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'Life Grasps Life': Wilhelm Dilthey's Minor Jurisprudence

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Abstract

In an article from 1994, I tried to read Franz Kafka's short story 'In the Penal Colony' as what I called 'minor jurisprudence' by drawing on an analogy from Gilles Deleuze and Félix Guattari. Whatever Kafka had to say about law should not, so I claimed, be understood as a form of theodicy as it usually is but, rather, as the possibility for a new 'politics of desire'. As 'minor literature', Kafka's texts were inherently resistant to attempts to box them into conventional literary taxonomies. And it was this inherent resistance that created the opening for his 'minor jurisprudence', as well. My aim will be to discuss the nature of this discordant force through the notion of vitalism. More specifically, I will discuss this vitalistic element through Wilhelm Dilthey's 1883 treatise *Introduction to the Human Sciences*. But instead of focusing on the hermeneutical method which is the usual way in which Dilthey is introduced into the jurisprudential tradition, I will discuss his more general views on law as a cultural and political phenomenon and on jurisprudence as the 'human science' that studies it, both significant themes in the 1883 *Introduction* but which scholarship has largely ignored.

‘Life Grasps Life’: Wilhelm Dilthey’s Minor Jurisprudence

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1. The human sciences?

In the German tradition, the social sciences and humanities have traditionally been called the *Geisteswissenschaften*, literally the ‘sciences of the spirit’. Despite its misleading Hegelian overtones, the 1849 German translation of John Stuart Mill’s *A System of Logic* (Mill 2011) quickly popularised the expression. So in Book VI (‘On the Logic of the Moral Sciences’), Mill’s ‘moral sciences’ became ‘sciences of the spirit.’ The term was often used in a negative sense, that is, for all the disciplines that were *not* regarded as exact natural sciences. Originally for philosophy, philology, literary studies, law, theology, and history, and later even for newer disciplines such as sociology, economics, anthropology, and psychology (see Cohen 1994: 195-196). In short, the term corresponds roughly with the English expression ‘social sciences and humanities’ and its French equivalents ‘*sciences de l’homme*’ and ‘*sciences humaines*.’

The unapologetic reference to science is, however, worth noting. Not only *can* the social sciences and humanities be scientific, albeit in different ways than the natural sciences, but they also *must* ground themselves scientifically if they wish to produce accurate knowledge about the world that we live in.

It was particularly Wilhelm Dilthey (1833–1911) who would go on to use the term *Geisteswissenschaft* in his attempts to create such a foundation for the social sciences and humanities – now broadly understood as the ‘human sciences’ – as disciplines clearly distinct from the natural sciences (on the ambiguous term, see Dilthey 1991: 58). In these attempts, Dilthey’s work also participates in a tradition of life-philosophy, a *Lebensphilosophie* that aligns him with the likes of Friedrich Nietzsche (see e.g. Campbell and Bruno 2013; Normandin and Wolfe 2013). But if Nietzsche with his highly literary style scorns the modern infatuation with science as a form of decay and decadence, Dilthey has an explicit scientific agenda.

In this essay, I will discuss this life-philosophical element as *vitalism* through Dilthey’s 1883 treatise *Introduction to the Human Sciences* (Dilthey 1991).¹ So instead of focusing on the interpretive hermeneutical method which is the usual part that Dilthey plays in the jurisprudential tradition (e.g. Seebohm 2004; Palmer 1969),² I will concentrate on his more general views on law as a cultural and political phenomenon and on jurisprudence as the ‘human science’ that studies it, both significant themes in the 1883 *Introduction* but which scholarship has largely ignored. My claim will be that as his original aim of providing a scientifically feasible foundation for all the human sciences gradually loses its plausibility, the vitalistic nature of his life-philosophy becomes ever more prominent. *Life*, then, not only animates the incompatible taxonomies of the human sciences, but it is also responsible for the ‘repulsive’ force that ultimately prevents the human scientist from fixing her concepts and doctrines into the systemic frameworks that ‘major jurisprudence’ insists on.

