1 Introduction

1.1 Introduction

Several centuries ago, literary giant Charles Dickens wrote in *Oliver Twist*, that:

> The law is a ass – a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience – by experience.[1]

William Shakespeare also weighed in on the subject of law and lawyers in his play *Henry VI*, where he had a character announce that all the lawyers should be killed.[2] Opinions about the law are oftentimes a societal hobby. But these opinions aside, I believe – and argue here – that the law is a chameleon. It can and does change "color" depending on its context and function. For some, this might be obvious. Whether obvious or not, however, and time after time, the law becomes a chameleon-like monster.

The chameleon nature of law is connected to the numerous functions of Law; laws might be grounded in the sociological, the political, and even – or especially – concepts of normalized morality and ethics. And as common understandings of morality evolve, law adapt to their new moral environment. Even mathematics and physics might even be implicated if one considers laws about driving safety. But in terms of context, however, the one consistent context that Law cannot avoid is history. Due to procedurally correct laws, being labeled Jewish in Germany had horrific consequences before and during World War II, as did being non-white in South Africa during apartheid. Previously, taking the name of God in vain was an illegal act in colonial America which put some lackadaisical colonists in stocks, on public display. Even earlier, practicing herbal medicine and perhaps living without male "supervision" sent many women to be burned at the stake as witches in Catholic medieval Europe. Law may be a chameleon always changing functions, combining them or prioritizing one over the other but it is permanently bound to history, to a specific time and place and society.

This brings up the question of "good" law. For some legal philosophers, if a law is procedurally correct, enacted in ways constitutionally known and agreed upon, then the content is of no significance. It is a "good" law, no matter what it does or justifies. Whether or not one agrees or disagrees with any particular law is merely set aside as a political quarrel. The assumption is that a certain procedure and logic in law production has taken place and this can be changed by a change in political leaders in a

1 Charles Dickens, *Oliver Twist* (New York and Toronto: Vintage Classics, 2012) p. 400.
2 William Shaespeare, *Henry VI*, (New York: Bantam Dell Classic Books, 1988) p. 275. (Part II, Sct IV, Scene II, Dick the Butcher to Jack Cade, line 74.)

subsequent political election. But this focus and this assumption obscure an uncomfortable fact. Some laws can be "bad" or "immoral."

Another remedy, some argue, is that if one dislikes a particular law, one can pursue that matter in the appellate courts. But most courts are bound by what jurisprudential scholars call the Autonomy Thesis of Law (ATL). The ATL is a type of Berlin Wall that means one cannot go behind an enacted law every time it is used in order to question if it is just. If one could, the security and order of society would suffer. Police officers might never know if an arrest was legal or not. Was or wasn't a contract valid under the existing commercial code? One needs some assurances that law is law – and remains law – for a consistent, lengthy period of time.

This leads us to consider the question of how we know what we think we know, often called epistemology. And this is a serious question which is raised here, given the often strange twists and turns of history and political whims. History is no epistemological safe harbor either in this respect if one chooses to believe that the law is a source of security and order. As already implied above, the course of history changes, in part, because societal norms change. Norms can change slowly or rapidly, even within a lifetime. One may not feel on safe ground doing a particular act as a 20 year old but might freely engage in it as a 60 year old person. The main character in the play, *A Man for All Seasons*, is lawyer Thomas More who is King Henry VIII's Chancellor of the Realm. Eventually he is threatened by the King because of his religious beliefs and More tells his son-in-law that:

> I'm *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh there I'm a forester. I doubt there's a man alive who could follow me in there, thank God...[3]

Few knew the law better than More, but he was nevertheless eventually executed.

This book is about how law was driven by scientific and social norms during the first and closing decades of the twentieth century. Prior to and at the turn of the century, huge technological breakthroughs had been made, such as steam power, spreading both the advantages and disadvantages of the Industrial Revolution. Although genetic concepts had been discovered at the end of the 19th century, the first three decades of the twentieth were a time of experimentation. But it was "blind" experimentation in a sense, since knowledge of some of the most significant genetic structures and functions such as chromosomes and genes were unknown, much less knowledge of weak hydrogen bonds connecting adenine, guanine, cytosine and thymine in a helical molecule called DNA (deoxyribonucleic acid). This is the historical period in which Case One is situated and the two countries that are compared are the USA (state of Indiana) and Norway.

