having none.

Reynolds’ historical work was able to have a number of effects on Australian legal reasoning that anthropological studies cannot achieve, establishing particular types of “facts” which are the province only of historians and the kinds of evidence they work with. For example, in the *Mabo* judgment, it was Reynolds’ (1987) *The Law of the Land* which was drawn on to show, contrary to Blackburn J’s judgment, that Aboriginal relationships to land could be understood as “proprietary”, given the specifically *historical* evidence for a recognition of such a relationship by government authorities as well as by settlers. Justices Deane and Gaudron thus cite, no doubt led to the source by Reynolds, the permanent head of the Imperial Colonial Office, James Stephen, in 1841 stating in relation to South Australia that

It is an important and unexpected fact that these tribes had proprietary rights in the Soil -- that is, in particular sections of it which were clearly defined or well understood before the occupation of their country.³⁷

The particular historical materials gathered by Reynolds (1987) were also necessary to show that particular Indigenous interests had been recognized implicitly in practice if not explicitly in law, particularly the South Australian Letters Patent of 1836, which specified “the rights of any Aboriginal Natives [of South Australia] to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any land therein now actually occupied or enjoyed by such Natives”.³⁸ A similar role was played in the *Wik* (1996) judgment, in which the High Court which relied heavily on both Reynolds’ (Reynolds and Dalziel 1996) and Thomas Fry’s (1947) studies of the history of pastoral leases to found its own

³⁷ Colonial Office Records, Australian Joint Copying Project, File No 13/16, Folio 57; cited in *Mabo* 1991-1992: 107.

³⁸ Appendix to Reprints of the Public General Acts of South Australia 1837-1936, vol 8, pp 830-831, cited in *Mabo* 1991-1992: 107.

understanding of how divergent interests in land had in fact been construed over time, which in turn was important in coming to an assessment of their current legal status.

What is interesting in comparison to *Milirrpum* is how Reynolds' historical arguments were assimilated into the fabric of the judgments without having to pass any of the hurdles concerning expert opinion. They were simply taken as given by the High Court Justices, subjected to no uncomfortable comparison with live testimony (which was in any case impossible), unlike the unfortunate Berndt and Stanner, or even with competing historical interpretations.³⁹ Most importantly, the precise form taken by the interaction between Reynolds' work and the reasoning of many of the High Court Justices (but not all, the notable exceptions being Dawson and Toohey JJ) had the effect of framing the legal questions in terms of a supposed "doctrine of *terra nullius*", thus placing Australian property law within a particular understanding of the history of colonial dispossession and driving the Court's reasoning in a particular direction (van Krieken 2000). But with the passage of the *Native Title Act (1993)* (Cth), along with the exigencies of particular cases and divergent judicial attitudes, the intersections between anthropology, history and law took a new turn.

Ward v WA (1998) and Yorta Yorta (2001)

David Ritter (1999) has argued that generally anthropologists continue to enjoy greater privilege than historians in native title proceedings, especially in *Aboriginal Land Rights (NT) Act 1976* proceedings. As an indicator of this, Ritter points to the inclusion of discussions of anthropology in texts on evidence law, and the contrasting absence of any discussion of history. His argument is that more explicit discussions of the history of Indigenous dispossession and relationships to land, as well as being central to the *Mabo* and *Wik* judgments, are also important for the ongoing management of native title claims. Like those two cases, Ritter believes there are important questions in native title proceedings, particularly in relation to the question of continuity of laws and customs, which can only be answered by historians, and indeed are best answered by them.

However, there is reason to ask whether the impact of historical knowledge within native title litigation will in fact always be of this nature. There is a standing general complaint about the juridical field's relationship to history, namely that the uses to which historical materials are put in the courtroom often breach fundamental principles widely shared within the discipline (Kelly 1965; Miller 1969; Wiecek 1987; Fulcher 1997).⁴⁰ As Alexander Reilly has pointed out, the Federal Court is required to work through bodies of historical evidence without any real expertise (Reilly 2000: 454). Reilly also observe a variance in the ways in which different judges will weight (1) written historical records, (2) oral history, (3) anthropological evidence and (4) oral testimony. Exactly how these different bodies of evidence are weighed up

³⁹ For example, Fulcher 1997.