In the first section, I will, then, discuss the larger philosophical framework to which Dilthey’s 1883 *Introduction* belongs, namely his attempt to provide the human sciences with a scientific foundation. I will then try to show how the ‘first-order truths’ of a philosophical anthropology that Dilthey identifies for that purpose gradually make way for a more vitalistic understanding of life making his original project more or less impossible. The second section focuses on the

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‘second-order truths’ that Dilthey outlined in the 1883 *Introduction* and that were also meant to represent the objects of study for the individual human sciences after they had first been provided with a scientific foundation. My emphasis will be on the central role that Dilthey assigns to law as a mediator between two second-order systemic wholes that he calls ‘cultural systems’ and the ‘external organisation of society.’ Dilthey’s law namely has the makings for a rather unique ‘law and society’ type of jurisprudence. The third main section will clarify the role of Dilthey’s vitalistic notion of life in this configuration of law and the way in which it translates into the ‘tragic failure’ of his ‘minor jurisprudence.’³

2. Dilthey’s vitalistic anthropology

In many ways, Dilthey’s starting-point reflects the crossroads at which mainstream jurisprudence stands today. He begins with a very rudimentary distinction between two different points of departure in the human sciences. One is based mainly on Kant’s philosophy, the other seeks to explain the development of social and cultural phenomena by way of social reality. The first is a theoretical approach, the second a more empirically oriented approach that Dilthey will often call the ‘historical school’ (i.e. German historicism as in Beiser 2011). Although Dilthey frequently alludes to the superiority of the latter approach, he also identifies shortcomings in it that he proposes to address with a reconciliation with the former. So the task of Dilthey’s philosophy is to validate the historico-empirical variant of the human sciences by providing it with a theoretical foundation that draws its inspiration from the epistemological emphases of the Kantians (e.g. Dilthey 1991: 79-80).

Two points are worth noting. First, the human sciences, ‘linked together by their common object’ (i.e. ‘man’, Dilthey 2010a: 101), involve distinct and separate categories of knowledge that do not and cannot mime those that the ‘so-called positivists’ (Dilthey 1991: 57) have ‘arbitrarily’ adopted from the natural sciences (see e.g. Rickman 1960). And second, the human sciences form a unitary whole, an

architectonic system where the individual disciplines are in clearly defined and logical relations to one another. The first point is Dilthey's soft polemic against the predominance of the natural sciences and the privileged position that they enjoy in the realm of knowledge, while in the second he criticises the epistemological shortcomings of the human sciences as represented in, for example, early romanticism. But here too Dilthey prefers to act as a moderator between what he regards as two sides of a false dichotomy (e.g. Dilthey 1991: 71-72).

Dilthey's central claim is that the human scientist has access to 'man' as an object of study only through an 'inner experience' that cannot be accounted for through the causal relations of nature. Indeed, only external nature can be *explained*. Human life and social reality, for their part, are internal and can only be *understood*:

In nature we observe only signs for unknown properties of a reality independent of us. Human life, by contrast, is given in inner experience as it is in itself. Therefore, only in anthropological reflection is the real there-for-us in its full reality (Dilthey 1991: 435).

The individual who experiences and knows herself from within is a constituent of the social body of which she is part and in which she acts. Other constituents of the same social body resemble the individual and are accordingly comprehensible to her. With her empathic ability the individual understands social life from within. The individual is an element in social interactions, a point of intersection where various systems of such interactions meet, and she reacts to the influences of society with conscious actions and intentions. But the individual is also an intellect contemplating and investigating the complex that she is part of (Dilthey 1991: 89).

How to, then, make sense of these interactions in a 'scientifically' valid way?

Within the architectonic of Dilthey's original aspirations, the only possible foundation for the human sciences is a philosophical anthropology that takes psychology as its starting point. Psychology, as Dilthey understands it in his 1883 *Introduction*, is the scientific core of the human sciences, and its aim is to develop verifiable 'first-order

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truths’ about the ‘psychophysical life-unit’ in the different social and historical contexts in which she acts. The twist that Dilthey adds to his notion of psychology is that its object of analysis cannot be man ‘prior to society’. Only by first contextualising man both socially and historically can psychology perform its foundational task and validate the various human sciences which is Dilthey’s main objective here (Dilthey 1991: 83-84).

For Dilthey, the scientific foundation of the human sciences is, then, a psychologically bent philosophical anthropology on top of which the remaining human sciences must be built. There can be no scientifically valid discipline of, say, history, society or culture without a basic knowledge of man as a psychophysical life-unit.

But what is this ‘inner experience’ that cannot allegedly be explained but can only be understood?