3 Robert Bolt, *A Man for All Seasons* (New York: Vintage International, 1990), p. 65–66.

At the end of the twentieth century, although more scientific information was known, the "betterment" of society through controlled reproduction, which had come to be the ostensible goal at the beginning of the century, took back seat to socio-political factors. At mid-century, laws had been conceived, written and enacted which had given women no or little control over reproduction. In the USA, condoms were illegal. But, as science and technology progressed, better ways of controlling reproduction did emerge. However, as far as the law was concerned, these laws were problematic. This is the period in which Case Two is situated and, in a sense, it is the antithesis of Case One. In Case One, legislators created and passed laws based on what they considered to be cutting-edge science and in the best interests of their societies. In Case Two, the demand for cutting-edge scientific technology (birth control pills) came from below and legislators balked at allowing this. Again, the two countries that are compared are Norway and the USA.

We should also remember that the philosophy of law and the social science of sociology begin with different assumptions, although both claim to use logic. Both claim the scientific process is at work in the discipline. In 1870, Harvard Professor Christopher Columbus Langdell, who will be introduced below, envisioned the law school library as a "laboratory" much like any chemistry or biology laboratory. But words which create precedent and the logic of legal argument seem to have a basic difference from, for example, the certainty of what the outside temperature might be, and at a given pressure, in degrees Celsius or Fahrenheit. These ideas are also examined below.

The scientific method requires that we work from a theory, collect data and make conclusions; it also requires reproducibility. The main theory that I will use here is a theory that comes from STS (Science and Technology Studies) circles often associated with its French originator, Bruno Latour. Harvard Professor Sheila Jasanoff also subscribes to work done in the field of STS and has advanced a theory of how knowledge is co-produced. She writes that four "fields" co-produce knowledge; these are representations, institutions, discourse and identities. These four fields will be explained and used to examine the data presented in the print media at the time the laws were passed.

I use these four "fields" in this book but, since the data set can be large, I also use a theory to supplement the work of Jasanoff and that is the theory of "intersubjectivity." This idea comes from feminist scholarship and argues that we can look at "intersubjective categories" of race/ethnicity, class, gender, citizen status and ability because there are common linkages among the categories due to hierarchical power and oppression.

The theory that I will use to look at creation of law is one used by Brian Tamanaha, called the socio-legal positivist theory of law. Positive law is simply law that is written down "on the books" so to speak. Some thinkers describe their work in terms of positive law but go no further to ask, "is that all there is?" They maintain that if a law is "unjust", it is still positive law and should therefore be obeyed. Still

others reach different conclusions along a spectrum culminating, at the opposite end, in the position a tired Rosa Parks found herself one December day in Alabama when she decided to sit in the front of a bus instead of the back – which was illegal – because it was positive law that required Black African Americans to sit in the back of the bus.

This brings me to the concept of "body law" as used in this book. While working on these cases, it struck me that the most basic thing we have which is subject to the law is our bodies. Our minds are free enough so that we can imagine breaking any number of laws every day without consequence. Every law that is enacted by freely elected politicians applies to citizens of a country unless otherwise noted. Sometimes, the "otherwise noted" applies to bodies that are not white and not rich, or without status or influence, as the Baldus (Death Penalty) Study shows below. For example, different penalties under federal law for possession of cocaine, have depended on the type of cocaine used. Use of crack cocaine, mostly used by non-white, poor citizens carried harsher penalties than that found waiting in the restrooms at a corporate Christmas party.

This brings us to consider the people who make law and their epistemic realities. I mention below the theory of "legisprudence" coined by Luc Wintgens and to the work of Kaarlo Tuori. Tuori theorizes that where law and politics might appear connected at a top, superficial level, they are autonomous at lower levels of law formation. At the lowest level of Tuori's three levels is what Michel Foucault calls the "episteme", the prelogical and preconceptual foundations of legal norm creation. And again, we come back to epistemology.

But, more often, the law affects the specific bodies mentioned above, as the historical composition of prisons in the USA – and elsewhere – demonstrates. Critical legal theory suggests that there are often two (or more) sets of laws, and it makes no difference if Lady Justice is blindfolded or not. As children, what we first learn to notice about another person is his or her gender, then race and later, class. As I heard a Black man scream outside court in San Francisco one day, "There ain't no justice, there's only just us!" McCall's theory of intersubjectivity, mentioned above, helps to describe this situation as well as critical legal theory on the ground. It basically says that oppression is an interlocking affair and comes into being because of race, class and gender hierarchies.

