Legal reasoning as a field of knowledge production: Luhmann, Bourdie and law’s autonomy

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Abstract

A number of recent theoretical accounts of law have highlighted the paradoxical nature of the relationship between law and society by suggesting that the legal >system= or >field= is both autonomous from and interdependent with other social sub-systems, institutions, fields and practices. This paper pursues an improved critical 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. It proceeds against the background of the existing literature on the role of scientific knowledge in legal proceedings, but deals with a different set of concerns, to do with the authority appealed to in the development of judicial reasoning in relation to >hard= cases where the relation between normative and strictly legal arguments is more complex. I will focus on the >social= sciences - in particular, history and anthropology - rather than medicine, information technology, or engineering. The conceptual starting points are, first, Niklas Luhmann=s 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=. The paper will both critically reconstruct 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 variety of particular empirical examples of the role of extra-legal forms of knowledge within the legal system arising from a current research project. The project is beginning with a focus on Australian law, and subsequent stages will develop a comparative analysis incorporating German and Dutch law.
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[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.1

INTRODUCTION

Ever since this exchange between Edward Coke and James I, at least, there has been a concern 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<,2 >the trick by which the law rebuilds itself in mid-air without ever touching down=.3 This paper reflects on what more can be said about the means by which this >amazing trick< is performed, what makes legal rhetoric >effective= or not, and what might be gained from seeing 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.

I pursue these aims by examining how we might understand the specific features of legal reasoning which set it apart from other modes of generating authoritative knowledge about human behaviour and social relations, as well as the dynamic interrelationships between legal rationality and the human sciences more broadly.4 A number of recent theoretical accounts of law have highlighted the paradoxical nature of the relationship between law and society by suggesting that the legal >system= or >field= is both autonomous from and interdependent with other social sub-systems, institutions, fields and practices.5 My overall aim will be an improved critical 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.

Law=s >claim to truth= in relation to other human sciences appears to be based to a large extent on its privileged institutional position within the >reason of state=.6 If we ask what

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1 Prohibitions del Roy (1608) Coke Rep 65; 77 ER1343 (Sir Edward Coke, CJ of Common Pleas).
3 Stanley Fish, >The law wishes to have a formal existence=, Closure or Critique: New Directions in Legal Theory, ed. A. Norrie (1993) 171.
4 Despite Richard Posner=s belief that >there is no such thing as legal reasoning=, The Problems of Jurisprudence (1990) 459.
6 Christopher Tomlins, >Framing the field of law=s disciplinary encounters: A historical narrative=
is specifically >legal= about legal reasoning, the answer given by the US Supreme Court in
>Daubert v Merrell Dow Pharmaceuticals, Inc< is framed in terms of the differing functions of law and
science. Science is understood as generalized pursuit of truth and >cosmic understanding=, backed by
persuasion, law as particularized resolution of disputes, backed similarly by
persuasion but also by force:8

The scientific project is advanced by broad and wide-ranging consideration of a
multitude of hypotheses, for those that are incorrect will eventually be shown to be so,
and that in itself is an advance. Conjectures that are probably wrong are of little use,
however, in the project of reaching a quick, final, and binding legal judgment - often of
great consequence - about a particular set of events in the past.9

Law=s relationship to other disciplines is then organized around either (1) the displacement of
alternative sources of explanatory authority, or (2) the appropriation of the knowledge
produced by those other disciplines in order to enhance that privileged position, without
granting any authority to other modes of knowledge production.10 For example, in the Mabo
decision11 the pivotal impact of historian Henry Reynold=s research and arguments is
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. 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=,12 and can also usefully be seen as straddling the categories of >meaningful knowledge= (Deutungswissen or Orientierungswissen) and >action knowledge= (H andlungswissen),13
despite his own exclusion of law from his survey of knowledge societies.

Following Paul Kahn=s suggestion regarding what he calls the >cultural= study of
law,14 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=15 and because >within law, we are always in danger of allowing law to fill our entire
vision=,16 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 paper is addressed not only to lawyers and the law, but also to a broader social
science audience of which law is one but not the only component, in order better to understand
the dynamics of power running through the law=s assertion of its authority vis-à-vis other
human sciences from its key institutional position within state administration.