No unequivocal definition is given. But if we reach beyond the 1883 *Introduction* to Dilthey’s later work, we can see how his original aspirations gradually lose momentum. The more Dilthey becomes aware of the impossible task of harnessing the complexities of the ‘inner experience’ in a scientifically valid way, the more his life-philosophy comes to the fore. The ‘inner experience’ of the psychophysical life-unit takes on distinctly conative colours, and this conation becomes ever more difficult to subsume under any set of scientifically plausible ‘psychological’ truths:

The external world expresses itself in life as pressure through the relation of impulse to resistance. Its reality lies only in this life-relationship. Its reality signifies nothing else but these relations to psychic structure within the human sciences (Dilthey 2010a: 352).

In other words, in the ‘inner experience’ man reaches out to the external world through conative urges, through volitive or purposive impulses with which she attempts to appropriate the contextual environment that she inhabits. The limitations of the external world to accommodate her impulses, for their part, introduce resistance. So as a conative being, man experiences her external world as the pressure that builds up between her appropriative impulses and the resistance

that these impulses encounter in the external world:

Impulse, pressure and resistance are the stable constituents that impart to all external objects their solidity. Will, conflict, work, need, and satisfaction are the constantly recurring core elements that provide the scaffolding of all human history. Here is life itself. It constantly demonstrates itself (Dilthey 2010d: 50).

At first sight it may seem that Dilthey is here simply paraphrasing the claim that the external world is only accessible through representations within consciousness, that is, the view of transcendental philosophy that was commonly held by many of Dilthey's contemporaries and that he himself identified as one side of the original dichotomy that he wanted to overcome (e.g. Dilthey 1991: 67). But it is the emphasis that Dilthey now puts on life as a vitalistic force that is worth noting. If we accept this vitalistic notion of life as conative urges and impulses as our starting point, then no further proof can be obtained by proceeding from consciousness to some transcendental 'thing-in-itself' that may or may not lie beyond it. The only possible preconditions for knowledge about the external world are already given in life itself beyond which the human sciences cannot reach.

This also renders the foundational task of Dilthey's philosophical anthropology impossible and returns the human sciences back to the *Methodenstreit* from which we started. As scientific modes of enquiry, the disciplines studying history, society and culture are caught in a vitalistic loop where the human scientist, empathically understanding her fellow human being and the world around her, can have no better guarantees about the accuracy of her analyses than the psychophysical life-unit has about her own conative life. Dilthey captures the idea of this vitalistic loop well in his famous motto-like phrase: 'Here life grasps life ...' (Dilthey 2010a: 157).

3. Law discovered, not made

How would this, then, apply to law and to jurisprudence?

As I noted earlier, the usual way in which Dilthey is introduced

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into the study of law is through the notion of hermeneutics that he developed as a general method of understanding and interpretation in the human sciences by critically expanding on what Friedrich Schleiermacher (1764–1834) had already done before him. In this way, Dilthey is reduced to not much more than a way station between Schleiermacher and Hans-Georg Gadamer (1900–2002) as one gradually moves from romanticist origins towards what is regarded as a ‘mature’ hermeneutical position (e.g. Palmer 1969: 98–123). But despite Dilthey’s rather abundant references to law and jurisprudence in the 1883 *Introduction*, surprisingly little has been written on what he understood by them (see however Thielen 1999: 429–432).

This lack of interest is at least partly due to Dilthey’s nineteenth century sources of inspiration that may, from our point of view, seem little more than historical curiosities. If there is something to be salvaged here, it cannot be the rehabilitation of obsolete doctrines. But we can try to radicalise. So instead of following the usual route of hermeneutics and interpretation, what will follow is an effort to clarify Dilthey’s notions of law and jurisprudence understood as mediators between two systemic ‘second-order’ wholes, namely between what Dilthey calls ‘cultural systems’ and the ‘external organisation of society’, and what these second-order wholes would look like if they were used to develop a ‘law and society’ type of jurisprudence.

I noted above how Dilthey articulated his original aspirations through an architectonic where the human sciences were to be founded on a philosophical anthropology. This foundation would have provided the ‘first-order’ truths about the psychophysical life-unit in her social and historical contexts on top of which the more complex ‘second-order’ truths about cultural systems and the external organisation of society would be built.