⁴⁰ Robert W. Gordon (1996) also reflects on why this is not likely to change.

against each other has important effects on the legal construction of the native title issues, and above all the release of historical evidence from the usual strictures of the *Evidence Act* (operating instead in the realm of “legislative facts”) may in the long run have consequences which are destructive of native title claims, in contrast the effects of this in cases like *Mabo* and *Wik*.

Although the written records mobilised by Reynolds were favourable to the identification of Aboriginal interests in land rooted in historical administrative and legal records, this is not necessarily the direction that the Australian historical record as a whole leans towards. Reilly’s observation is that there is a tendency in the written historical records to emphasis one particular narrative, namely that of the “destruction of Aboriginal society” (Rowley 1972), what Reilly calls the “narrative of extinction” (2000: 460). Reilly points out that in *Ward v Western Australia*, Justice Lee placed greater weight on the anthropological, linguistic, archeological and oral evidence than the historical material, without which “the weight of the historical evidence may well have defeated the claim, regardless of the wealth of evidence of the claimants contemporary physical and spiritual connection to the claim area” (2000: 460).

However, in the *Yorta Yorta* (1998) case, Olney J regarded the written historical record as the primary and authoritative source of knowledge, against which the oral testimony was to be tested. This consisted largely of the accounts of the subject area by Charles Sturt, George Robinson and Edward Curr. In cases of conflict between the two, His Honour felt the former should prevail. This meant that Curr’s (1883) book, *Recollections of Squatting in Victoria*, was treated as “the most credible source of information concerning the traditional laws and customs of the area” (*Yorta Yorta* 1998: §106), and less weight was accorded to the oral testimony. For example, Olney J dismissed oral testimony concerning the practice of taking “from the land and waters only such food as is necessary for immediate consumption” because it had not been recorded by Curr, and “therefore” “cannot be regarded as the continuation of a traditional custom” (*Yorta Yorta* 1998: §123).

It may be arguable that there were in any case other flaws in the plaintiff’s case, which failed at appeal to the Full Bench of the Federal Court (against the dissent of Black CJ), but irrespective of such considerations, Olney J’s approach to historical evidence is not, with respect, one which very many within the discipline of history would share. It is standard practice among historians to regard any historical account as necessarily partial, and granting this degree of authority to a single participant’s narrative could fairly be described as a relatively rare practice in this particular field of knowledge production. More interesting for our purposes is the lack of scrutiny to which Curr’s account is subjected, again unlike Berndt and Stanner in *Milirrpum*, and Reilly finds himself arguing in favour of a stricter application of the rules of evidence regarding expert opinion as a safeguard against the latitude given to such judicial notice of legislative facts.

Reilly gives the example of Justice Young’s approach to the evidence of historians in the very same year, 1998, when His Honour declared that “As far as counsel and I are aware this particular problem - that is, the problem of an alleged

expert giving evidence of what life was like 100 years ago - has not come before the courts for decision before" (*Bellevue Crescent v Maryland Holdings* 1998: 71). For Young J, although judicial notice might be taken of "basal facts such as when a particular war broke out or other matters of record from reputable histories", the *analysis* of historical events relating to "why certain things happened and generally how people behaved" is not a form of knowledge which fits within s79 of the *Evidence Act 1995*. In other words, anthropological knowledge has been judicially defined as meeting the requirements of the expert opinion exclusion, despite arising from hearsay evidence, whereas there is at least some judicial opinion that historical knowledge does not. This does not, however, prevent the court from taking judicial notice of historical analysis as a "legislative fact", unencumbered by the *Evidence Act 1995*, as Young J indeed goes on to say.⁴¹