My discussion proceeds against the background of the existing literature on the role of
scientific knowledge in legal proceedings, but deals with a different set of concerns. The central
focus of the majority of the work done on >science in court= is the question of admissibility of
expert evidence: what constitutes expert knowledge and under what conditions it is and should
be admitted into evidence.17 My concern here is a more general one with the authority appealed

8 As Posner 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=: above n4, p. 83.
10 Above n6.
13 Id, p. 100.
15 Id, p. 30.
16 Id, p. 138.
17 David L. Faigman, Legal Alchemy: The Use and Misuse of Science in Law (1999); Kenneth R. Foster and
to in the development of judicial reasoning in relation to hard cases where the relation between normative and strictly legal arguments is more complex. I will also be more concerned with social sciences, here history and anthropology, rather than medicine, information technology, engineering, and so on. The conceptual starting points are, first, Niklas Luhmann’s 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. The paper both utilises the theoretical insights of Luhmann and Bourdieu regarding the internal functioning of the legal system/juridical field, and extends those insights with reference to the 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 with law, and his work has become a central reference point for most social scientific approaches to the legal system. For the purposes of this paper, 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 is not in itself new. However, Luhmann suggests that it is precisely the character of law as a system of communication which constitutes its autonomy, treating 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.

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. This means that the binary code of the legal/illegal distinction is crucially significant in itself, at an abstract level in addition to whatever substantive distinctions it overlays, and Luhmann argues that the autonomy of law is threatened only when this code is challenged, when decisions are made in terms of other distinctions, such as benefit/harm, instead.


18 Above n5.
22 Luhmann, above n5, p. 1426.
23 Luhmann, above n21, p. 346.
24 Id, p. 347.
Before examining the exact significance of this argument for legal reasoning as knowledge production, 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. It is not always clear whether other systems should be seen as part of a system’s environment: Luhmann tends to refer to system-system issues and system-environment issues at different points without connecting the two. For example, one’s first inclination would be to understand the legal system’s environment as being society, but Luhmann insists that it is not true to describe society as law’s environment, and that it is more a case of a system within a system, with law’s autopoiesis an extension of society’s autopoiesis. 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.

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. 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. An analogy would be a building which creates 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.

This immediately casts a very particular light on the question of law’s autonomy from 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 autonomy. 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/illegal is only secondarily concerned with the resolution of conflicts; a more primary concern is a positioning of law in relation to disputes so as to

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25 Luhmann, above n5, p. 1425.
26 Luhmann, above n21, p. 340.
27 Luhmann, above n5, p. 1424.
29 Id, p. 14.
31 Id, p. 123.
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/ illegal 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=. Law, writes Luhmann, constitutes >the exploitation of conflict perspectives for the formation and reproduction of congruently (temporally/ objectively/ socially) generalized behavioural expectations= which are subsequently >systematized by juristic skill, by comparisons of cases, by concepts, and by doctrine. The result becomes, and is experienced as, law=.

The legal/ illegal distinction is also self-referential, in the sense that the distinction can itself be either legal or illegal, generating the need to suppress or render invisible this second question. This paradox of the self-referentiality of the the legal/ illegal 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=. 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=.

NORMATIVE/OPERATIONAL CLOSURE - COGNITIVE OPENNESS - STRUCTURAL COUPLING

What does the idea of autonomy or closure mean 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, but that (1) all of its >operations= reproduce it as a system, and (2) only its own operations reproduce it as a system. 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=. 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 checked by the usual references to legal texts, precedents, or rulings that limit the realm of legal argument=. 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. 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)=.

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

32 Luhmann, above n28, p. 25.
33 Id, p. 27.
34 id at 28.
36 Id, p. 297.
37 Luhmann, above n28, p. 15.
38 Luhmann, above n5, p. 1431.
39 Id, p. 1429.
40 Luhmann, above n21, p. 345.
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 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.  

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 simply as what happens when an individual, unit or system either fails or refuses 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. 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 asimilat items in its environment. Nothing else is meant by autopoiesis. 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. 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. The doctrine of stare decisis, then, is as much as 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: 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.