Dilthey’s cultural systems are collaborative networks into which individuals enter with the aim of achieving designated purposes that can be reached through cooperation either more efficiently or exclusively. This purposiveness is characteristic of all cultural systems, and they can involve any aspect of social life, be it political, economic, religious

or cultural in the narrower sense (Dilthey 1991: 96). But in addition to such cultural systems that are entered into voluntarily for the sake of purposive cooperation, individuals are also born into existing structures that make up the institutional framework of the world that they inhabit. Dilthey calls such enduring institutional structures, like family and the state, the external organisation of society, and it provides the framework for establishing and maintaining relations of, for example, power and property:

The unruly force of his passions and his inner need for, and feeling of, community make man not only a component in the structure of cultural systems, but also a member of the external organization of humanity. Over against the structure which shows the nexus of psychic elements in the purposive whole of a cultural system, we now distinguish that structure which arises in the association of men as volitional beings (Dilthey 1991: 98).

In this way, Dilthey's architectonic vision of the human sciences begins to take shape. Its foundation is a philosophical anthropology the aim of which is to establish the first-order truths about the 'psychophysical life-unit' in her historical and social contexts. As I've argued above, Dilthey's foundationalist aspirations lead into a *cul-de-sac* and the turn towards a more vitalistic understanding of life. The foundation was meant to validate the study of two distinct and systemic wholes and to establish the second-order truths about the individual in her more complex interactions with others. Cultural systems provide the individual the different ways in which she enters into voluntary collaboration with others in order to achieve designated purposes, whereas the external organisation of society is an always already existing institutional framework that binds individuals together as volitional beings and that often makes collaboration possible to begin with. In terms of the individual human sciences that these systemic complexes represent, the former would include the more culturally oriented disciplines like philosophy, history and literature, that is, the humanities in the narrower sense, whereas the latter would include political science and its kin.

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So is law a cultural system, or does it belong to the external organisation of society? And in a parallel way, does jurisprudence as an academic discipline belong to the humanities in the narrower sense, or to the political and social sciences? If we reply intuitively from within the legal tradition, we would probably argue that law belongs to the latter. And consequently any interdisciplinary affiliations that jurisprudence might have with the humanities – understood here again in a narrower sense as the disciplines representing cultural systems – would take place through a ‘constant cross-referencing’ (Dilthey 1991: 99) that Dilthey sees as essential for the development of the human sciences as a whole.

But for Dilthey law has a much more important role to play. To claim that law belongs to both would be an understatement. In fact, law *is* that ‘constant cross-referencing,’ the medium that makes it possible for one half of the second-order truths to communicate with the other and to accordingly validate the human sciences as a whole:

the relations between the cultural systems and the external organization of society existing within the living purposive nexus of the socio-historical world point back to a reality which is the condition of all consistent action of individuals and in which, furthermore, both the cultural systems and the external organization of society are inextricably linked. That reality is *law*. It contains in an undifferentiated unity that which is then later divided into cultural systems and the external organization of society. Thus the law illuminates the nature of the separation which occurs and the various relations between what is separated (Dilthey 1991: 104).

Such a bold understanding of law compels Dilthey to deal with it from the two angles representing both cultural systems and the external organisation of society respectively. Dilthey begins his account with a rhetorical stab at the positivistic tradition: ‘Law is a purposive system based on a sense of justice as a constantly operative psychological fact’ (Dilthey 1991: 105). So like cultural systems in general, law is a purposive system enabling the voluntary and collaborative realisation of designated aims. The purposive character of law as a cultural system is, in turn, animated by a ‘sense of justice’ (*Rechtsbewußtsein*). Dilthey goes

to great lengths to emphasise that this sense of justice that transcends positive law is usually counterfactually 'sacrificed' in the construction of the 'conceptual models' of a 'systematizing spirit' unable to realise its own limitations (Dilthey 1991: 105). But for Dilthey the sense of justice is a 'psychological fact,' and he must accordingly also mean that it is a first-order truth on which the understanding of law as a second-order systemic complex must be founded.⁴

But law is not just a cultural system among others. It can only exist in terms of its parallel function of externally binding the wills of individuals into a stable and valid order. The resultant order, in turn, defines the relationships of individual spheres of power to one another and to the collective will. By integrating the wills of individuals into a relatively stable and permanent order, law creates the 'purposive nexus' that enables individuals as part of a unified collective will to achieve their legally designated aims. In other words, the purposive system of law is a 'correlate' of the external organisation of society where both presuppose the existence of the other. Just as law as a purposive system animated by a sense of justice must presuppose a unified will that resides in the external organisation of society, the external organisation of society, in so far as it too must account for the sense of justice as a 'psychological fact,' must also include within itself law as a purposive system (Dilthey 1991: 105-106). One cannot exist without the other.