In relation to the pursuit of particular legal outcomes, then, judicial discretion is a double-edged sword. It is difficult to identify a particular approach to the differing forms of knowledge that might be drawn upon to argue a case which will produce the same sorts of results, to a large extent because of the blurred boundaries between the three categories of expert opinion, adjudicative facts and legislative facts, which different judges and opposing legal teams will move across in differing ways. Historical knowledge, in particular, has some way to travel before it can be used consistently as expert knowledge, and its utilisation in the realm of judicial notice of legislative facts makes its influence highly unpredictable, within minimal control over that influence from outside the juridical field. But from the perspectives of both Luhmann and Bourdieu, this is exactly the point, that what matters operates at a higher level of abstraction, namely the preservation of the legal system's capacity to determine its own operations from within, the maintenance of its normative or operational closure. The *Mabo* judgment and Olney J's judgment in *Yorta Yorta* might display very different approaches to the normative issues surrounding native title, but they also remain manifestations of exactly the same characteristic of the juridical field: its structural indeterminacy and autonomy.

Conclusion

Here I have only examined one possible arena - the Australian jurisprudence surrounding native title - in which all the theoretical questions concerning law's autonomy and closure can be developed in relation to the actual workings of the juridical field. A more comprehensive analysis of the relationships between history and law would need to encompass other fields of law (e.g., Ginzburg 1999), and equally important would be the relationship of all the social sciences to all the fields of law: social science research and family law, psychological and sociological studies and criminal law and crime control policies, and so on. But in addition to the theoretical analyses of Luhmann and Bourdieu providing a powerful conceptual

⁴¹ "Although the material from the historians was not, strictly speaking, admissible I have, of course, read it and it would have been possible, had I thought it be relevant, for me to add it to my general knowledge and take judicial notice": *Bellevue Crescent v Maryland Holdings* 1998: 371-2.

vocabulary, a “way of seeing”, for better understanding the operation of law in relation to its surrounding social, political and economic context, already we can also see a number of implications for those theoretical analyses themselves.

For example, there appears to be support for a *linkage* between Luhmann’s and Bourdieu’s arguments and orientations, in that the question of *how* the articulation of normative closure and cognitive openness, the structural coupling of the legal system with other systems and its environment, actually works is a *strategic* question which can only be answered “on the ground” in relation to specific configurations of issues and the actual choices made by the relevant parties, and also depends on the ways in which different parts of the juridical field relate to each other. The *Native Title Act 1993* (Cth), for example, itself a consequence of the legal system’s cognitive openness, imposes a particular requirement for a specific utilisation of historical materials which would play different roles within legal reasoning in the absence of that requirement. It is also clear that once we have acknowledged the phenomenon of cognitive openness, what then become interesting is the *competition* between different sources of cognitive openness, either as pursued by the representatives of those fields of knowledge production themselves, or as produced by the adversarial logic of the legal process. It is also important to examine the role of forms of knowledge-production which are both non-expert and non-legal, such as lay (“common-sense”) and administrative mode of knowledge (Valverde 2003; Ward 1997; 1998).

There is also much to be gained, conceptually as well as empirically, from linking Luhmann’s and Bourdieu’s conceptual arguments to the concrete workings of the relevant evidence legislation and the doctrines surrounding judicial notice, in order to give those arguments a much firmer empirical anchorage in the operation of the legal system itself. Such a utilisation of their work has shown here, and might also show in other arenas, that there are important distinctions between ways in which extra-legal knowledge gets absorbed: distinctions between expert opinion, adjudicative facts and legislative facts. This in turn casts greater light on the nature of legal knowledge production, the workings of that “production process”, and its relationship to other fields of knowledge. It is also clear from this brief discussion that the configuration of the relationships between legal and other forms of knowledge changes over time, and a diachronic study of its *historical development* is as important as the more synchronic analyses found in Luhmann and Bourdieu. Again, this is an issue which will only become clearer with detailed consideration of a variety of empirical examples.