At the same time, however, the legal system, like any other, also has to coordinate itself with other systems and with its environment, and this raises the question of exactly what the

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41 Luhmann, above n5, p. 1430.
42 Luhmann, above n28, p. 22.
43 Luhmann, above n5, p. 1428.
44 Luhmann, above n5, p. 1428.
46 Luhmann, above n35, p. 287.
47 Ibid.
48 As Karl Llewellyn and the legal realists had pointed out in the 1930s: Karl Llewellyn, > Some Realism About Realism -- Responding to Dean Pound = (1931) 44 Harvard LR 1222, pp. 1235-6.
relationship is between the legal system’s self-reproduction and the interactions between itself and its environment.\textsuperscript{49} 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 - 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.\textsuperscript{50} Luhmann refers to the parallel example of the economic system to illustrate his 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.\textsuperscript{51}

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, that is, its self-reproduction.\textsuperscript{52} 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.\textsuperscript{53}

Luhmann uses the term >structural coupling= to capture the way in which the legal system is 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,\textsuperscript{54} and judicial decisions, which can play as important, sometimes more important, a role within the political system as within law.\textsuperscript{55} Constitutions are particularly important as overall frameworks for both separating systems and structurally coupling them:

\textsuperscript{49} Luhmann, above n21, p. 335.
\textsuperscript{50} See also Edward L. Rubin, >Law and the methodology of law= (1997) 1997 Wisconsin LR 521-65.
\textsuperscript{51} Luhmann, above n28, p. 20.
\textsuperscript{52} Luhmann, above n21, p. 341.
\textsuperscript{53} Luhmann, above n5, p. 1427. Although, this is not an obviously good and clear example, since in fact the closure/openness distinction cuts across this one: whether a crime was committed is still determined according to legal principles not open to learning from the environment, so the cognitive openness is only partial, and whether an act is a crime is also something which is changed by the environment, when legislation changes, and is thus also subject to a learning process imposed by the environment.
\textsuperscript{54} Luhmann, above n21, p. 342.
\textsuperscript{55} Baxter, above n45, p. 2079. Obvious recent examples include Mabo (above n11) and the Cubillo/Gunner case (Cubillo & Anor v Commonwealth (No 2) (2000) 103 FCR 1), or the various examples of judicial sexism in rape and assault cases.
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.56

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, between redundancy and information.57

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= 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).58 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 see 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.59 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=.60 As Shapiro points out, the practice of citation itself serves
the function of saying AI am not saying anything new, it=5 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=.61

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.62 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

56 Luhmann, above n5, pp. 1436-7.
57 Martin Shapiro, >Toward a theory of stare decisis= (1972) 1(1) Journal of Legal Studies 125-34.
58 Id, p. 130.
59 Id, p. 131. This is why the legal system has been relatively quick to exploit all opportunities to make
its communications more easily accessible, such a via the Internet.
60 Ibid.
61 Id at 129.
62 Id, pp. 131-2. See Mabo, above n11.
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. 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, again for reasons to do with the self-reproduction of the legal system.

Of all the criticism which Luhmann=s account of law as an autopoietic system has encountered, 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, 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. 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 those conflicts are then not amenable to further and different forms of challenge.

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.

The problem which Cotterrell is pointing 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 a central element of the form of knowledge and communication which characterizes law and sets it apart from other fields of knowledge production.

Second, Luhmann=s particular approach to meaning and communication runs the risk of writing acting human beings out of the picture; like all varieties of theoretical anti-humanism, structuralist or systems theory his 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 in real social interaction. I use words like >real= and >actual= deliberately, because a large part of this criticism concerns the abstractness of Luhmann=s conceptualization, presenting a social world populated by systems interacting with each other,

63 Id, p. 131.
64 See, for example Michael King=s 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: Michael King, >Child Welfare within Law: The Emergence of a Hybrid Discourse= (1991) 18 Journal of Law and Society 303-22. For a slightly different perspective, see also S. White, 'Interdiscursivity and child welfare: the ascent and durability of psycho-legalism' (1998) 46(2) Sociological Review 264-92.
65 H. Kelsen, 'The pure theory of law, its methods and fundamental concepts' (1934) 50 Law Quarterly Review 474.
67 Cotterrell, Law’s Community, id, pp. 91-4.
68 Id, p. 110.
with only a weak sense of their anchorage in constellations of acting human individuals. Although there are often good reasons to speak of a system having needs, it is not always true that the human beings making up those systems have felt, thought and acted only in terms of those needs, and indeed the change which has taken placed 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 appears ahistorical, even though it does in fact have its own historical story to tell about the increasing differentiation of society. If one sees the legal system as constituted by the production of knowledge, then an understanding of that production process may require a more detailed understanding of how its human agents, as individuals or groups, move around within it than that provided by Luhmann’s strong focus on social systems as autopoietic wholes.