Most citizens of a country probably assume that making law is a complicated procedure. But, as this book helps to show, it is an infinitely more complicated matter than we often realize. Different hierarchies are at work, directly or indirectly, different assumptions about what the "polis" wants or doesn't want, different epistemic understandings of what is "best", sometimes impacted by misinformed and misleading propaganda from religion, politics and even science, all informing any given law.

It seems that only the passage of time gives us the luxury of looking backward with some trepidation to see the consequences of these "bad" laws. But I also ask in

this book if there might be a way that one could anticipate "bad" law, even before the consequences are known, or a way to lessen "bad" consequences.

1.2 How this Book is Organized

The pseudo-science of Eugenics burst into what was called the Progressive Era in the USA at the end of the 19th century and the beginning of the 20th. Legislators thought it might be some sort of panacea to any number of problems, including crime, poverty and lack of education. Case One examines eugenic laws in the USA state of Indiana and Norway. A law permitting the castration laws of "confirmed criminals" was passed in Indiana in 1907, the first in history. In Norway, a law was passed in 1934 allowing for the castration/sterilization of people considered societal "parasites."

Case Two looks at the antithesis of the laws passed in Case One. What had been legally mandated from above in 1907 and 1934 with regard to reproduction was later abandoned. However, a caveat should be mentioned here. The laws were no longer "on the books" and there was no longer any obvious eugenical castration/sterilization but eugenics practices did continue into the 1970s and beyond. But the laws from 1907 and 1934 had been technically abandoned. Case Two is about the birth control/abortion debate – begun from below – in both countries throughout the late 1960s and 1970s. Women wanted control over reproductive matters, but they did not fit into the categories of people seen in Case One. This became a problem for politicians.

Both cases involve the body of the individual based on certain classifications of that body by society and assumptions about their worth. They have in common what a person may or may not legally do with her or his body. What a body looks like, the epistemics of sight knowledge, can often determine what that person may and may not do. Black citizens in 1907 Indiana could not do things that white citizens could. European citizens – Roma – cannot do things in Norway today that ordinary Norwegians can do. But the problem with visually "knowing" a body is that it can also be misleading. One could not be sure if a Norwegian citizen was "insane" in 1934 simply by looking at her any more than one could know if a man was a habitual criminal or not in 1907 in Indiana, or that a person is "gay" today. "Out of place" persons were also a major theme in Norway in 1934, possibly due to its small Roma population.[4]

Therefore, some un-readable bodies became the subject of the law in a pro-active manner and law became the instrumentalized force in the search for a pro-active public policy. Here, I look at the social and cultural norms at work in both societies at

4 "Out-of-place" persons continue to be feared. This is exemplified by the arrest of Harvard Professor Henry Gates after trying to get into his own house. Please see Rupert Cornwell, "The arrest that divided America", *The Independent*, 24 July 2009 at http://license.icopyright.net/user/viewFreeUse.act?fuid=NDI0MDU1NA%3D%3D, last accessed 7 July 2009.

the time that these laws were passed. I assume that these norms can be inserted into the formation of laws at a variety of junctures, or "injection points." These include, but are not limited to, 1. the public at large, 2. the electorate, i.e. those that fit the criteria of "citizen", 3. social movement organizations (SMOs) of the time, 4. smaller, specialized interest groups, and 5. the individual legislator or parliamentarian. These injection points are therefore located at all levels of society, the macro-, meso- and micro-levels and these are the three levels that I often use for examples in each case.[5] Another question that is briefly taken up is the timing of the legislation. Besides the eugenics craze, was anything else at work that may have affected societal norms at these times? In this respect, I examine episodic social/moral panics and major structural changes in society are major factors that can trigger legal norm attachment directly to the unreadable body.

This book is divided into seven chapters. Chapter 1 includes an Introduction and short overview of how the book is organized, chapter by chapter.[6]

In Chapter 3, I look directly at societal norms in Indiana and Norway around the time their similar laws were passed. I examine questions of large scale structural changes as well as social/moral panics at the time these laws were legislated.

Chapter 4 examines how people were eventually selected as subjects/objects of the laws passed in Indian and Norway. It is here, that I go beyond what I call the "injection points" available to the individual citizen and look at which SMOs and smaller interest groups were involved, pressing legislators for involuntary sterilization in Indiana and Norway. I also examine some of the individual legislators or parliamentarians involved in each country and the social and political networks/movements in which they were enmeshed.