A central feature of the literature on the fundamental character and dynamics of post-industrial societies as “knowledge societies” (Lane 1966; Bell 1973: 37; Stehr 1994), that is, as organised around the “added value” of human intellectual creativity, is that the understanding of what constitutes “knowledge” is based almost entirely on the model of “science”. Even though there is increasing awareness of a need to pay greater attention to the production of science and its application or utilization, between science and society (Gibbons, et al 1994; Nowotny, Scott & Gibbons 2001), there is still almost no attention paid in this research to the juridical

field as part of the realm of knowledge, or as itself a “knowledge regime” (Stehr 1994). No doubt this is because of law’s particular and unique relationship to state power and governance, its role as the “reason of state”, but I would like to conclude by proposing that the time has come for us to look beyond this discontinuity and pay more attention to the *connections* between law and science from the perspective of the sociology of knowledge. These connections may be agonistic, and law might be best understood as a kind of meta-knowledge given its role in managing interpersonal, institutional and social power relations and conflict, but changes which the structure and dynamics of knowledge production and utilisation more broadly are currently going through suggest that it will be increasingly important, in responding to those changes, to see law as part of a “knowledge production/governance complex”, rather than as a “special case” for which we have to struggle to define its position in relation to the competing forms of knowledge production.

References

- Andrews, Neil (2000) “The inherited ‘peculiarities of the English’: exploring the culture of the common law statements of directors’ duties with Luhmann and Bourdieu,” pp. 163-223 in Mads Andenas and David Sugarman, eds, *Developments in European Company Law: Volume 3/1999 Directors’ Conflicts of Interest: Legal, Socio-Legal and Economic Analyses*. London: Kluwer.
- Aubert, Vilhelm (1985) “The structure of legal thinking,” pp. 41-63. in J. Andenaes, et al., eds, *Legal Essays: A Tribute to Frede Castberg*. Oslo: Universitetsforlaget.
- Bankowski, Zenon (1996) “How does it feel to be on your own? The person in the sight of autopoiesis,” pp. 63-80 in David Nelken, ed., *Law as Communication*. Aldershot: Ashgate.
- Baxter, Hugh (1998) “Autopoiesis and the “relative autonomy” of law,” 19(6) *Cardozo Law Review* 1987-2090.
- Beattie, Kate (1998) *Terra nullius and the colonisation of Australia* Unpublished BA Honours thesis, Dept of Department of Government, University of Sydney.
- Bell, Daniel (1973) *The Coming of Post-Industrial Society*. New York: Basic Books.
- Berns, Sandra (2000) “Folktales of legality: family law in the prodecursal republic,” 11(1) *Law & Critique* 1-24.
- Bourdieu, Pierre (1987) “The force of law: towards a sociology of the juridical field,” 38(5) *Hastings Law Journal* 814-53.
- Carter, P.B. (1982) “Judicial notice: related and unrelated matters,” pp. 88-99 in Enid Campbell & Louis Waller, eds, *Well and Truly Tried: essays on evidence, in honour of Sir Richard Eggleston*. Sydney : Law Book Company.
- Collins, Hugh (1997a) “Legal classifications as the production of knowledge systems,” pp. 57-70 in Peter Birks, ed., *The Classification of Obligations*. Oxford: Clarendon Press.
- (1997b) “Productive learning from the collision between the doctrinal systems of contract and tort,” 1997 *Acta Juridica* 55.
- (1999) *Regulating Contracts*. Oxford: Oxford University Press.