The collective will that is anchored into the external organisation of society expresses law as imperatives coupled with an intent to enforce them. But it displays an impulse to enforce its legal imperatives regardless of how well or poorly developed the existing institutional framework may be. In other words:

the collective will, which supports the law, and the sense of justice of individuals work together in the development of law. Individuals are and remain dynamic, law-forming forces. On the one hand, law is shaped by their sense of justice, while on the other hand, it depends on the volitional unity which has been formed in the external organization of society. Accordingly, the law has neither wholly the features of the collective will nor wholly those of a cultural system. It unites in itself essential features of both types of social reality (Dilthey 1991: 107).

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Although for Dilthey all human action is by necessity purposive, not every purpose requires a systemic association or a purposive nexus in order to be realised. But often the ability to distinguish between cultural systems and the external organisation is simply a matter of choosing perspective which, perhaps, simply testifies to how unclear Dilthey’s own distinction between the two is. But we can, to take a completely random and incomplete example, satisfy many of our basic needs for nourishment through agriculture, and agriculture can be considered as purposive action in which we cultivate the soil in order to produce the desired crops. Some individual tasks like harvesting can be performed more efficiently through collaborative efforts, but neighbouring farmers bartering with agricultural services may well be regarded merely as a coordination of activities without the need of a formal systemic association. In addition to the hardships of nature, human life is, however, constantly threatened by the contending desires of other human beings. We may, if we stick with our example, enter into a dispute about our collaborative obligations as a neighbouring farmer contests her share of them. Seen from this perspective, a cultural system such as agriculture takes on new meanings because the ‘unbridled force of human passions does not allow man to fit himself into such a purposive system with deliberate self-control; rather, a strong hand holds each person within his limits’ (Dilthey 1991: 126).

This ‘strong hand’ is the state and its legal order. The state is not a voluntary association that would merely contribute towards the coordinated efficiency in, say, agricultural activities. Through its protective function and the enforceability of its laws, it is, rather, the very condition of association. In other words, law is also a function of the external organisation of society that guarantees the consistency of all action within cultural systems. It is anchored in the collective will, and it assigns individuals their respective competences of power in accordance with their tasks and positions in the cultural systems.

But because all wills, including the collective will of the state, generate purposive systems, the law is also a cultural system in this sense. The state may build public roads, or it may provide educational

services and health care for its citizens, and it often does so by legislating. Moreover, it does so by collaborating with its subjects. But what sets the law apart from other cultural systems is the sense of justice of individuals and its relation to the legal system. The collective will of the state cannot create law merely as an abstract idea. Drawing on what he calls the 'profound truth' of natural law, Dilthey paraphrases the so-called declaratory theory by claiming that law is 'not *made* but *discovered*' (Dilthey 1991: 127). Regardless of the different historical expressions of this 'profound truth,' natural law doctrine generated the idea of a systemic and purposive nexus of law from which the notion of positive law was then separated:

The state of affairs which the idea of natural law thus attempted to express provides the basis for one aspect of the relationship between jurisprudence and political science, namely, the relative autonomy of the former. Law is an end in itself. A sense of justice cooperates with the organized collective will in generating and maintaining the legal system. For this sense of justice embodies a volitional content whose power is deeply rooted in personality and religious experience (Dilthey 1991: 128).

The failure of natural law theory, as Dilthey sees it, was to consequently separate the purposive system of law, now understood as an end in itself and founded on the first-order truth of the sense of justice that all individuals exhibit, from its historical development. And for the Dilthey of the 1883 *Introduction*, this inevitably compromises the scientific status of jurisprudence as a human science. The only way in which this failure can be rectified is a two-way binding in which natural law theory is first complemented with the historical and empirical analyses that are common to all human sciences and, secondly and conversely, the conceptual abstractions of positivism are grounded in the facts thus established. This forced interdisciplinarity leads to a 'relative autonomy' claim in the sense that for Dilthey 'there is no special philosophy of law and that instead the task of such a discipline will have to devolve on a philosophically grounded system of the positive human sciences' (Dilthey 1991: 129).

4. Dilthey’s tragic failure

It is now time to bring the two different perspectives from which we’ve read Dilthey together and to draw some initial conclusions. Dilthey’s ideal for the human sciences is, without a doubt, holistic. Although he sides with the empirical tradition on many levels, he rejects its tendency to isolate individual phenomena into atomised truths that are unable to account for the richness of human reality. As he polemically asserts, it would be senseless to try to explain Goethe’s passions, intellect and artistic productivity from the structure of his brain or his physical properties (Dilthey 1991: 61).