In Chapter 5, I look at the social and cultural processes that took place *after* the sterilization laws were passed that supported their invalidation or which were engaged in reversing what could be seen as extra-judicial processes. At this point, I also look at later parallel cases, involving laws passed in 1965 in the United States and 1978 in Norway. In those years, normative legal formation again addressed specific persons. I begin by tracing the United State Supreme Court (USSC) case of Griswold v. Connecticut, 381 U.S. 479 (1965), generally understood as bringing into force a "right of privacy." This case allowed married couples the use of contraception as

5 SMOs interact with "scientific/intellectual movements" (SIMs). Please see Scott Frickel and Neil Gross, "A General Theory of Scientific/Intellectual Movements" in *American Sociological Review*, 70 (2005), 204–232.

6 Please see George Ritzer, *Sociological Theory*, 7th Ed, (Boston, etc.: McGraw-Hill, 2008) and Kaarlo Tuori, "Legislation Between Politics and Law" in Luc J. Wintgens, (ed.) *Legisprudence: A New Theoretical Approach to Legislatio: Proceedings of the Fourth Benelux-Scandinavian Symposium on Legal Theory* (Oxford and Portland: Hart Publishing Co., 2002) and Kaarlo Tuori, Zenon Bankowski and Jyrki Uusitalo (eds.), *Law and Power: Critical and Socio-Legal Essays* (Liverpool: Deborah Charles Publishing, 1997).

prescribed by a doctor and is generally regarded as the precursor to Roe v. Wade, 410 U.S. 113 (1973), allowing for the right to a legal abortion in the United States.

Chapter 6 looks at how this reversal process was carried out in Norway. The two countries fashioned these normative "body laws" through very dissimilar political and legal processes and I argue that the differences in legal procedural apparati in place were of no significance since it was – in the main – the normative changes that were based at a more fundamental level in society and its culture that allowed for the changes. It is true that law can change norms and that this is often the hope of many policy makers; this strategy has been tried at various times and places. But it is my thesis that the normative ebb and flow between culture and law, during these particular stressful times is from culture to law.

Chapter 7 summarizes the comparisons between the two countries in terms of social and cultural norms and which groups advocated for and against these norms. I also introduce an overview of race/ethnicity, class and ability as it related to the law in the earlier sterilization laws as well as the later contraception/abortion laws. Norway and the United States have different legal and political histories and I consider these in relation to law formation. Finally, I turn to my argument that norms are seen to be embodied in physical bodies and that the law, at opportune times, will create a one-to-one correspondence with intersubjective bodies, based on relative political power, the settled epistemic knowledge of the time, large scale structural changes and the presence or absence of a moral panic.

I also argue that this does not mean the Law is always a relative entity but that laws should be assessed as "just" or "unjust" before enactment, *despite* having met their procedural safeguards; this assessment can be based on the relative social and political position of members of within a country's population. This helps put in place a type of "transparency" that legal scholars Olsen and Toddington argue for with regard to the Autonomy Thesis[7], that Brian Tamanaha searches for in his theory of socio-legal positivist theory of law[8] and that others such as, Duncan Kennedy[9], Liam Murphy[10] and Bonaventura de Sousa Santos[11], directly or indirectly, consider as a necessary antidote to strong positivism.

7 Henrik Palmer Olsen and Stuart Toddington, *Law in its Own Right* (Oxford and Portland: Hart Publishing, 1999).

8 Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001).

9 Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Cambridge, London: Harvard University Press, 1997).

10 Liam Murphy, "The Political Question of the Concept of Law" in Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to "The Concept of Law"* (Oxford: Oxford University Press, 2001).

11 Bonaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York, London: Routledge, 1995).

In conclusion, my work addresses the "how" and the "why" of norm-inclusion in what I term "body law." To do this, I examine both social and legal norms and theories of how they are both created. I then use various sociological theories to untie the various strands of social history as well as legal history and look at two cases of legislation from the United States and Norway. I ask if there is a set of confluences in socio-legal history and/or theory where one might expect to see tendencies in legislatures or Parliaments, to pass "body-law." As part of this analysis, I also include secondary conclusions, about the role of the trans-national social movements, such as Eugenics, as historical forces.