- Conklin, William E. (1998) The Phenomenology of Modern Legal Discourse: The Juridical Production and the Disclosure of Suffering. Aldershot: Ashgate.
- Cotterrell, Roger (1993) "Sociological perspectives on legal closure," pp. 175-93 in Alan Norrie, ed., Closure or Critique: New Directions in Legal Theory. Edinburgh: Edinburgh University Press.
- (1995) Law's community : legal theory in sociological perspective. Oxford: Clarendon Press.
- Davis, Kenneth Culp (1955) "Judicial notice," 55 Columbia Law Review 945-.
- (1980) Administrative Law Treatise. Boston: Little, Brown.
- Davis, Peggy C. (1987) ""There is a book out...." An analysis of judicial absorption of legislative facts," 100 Harvard Law Review 1539-604.
- Dezalay, Yves and Bryant Garth (1995) "Merchants of law as moral entrepreneurs: constructing international justice from competition for transnational business disputes," 29(1) Law & Society Review 27-64.
- (1996) Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order. Chicago: University of Chicago Press.
- Dingwall, Robert, John Eekelaar and Topsy Murray (1983) The Protection of Children: State Intervention and Family Life. Oxford: Basil Blackwell.
- Edwards, Harry T. (1992) "The growing distinction between legal education and the legal profession," 91 Michigan Law Review 34-78.
- Elias, Norbert (2000) The Civilizing Process: Sociogenetic and Psychogenetic Investigations. Oxford: Blackwell.
- Ewald, François (1988) "The law of law," pp. 36-50 in Gunther Teubner, ed., Autopoietic Law: A New Approach to Law and Society. Berlin: de Gruyter.
- Ewald, William (1995) "Comparative jurisprudence II: the logic of legal transplants," 43 American Journal of Comparative Law 489-510.
- Faigman, David L. (1999) Legal Alchemy: The Use and Misuse of Science in Law. New York: WH Freeman & Co.
- Fish, Stanley (1993) "The law wishes to have a formal existence," pp. 157-74 in A. Norrie, ed., Closure or Critique: New Directions in Legal Theory. Edinburgh: Edinburgh University Press.
- Foster, Kenneth R. & Peter W. Huber (1999) Judging Science: Scientific Knowledge and the Federal Courts. Cambridge, Mass: MIT Press.
- Freeman, Michael & Helen Reece (eds) (1998) Science in Court. Aldershot: Ashgate.
- Fry, Thomas (1947) "Land Tenures in Australian Law," 3 Res Judicatae 158.
- Fulcher, Jonathan (1997) "Sui generis history? The use of history in Wik," pp. 51-6 in Graham Hiley, ed., The Wik Case: Issues and Implications. Sydney: Butterworths.
- Gibbons, Michael, Camille Limoges, Helga Nowotny, Simon Schwartzmann, Peter Scott & Martin Trow (1994) The New Production of Knowledge: The Dynamics of Science and Research in Contemporary Societies. London: Sage.
- Ginzburg, Carlo (1999) The Judge and the Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice. London: Verso.

- Gordon, Robert W. (1996) "The past as authority and as social critic: stabilizing and de-stabilizing functions of history in legal argument," pp. 339-78 in Terrence J. McDonald, ed., The Historic Turn in the Human Sciences. Ann Arbor: University of Michigan Press.
- Greenawalt, Kent (1992) Law and Objectivity. New York: Oxford University Press.
- Habermas, Jürgen (1987) The Theory of Communicative Action, Vol 2. Lifeworld and System: A Critique of Functionalist Reason. Cambridge, Mass.: MIT Press.
- (1996) Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. Cambridge, Mass.: MIT Press.
- Jasanoff, Sheila (1995) Science at the Bar. Cambridge, Mass.: Harvard University Press.
- Kelly, Alfred (1965) "Clio and the Court: an illicit love affair," 119 Supreme Court Review.
- Kelsen, Hans (1934) "The pure theory of law, its methods and fundamental concepts," 50 Law Quarterly Review 474.
- King, Michael (1991) "Child Welfare within Law: The Emergence of a Hybrid Discourse," 18 Journal of Law & Society 303-22.
- (2000) "Future uncertainty as a challenge to law's programmes: the dilemma of parental disputes," 63(4) Modern Law Review 523-43.
- (2001) "The construction and demolition of the Luhmann heresy," pp. 123-56 in Jiri Priban and David Nelken, eds, Law's New Boundaries: the Consequences of Legal Autopoiesis. Aldershot: Ashgate.
- King, Michael and Chris Thornhill (2003) "'Will the real Niklas Luhmann stand up, please'. A reply to John Mingers," 51(2) Sociological Review 276-99.
- Lane, Robert E. (1966) "The decline of politics and ideology in a knowledgeable society," 31(5) American Sociological Review 649-62.
- Legrand, Pierre (1995) "Comparative legal studies and commitment to theory," 58 Modern Law Review 262.
- (1997) "The impossibility of legal transplants," 4 Maastricht Journal of European and Comparative Law 111.
- Lipson, Leon & Stanton Wheeler (eds) (1986) Law and the Social Sciences. New York: Russell Sage Foundation.
- Llewellyn, Karl (1931) "Some Realism About Realism - Responding to Dean Pound," 44 Harvard Law Review 1222.
- Luhmann, Niklas (1985) A Sociological Theory of Law. London: Routledge.
- (1986a) "The self-reproduction of law and its limits," in Gunther Teubner, ed., Dilemmas of Law in the Welfare State. Berlin: de Gruyter.
- (1986b) "The individuality of the individual: Historical meanings and contemporary problems," pp. 313-25 in Thomas C. Heller, Morton Sosna and David E. Wellberg, eds, Reconstructing Individualism: Autonomy, Individuality and the Self in Western Thought. Stanford: Stanford University Press: Stanford University Press.
- (1988a) "Closure and openness: on reality in the world of law," pp. 335-48 in Gunther Teubner, ed., Autopoietic Law: A New Approach to Law and Society. Berlin: de Gruyter.