Hence a reconciliation of the empirical and the theoretical is needed. Dilthey’s specific aim was to develop this ‘universal explanatory framework’ of the human sciences by, first, founding what he often refers to as ‘human nature’ on a set of first-order truths through a philosophical anthropology and, second, by expanding from that foundation into the second-order disciplines that study the psychophysical life-unit in her cultural and political contexts. Founded in first-order truths, the second-order disciplines can then provide a scientifically valid understanding of the human world as a systemic whole where the various cultural systems and the external organisation of society are brought together.

I noted how law plays a curious intermediate role in both second-order complexes. Within cultural systems, law is a purposive system with which the psychophysical life-unit collaborates with others in order to achieve designated aims. We can, for example, regard an agricultural cooperative as a legally constructed autonomous association in which the collaborative efforts at bartering services that bring efficiency to farming are consolidated into a more fixed structure. The cooperative clarifies the tasks of its individual members from primary producers to retailers, and it provides predictability in terms of the expected benefits. In this sense it has all the features of a cultural system.

But because a cooperative is also a legal construct that is defined in state legislation, it precedes the individual’s act of collaboration and, accordingly, functions in the external organisation of society, as well. It

defines what purposes a cooperative can be used for, what a cooperative member is entitled to, what individuals must do in exchange for their membership, what they can expect in return for their contributions, how the cooperative is governed, and the general mechanisms for monitoring its activities. Seen from the perspective of cultural systems, the cooperative requires the relevant legal concepts and institutionalised mechanisms in order to function. But conversely, seen as part of the external organisation of society, the legal construct of a cooperative would be an empty shell without the purposive element of its other side. If the second-order level of human life where individuals interact with each other in a variety of historical and social contexts is seen as the two systemic wholes, then law belongs to both but is not completely either.

But the question concerning the first-order truth of a sense of justice remains open. For without it Dilthey's notion of law would be left hanging in the air. In terms of second-order truths, law may very well occupy a curious intermediate position between cultural systems and the external organisation of society, but through the sense of justice, it also covers a 'slice' of the psychological first-order facts all its own. No other human phenomenon is dealt with in such detail. There is, for example, no 'sense of beauty' that would provide part of the foundational truths of aesthetics or art. Or at least Dilthey doesn't deal with any such more specific first-order truths. Except in relation to law.

We have good reasons to argue that Dilthey's original project, that is, the task of providing a scientific foundation for all the human sciences, collapses in its own impossibility. It either gets caught in the original dichotomy of the theoretical and the empirical from which it started without finding a way out (e.g. Reid 2001), or, alternatively, we can argue that through his vitalistic notion of life (e.g. Owensby 1994: 51-78) Dilthey abandons the project by aligning himself with the anti-foundationalism of life-philosophers like Nietzsche.⁵ Either way, the fate of a sense of justice as the first-order truth that underpins all law would have to be similar. It can either be the trace of a failed attempt to provide a foundation, or it can stand in for the vitalistic urges with which the individual attempts to appropriate her lifeworld.

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Perhaps this isn’t such a clear either-or choice after all. In his excellent analysis, Jos de Mul (2004) attempts to reconstruct the unfinished project that Dilthey, in a seemingly Kantian vein, called his ‘Critique of Historical Reason’ (see Ermarth 1978) and of which the 1883 *Introduction* was meant to be the first part. In de Mul’s reconstruction, Dilthey’s conceptual framework seems to resist the foundationalism that his transcendental presuppositions nonetheless suggest. And it is especially his notion of life that causes the tremors. In one of his notes Dilthey writes:

The expression ‘life’ formulates what is most familiar and most intimate to everyone, yet at the same time something most obscure, indeed totally inscrutable. What life is remains an insoluble riddle. All reflection, inquiry, and thought arise from this inscrutable [source] (Dilthey 2010c: 72).