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 be engaged with by reflecting on the observations made by another sociologist, Pierre Bourdieu, 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 sharper ethnographic sense of law as a form of work, as a living production process, as well as adding his own very 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 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. 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. 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.

The autonomy of legal thinking and practice, argues Bourdieu, is not mere rhetorical disguise, but 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

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71 Bourdieu, above n5.
72 Id. p. 814.
73 Id. p. 816.
74 Ibid.
judgment arises from careful consideration of a closed body of doctrine and rules does establish a real independence from the everyday world of assessments 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 laypeople to the fundamental principle of the jurists’ professional ideology - belief in the neutrality and autonomy of the law and jurists themselves.75

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.76

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,77 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.78 The autonomy of law is then increased still further 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 A 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.79 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 the non-lawyers, and this also underlies the power relation between lawyers and non-lawyers.80

The juridical field is also >the site of a competition for monopoly of the right to determine the law<,81 marked by extensive internal competition between >holders of different types of juridical capital<.82 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,83 as well as between the legal avant 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.84 One could add to this the competition between different parts of the legal system, such different courts at

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75 Id, p. 844.
76 A point also made by Stanley Fish, above n3, p. 170.
77 Bourdieu, above n5, p. 833.
78 Id, p. 833.
79 Id, p. 831.
80 Id, p. 834.
81 Id, p. 817.
82 Id, p. 823.
83 Id, p. 824-5; see also Harry T. Edwards, >The growing distinction between legal education and the legal profession< (1992) 91 Michigan L R 34-78.
84 Bourdieu, above n5, p. 852.
different levels, or between the courts and the common law on one hand and the legislature and its statutes on the other. 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,35 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,36 because a corollary of the 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 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=. 87

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=,88 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/ illegal 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=,89 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=.90 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=.91

A distinctive feature of law as a form of knowledge, notes Bourdieu, is that it is >the quintessential form of Aactive@ 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,92 producing a dual, interactive relationship of creation and constitution between law and society.93 More specifically, lawyers are important in

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86 Bourdieu, above n5, p. 820.
87 Id, p. 827.
88 Id, p. 827.
89 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=: above n4, p. 47.
90 Bourdieu, above n5, p. 826-7.
91 Id, p. 845.
92 Id, p. 839.
93 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
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<). 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, 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=. 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. 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 ÂªorthodoxyÂ¿, proper belief explicitly defining what ought to happen, to the status of ÂªdoxaÂ¿, 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.

The intersections of the juridical field with the social world as well as individual behaviour patterns can thus be seen as integral to what Norbert Elias 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 >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 seems to me, I must confess, richer and denser, in the sense that he appears to retain all that is useful in Luhmann, as well as adding a number of other important conceptual layers, such as: the existence of a division of labour within the legal field, with those divisions underpinning relations of competition and power within law, 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 outside of law.

94 Bourdieu, above n5, p. 833, n48.
95 Id, p. 831.
96 Id, p. 831.
97 Id, p. 836. This would be another account then, of both the >juridification of the lifeworld= as identified by Habermas, and of the supposed increasing litigiousness of contemporary Western societies.
98 Bourdieu, above n5, p. 848.
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 arisen from observations of the workings of the law, but they can clearly 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 a changing empirical world, and to identify possible modifications of our theoretical concepts, depending on exactly how they >work= in relation to empirical legal reality. 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.100

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/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 and argument about the position of law and the courts within Australian society and politics.