- (1988b) "The unity of the legal system," pp. 12-35 in Gunther Teubner, ed., Autopoietic Law: A New Approach to Law and Society. Berlin: de Gruyter.
 - (1992) "Operational closure and structural coupling: the differentiation of the legal system," 13 Cardozo Law Review 1419-41.
 - (1993) Das Recht der Gesellschaft. Frankfurt a.M.: Suhrkamp.
 - (1995) "Legal argumentation: an analysis of its form," 58(3) Modern Law Review 285-98.
- Madsen, Mikael R. and Yves Dezalay (2002) "The power of the legal field: Pierre Bourdieu and the law," pp. 189-207 in Reza Banakar and Max Travers, eds, An Introduction to Law and Social Theory. Oxford: Hart.
- Mantziaris, Christos (1999) "The dual view theory of the corporation and the Aboriginal corporation," 27 Federal Law Review 283-321.
- Miller, Charles (1969) The Supreme Court and the Uses of History.
- Mingers, John (2002) "Can social systems be autopoietic? Assessing Luhmann's social theory," 50(2) Sociological Review 278-99.
- Monahan, John & Laurens Walker (1985) Social Science in Law. New York:
- (1987) "Social authority: obtaining, evaluating and establishing social science in law," 134 University of Pennsylvania Law Review 477-517.
- Morgan, Edmund M. (1944) "Judicial notice," 57(3) Harvard Law Review 269-94.
- Mosteller, Robert (1989) "Legal doctrines governing the admissibility of expert testimony concerning social science evidence," 52(4) Law & Contemporary Problems 80-99.
- Nelken, David (1988) "Changing paradigms in the sociology of law," pp. 191-217 in Gunther Teubner, ed., Autopoietic Law: A New Approach to Law and Society. Berlin: de Gruyter.
- (1993) "The truth about law's truth," European Yearbook for the Sociology of Law 87-160.
 - (1998) "A just measure of science," pp. 11-36 in Michael Freeman and Helen Reece, eds, Science in Court. Aldershot: Ashgate.
 - (2001a) "Can law learn from social science?," 35(2-3) Israel Law Review 1-20.
 - (2001b) "Towards a sociology of legal adaptation," pp. 7-54 in David Nelken and Johannes Feest, eds, Adapting Legal Cultures. Oxford: Hart.
 - (2001c) "Beyond the metaphor of legal transplants? Consequences of autopoietic theory for the study of cross-cultural legal adaptation," pp. 265-302 in Jiri Prihan and David Nelken, eds, Law's New Boundaries: the Consequences of Legal Autopoiesis. Aldershot: Ashgate.
- Nowotny, Helga, Peter Scott & Michael Gibbons (2001) Re-Thinking Science: Knowledge and the Public in an Age of Uncertainty. Cambridge: Polity.
- Odgers, Stephen (2000) Uniform Evidence Law. Sydney: Law Book Company.
- O'Donovan, Katherine (1993) "Law's knowledge: the judge, the expert, the battered woman, and her syndrome," 20 Journal of Law & Society 427-37.
- Paterson, John (1996) "Who is Zenon Bankowski talking to? The person in the sight of autopoiesis," pp. 81-104 in David Nelken, ed., Law as Communication. Aldershot: Ashgate.

- Penner, James (2002) "Legal reasoning," pp. 649-717 in James Penner, David Schiff and Rochard Nobles, eds, Introduction to Jurisprudence and Legal Theory: Commentary and Materials. London: Butterworths.
- Posner, Richard A. The Problems of Jurisprudence. Cambridge, Mass.: Harvard University Press.
- Reece, Helen (ed.) (1998) Law and Science. Oxford: Oxford University Press.
- (1999) "Judging Knowledge: Scientific Knowledge and the Federal Courts," 8(1) Social & Legal Studies 152-53.
- Reilly, Alexander (2000) "The ghost of Truganini: use of historical evidence as proof of native title," 28 Federal Law Review 453-75.
- Reynolds, Henry (1987) The Law of the Land. Melbourne: Penguin.
- Reynolds, Henry and Dalziel (1996) "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855," 19 UNSW Law Journal 315.
- Ritter, David (1996) "The "rejection of Terra Nullius" in Mabo: a critical analysis," 18(1) Sydney Law Review 5-34.
- (1999) "Whither the historians: the case for historians in the native title process," 4(17) Indigenous Law Bulletin 4-6.
- Roach Anleu, Sharyn L. (2000) Law and Social Change. London: Sage.
- Rowley, Charles D. (1972) The Destruction of Aboriginal Society. Melbourne: Penguin.
- Rubin, Edward L. (1997) "Law and the methodology of law," 1997 Wisconsin Law Review 521-65.
- Scheiber, Harry (1984) "Public rights and the rule of law in American legal history," 72 California Law Review 217-.
- Shapiro, Martin (1972) "Toward a theory of *stare decisis*," 1(1) Journal of Legal Studies 125-34.
- (1980) "Appeal," 14(3) Law & Society Review 629-61.
- Stehr, Nico (1994) Knowledge Societies. London: Sage.
- Teubner, Gunther (1987) "Juridification: concepts, aspects, limits, solutions," in Gunther Teubner, ed., Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law. Berlin: Walter de Gruyter.
- (1989) "How the law thinks: toward a constructivist epistemology of law," 23 Law & Society Review 727-57.
- (1993) Law as an Autopoietic System. Oxford: Blackwell.
- (1997) "Altera pars audiatur: law in the collision of discourses," in R. Rawlings, ed., Law, Society and Economy. Oxford: Clarendon Press.
- Teubner, Gunther, Richard Nobles and David Schiff (2002) "The autonomy of law: an introduction to legal autopoiesis," pp. 897-954 in James Penner, David Schiff and Rochard Nobles, eds, Introduction to Jurisprudence and Legal Theory: Commentary and Materials. London: Butterworths.
- Tomlins, Christopher (2000) "Framing the field of law's disciplinary encounters: A historical narrative," 34(4) Law & Society Review 911-72.
- Valverde, Mariana (1996) "Social facticity and the law: a social expert's eyewitness account of law," 5(2) Social & Legal Studies 201-17.