ANTHROPOLOGY AND HISTORY: FROM MILIRRPUM TO MA BO 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.101 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=.102 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,

100 Luhmann, above n5, p. 1439.
101 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).
102 s79.
which can include, the study of seat-belts and car accidents, spectrographic analysis, or ondontological evidence, as well as the acceptance of particular propositions within that field of knowledge production. But any internal differences, any lack of unanimity within a field of knowledge production will render it wholly ineffective within the juridical field.

Second, the taking of judicial notice of matters of common knowledge, sometimes referred to as adjudicative facts, such as the day of Christmas Day on which a case was argued, the longitude and latitude of Beijing, school hours and the ages at which children start and finish school, the 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, the facts of segregated education on black children, the harm inflicted by segregated education on black children, 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, the nature of native customs, more broadly.

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.

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103 Eagles v Orth [1976] Qd 313 at 320 (Dunn J).
104 R v Gilmore [1977] 2 NSWLR 935.
105 R v Carroll (1985) 19 A Crim R 410; the evidence was admissible but still unsafe because of the degree of dispute within the field.
106 Examples would include whether the concept of battered woman syndrome was indeed broadly accepted in the discipline of psychology: R v Runjanjic (1991) 56 SASR 114 at 119 (King CJ); c.f. Katherine O’Donovan, on the judge, the expert, the battered woman, and her syndrome (1993) 20 Journal of Law and Society 427-37.
107 See, for example, Mariana Valverde, Social facticity and the law: a social expert’s eyewitness account of law (1996) 5(2) Social and Legal Studies 201, pp. 207-8.
108 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.
110 PB Carter, Judicial notice: related and unrelated matters, in We l and Truly Tried, eds E. Campbell and L. Waller (1982) 88-99. Or the decision not to take judicial notice, say of how many Jews were killed in the Holocaust, or whether it was pursuant to official policy, since this was what the appellant was disputing R v Zundel No 2) (1990) 53 CCC (3d) 161
113 Australian Communist Party v Cth (1951) 83 CLR 1 at 196 (Dixon J).
114 Muller v Regn 208 U.S. 412 (1908).
116 Mlilrupm v N abako & Cth (1971) 17 FLR 141 at 156
This refers to a kind of background knowledge which judges can rely on either explicitly or implicitly, and in which they have almost unfettered 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,119 and Kenneth Davis observes that restrictions on use of legislative facts are almost non-existent but when they exist they are loose and liberal=,120

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) in 1971,121 (2) Mabo and Wik in 1991 and 1996,122 and (3) the more recent native title cases around 1998-2001.123 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 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.

1. Milirrpum v Nabalco (1971)

The Yirrkala case, despite the claims made about Mabo=s overturning of a long-standing doctrine of terra nullius=, was the first Australian Aboriginal land rights case, and one in which terra nullius played an insignificant role.124 It was also a case in which a number of people remarked that never before had there been so much anthropological evidence in a courtroom=,125 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:

1. In general terms, their testimony is opinion, but is it excepted from the opinion rule by virtue of of their special training, study or experience? Berndt= and Stanner= authority as anthropologists was unquestioned, although Berndt was challenged because he had not done much work among the Yolnuq themselves, but Blackburn J felt that it was well within any judge= 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

120 Kenneth Culp Davis, Administrative Law (1980)146; 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 P.C. Davis, >>There is a book out....@ An analysis of judicial absorption of legislative facts= (1987) 100 H arvard L R 1539-604.
121 Above n116.
matter to make his evidence admissible. It was a process, wrote Blackburn J, involving an exercise of personal judgment on the part of the judge, for which authority provides little help.\footnote{126}

2. However, since their knowledge was based on what Aboriginal people had said to them, did this not make their testimony vulnerable to the hearsay prohibition,\footnote{127} 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: A Munggurrawuy told me that this was Gumatj 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.\footnote{128}

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=.\footnote{129}

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.\footnote{130}

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 Yolngu=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 version\footnote{131} - which was held to be authoritative.\footnote{132}

\footnote{126} Above n116, p. 160.
\footnote{127} s59 Evidence Act 1995.
\footnote{128} Above n116, p. 161.
\footnote{129} Id, p. 162.
\footnote{130} Id, p. 169.
\footnote{131} For a critical discussion of that understanding, see Nancy M. Williams, The Yolngu and their Land: A System of Land and Title and the Fight for its Recognition (1986).
\footnote{132} Above n116, at 169-171.
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. 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 Milirpum 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 adverserial 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 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 Mabo decision.