- (2003) Law's Dream of a Common Knowledge. Princeton: Princeton University Press.
- van Krieken, Robert (2000) "From Milirrumpum to Mabo: the High Court, *terra nullius* and moral entrepreneurship," 23(1) UNSW Law Journal 63-77.
- (2001) "Legal informalism, power and liberal governance," 10(1) Social & Legal Studies 5-22.
- Ward, Tony (1997) "Law, common sense and the authority of science: expert witnesses and criminal insanity in England, ca. 1840-1940," 6(3) Social & Legal Studies 343-62.
- (1998) "Law's truth, lay truth and medical science," pp. 243-64 in Helen Reece, ed., Law and Science. Oxford: Oxford University Press.
- Watson, Alan (1974) Legal Transplants: An Approach to Comparative Law. Edinburgh: Scottish Academic Press.
- (1983) "Legal change: sources of law and legal culture," 131 University of Pennsylvania Law Review 1121.
- (1991) Legal Origins and Legal Change.
- (1996) "Aspects of Reception of Law," 44 American Journal of Comparative Law 335-51.
- Watson, Virginia (2001) Governing Interests: Miners and Indigenous People in Arnhem Land and the Alligator Rivers Region 1911-1977 Unpublished PhD thesis, Dept of Dept of Government & International Relations, University of Sydney.
- Weber, Max (1978) Economy and Society. Berkeley: University of California Press.
- White, S. (1998) "Interdiscursivity and child welfare: the ascent and durability of psycho-legalism," 46(2) Sociological Review 264-92.
- Wiecek, William (1987) "Clio as hostage: the United States Supreme Court and the uses of history," 25 California Western Law Review 227.
- Williams, Nancy M. (1986) The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition. Canberra: Australian Institute of Aboriginal Affairs.
- Wolfe, Alan (1992) "Sociological theory in the absence of people: the limits of Luhmann's systems theory," 13(5) Cardozo Law Review 1729-43.
- Woodward, A.E. (1974) The Aboriginal Land Rights Commission: Second Report. Canberra: Australian Government Publishing Service.
- Ziegert, Klaus A. (2002) "The thick description of law: an introduction to Niklas Luhmann's theory of operatively closed systems," pp. 55-75 in Reza Banakar and Max Travers, eds, An Introduction to Law and Social Theory. Oxford: Hart.

Cases Cited

- Anderson v Wilson* (2000) 97 FCR 453 (Federal Court) (Black CJ//Beaumont//Sackville JJ).
- Angu v Atta* (1916) Gold Coast Privy Council Judgments (1874-1928) 43.

Australian Communist Party v Cth (1951) 83 CLR 1.
Bellevue Crescent v Maryland Holdings (1998) 43 NSWLR 364 at 71 (NSWSC) (Young J).
Brown v Board of Education 347 US 483 (1954).
Daubert v Merrell Dow Pharmaceuticals, Inc 509 (1993) U.S. 579.
Eagles v Orth [1976] Qd 313
Mabo and Ors v Queensland (No. 2) (1991-1992) 175 CLR 1.
Milirrpum v Nabalco & Cth (1971) 17 FLR 141.
Muller v Oregon 208 U.S. 412 (1908).
Prohibitions del Roy (1608) Coke Rep 65; 77 ER1343 (Sir Edward Coke, CJ of Common Pleas).
R v Gilmore[1977] 2 NSWLR 935.
R v Carroll (1985) 19 A Crim R 410.
R v Runjanjic (1991) 56 SASR 114.
Sullivan v Gordon (1999) 47 NSWLR 319.
Ward v Western Australia (1998) 159 ALR 483 (Lee J).
Western Australia v Ward (2000) 99 FCR 316 (Full Bench).
Wik Peoples v Queensland (1996) 187 CLR 1 (High Court) (Gummow J).
Yorta Yorta v Victoria FCA 1606, 18 December 1998, unreported, Olney J
<www.austlii.edu.au/au/cases/cth/federal_ct/1998/1606.html>.
Yorta Yorta v Victoria (2001) 110 FCR 244 (Federal Court).

Following Paul Kahn's (1999) suggestion regarding what he calls the "cultural" study of law, that we "need a form of scholarship that gives up the project of reform, not because it is satisfied with things as they are, but because it wants better to understand who and what we are" (1999: 30) and because "within law, we are always in danger of allowing law to fill our entire vision" (1999: 138), I will not direct the argument towards a search for ways in which legal thinking and training might be somehow 'improved' in order to take account of this analysis of legal reasoning. The article aims simply at an improved understanding of the dynamics of power running through the assertion of the authority of legal reasoning vis-à-vis other human sciences from its key institutional position within state administration.