Two political events followed the Milirpum judgment: first, the establishment of the Woodward Royal Commission (AE Woodward was the QC acting for the plaintiffs in Milirpum) 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 Woodwards’s 2nd Report as Aboriginal Land Rights Commissioner. 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. 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. 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 both domestically and within the international community. This understanding of the role of history became particular effective when joined by the contributions of Henry Reynolds and subsequently taken up by the High Court.


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.

Indeed, Christos Mantziaris identifies the Mabo judgment as a key example of the combination of normative closure and cognitive openness: a concept 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. 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 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' 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.

136 Watson, above n 134, p. 224.
137 Wik Peoples v Queensland (1996) 187 CLR 1 at 180 (Gummow J).
139 Mabo and Ors v Queensland (N o. 2) (1991-1992) 175 CLR 1 at 107 (Brennan J).
The particular historical materials gathered by Reynolds 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. A similar role was played in the Wik judgment, in which the High Court which relied significantly on Reynolds’ study of the history of pastoral leases to found its own 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 Miliplant 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 (it was in any case impossible), unlike the unfortunate Berndt and Stanner, or even with competing historical interpretations. 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. 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.


David Ritter has argued that generally there is remains a greater privilege enjoyed by anthropologists in native title proceedings, especially in Ahistorical N and Rights (N T) 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. As Alexander Reilly has pointed out, the Federal Court is required to work through bodies of historical evidence without any real expertise. Reilly also observe a variance in the

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143 For example, J F Fulcher > sui generis history? The use of history in Wik=, in The Wik Case: Issues and Implications, ed. G. Hiley (1997).
144 This is discussed in more detail in van Krieken, above n124.
145 Alfred Kelly, > Chio and the Court: an illicit love affair= (1965) 119 Supreme Court Review; Charles Miller, The Supreme Court and the Uses of History (1969); William Wiecek, > Chio as hostage: the United States Supreme Court and the uses of history= (1987) 25 California Western LR 227; Fulcher, above n143. Robert W. Gordon also reflects on why this is not likely to change: > The past as authority and as social critic: stabilizing and de-stabilizing functions of history in legal argument=, in The Historic Turn in the Human Sciences, ed. T. J. McDonald (1996).
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 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, what Reilly calls the narrative of extinction. 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.

However, in the Yorta Yorta case, O=ney 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 book, Recollections of Squatting in Victoria, was treated as the most credible source of information concerning the traditional laws and customs of the area, and less weight was accorded to the oral testimony. For example, O=ney 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.

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, O=ney 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. 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

148 Reilly, above n146, p. 460
149 Ibid.
151 (1883).
152 Above n150, at para 106.
153 Id at para 123.
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.\footnote{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) 43 NSWLR 364 at 371-2.}

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 in which all the theoretical questions concerning law’s autonomy and closure can be developed in relation to the real workings of the juridical field. One could expand the analysis of the relationship of history to law to include other fields, and further possibilities would include the impact of social science research on family law, of psychological and sociological investigations on criminal law and crime control policies, and so on. But in addition to the theoretical analyses of Luhmann and Bourdieu providing a powerful conceptual 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 consequences of the legal system’s cognitive openness, imposes a particular requirement for a specific utilisation of historical materials, which can 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.

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 Evidence Act and the doctrines surrounding judicial notice, in order to give those arguments a much firmer 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. There is, then, enormous scope for a clearer and firmer relationship being established between the >high theory< of Luhmann and Bourdieu and the >middle-range< theory produced in great volumes in the law reviews. 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 probably only becomes clearer with greater reflection on the empirical examples.

It is a striking feature of the literature on the fundamental character and dynamics of post-industrial societies as >knowledge societies<, that is, as organised around the >added value< of human intellectual creativity, 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, there is still almost no attention paid to the juridical field as part of the realm of knowledge. 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 see 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 resolving/managing social and interpersonal 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 simply as gloriously autonomous from and opposed to the arena of science.

\[156\] Stehr, above n12.