In his later work, Dilthey presented the concept of worldview as the supposedly structured way in which individuals attempt to solve life’s ‘insoluble riddle’ (e.g. Dilthey 1976a: 139). But for de Mul, Dilthey’s attempt to overcome his own philosophical enigma creates a ‘*tragic* contradiction between the philosophical desire for universal validity and the realization of the fundamental finitude of every attempt to satisfy that desire’ (De Mul 2004: 154 [my emphasis]). The ‘tragic contradiction’ precludes a confident choice between one or the other. The desire can be neither fully satisfied nor completely denied. The foundationalist desire is always coupled with a lack that is sustained by the inevitable failure to satisfy it, while any attempt to surrender to anti-foundationalism is still animated by the desire to overcome it.⁶ Tragically man is unable to bear the radical ambivalence, contingency, and finitude of her existence. So in order to suppress these, she falls back on the type of hermeneutic understanding that a human science can provide:

Understanding ... is not an instrument that we can dispose at will but the unavoidable way we exist as ambivalent, contingent, and finite beings. Understanding does not rob us of these attributes but allows us to live with them. Hermeneutic understanding transforms the *tragic*

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of life into a *tragedy*. As in a tragedy, tragic fate is not overcome but is transformed into representations with which we can live (De Mul 2004: 372).⁷

One should, however, be cautious with tragedies. For if, as in Miguel de Unamuno's well-known formulation, 'the most tragic [and irresolvable] problem of philosophy is to reconcile intellectual needs with the needs of the heart and the will' (Unamuno 1972: 19), then what we are left with is simply a crippling contradiction and its lamentation. Tragedy as representation becomes the narrative or the worldview through which we mourn our tragic fate. This is a very common interpretation of the tragic, one that elevates human fate beyond the domain of the political into a more or less stagnated universal humanism. Such a humanism would, no doubt, have appealed to Dilthey, as well.

But there are other 'humanisms'.

In her nuanced re-assessment of Sophocles's *Antigone*, Bonnie Honig notes how the tragic heroine is usually associated with what Honig calls a 'mortalist humanism'. Caught between mourning and a death wish, the tragic protagonist of mortalist humanism can only eulogise over singular loss or sovereign excess, a limiting and undeniably ineffectual form of contestation. This would seem to resonate with de Mul's notion of Dilthey's tragic fate, as well. But by presenting a more Nietzschean reading of the tragedy, Honig claims that the tragic heroine normally associated with death and lamentation can also be 'resignified' through her more vitalistic features. Antigone represents death for sure as the grand tradition of philosophical readings of the tragedy will testify. But as, for example, the vengeful sister of Ismene, she also acts in ways that promote life. So Antigone's principled disavowal of her cowering sister is a vitalistic element usually either disregarded or simply subsumed under her tragic heroism. This combination of mortality and life generates 'a different humanism – an agonistic humanism – that might better inspire progressive democratic imaginations than common receptions of this ancient heroine as mortal (death-identified) or maternal (and mournful)' (Honig 2013: 30).

5. Dilthey’s minor jurisprudence

What does this mean for a ‘minor jurisprudence’?

In Dilthey’s case, we need to begin with what is less contentious, that is, with the second-order truths of cultural systems and the external organisation of society in order to first establish the ways in which law functions in the social and historical contexts of human life. This would provide no more – or no less – than a ‘law and society’ type of jurisprudence, albeit one dotted with the idiosyncrasies of a very particular ‘jurisprude’. On the one hand, Dilthey’s law includes purposive systems with which individuals pursue designated collaborative goals. One individual may wish to engage in profitable commerce through contractual arrangements, another to enhance her chances on the housing market by pooling resources through a building cooperative. On the other hand, law provides permanence and rigidity to those systems clarifying both their possibilities and their limitations even before individuals decide to collaborate. So contract law will specify what an individual is entitled to expect from such legally framed collaboration, while the legislation covering building cooperatives will provide predictability both in terms of possible benefits and protection should something go wrong. In Dilthey’s understanding of law, neither side can function without the other. As mere purposive systems, legal institutions would leave the individuals involved vulnerable to the power plays that usually go together with human interaction and defeat the whole purpose of the intended collaboration, while without the purposive element the same institutions would be reduced to empty shells.

But even in Dilthey’s own admission, such a ‘law and society’ type of jurisprudence would be shallow without the foundation that a sense of justice as a first-order truth provides. In the 1883 *Introduction*, that sense of justice was the ‘undeniable truth’ of natural law theories that positivistic approaches wrongly discarded in a wholesale fashion. Without it, law would, Dilthey felt, be devoid of the type of meaning that is essential for all human action. Dilthey never fully elaborated what such a sense of justice could entail. Which may be just as well.

For later all such first-order truths lost their foundational character and took on more vitalistic colours through Dilthey's notion of life. So in this more vitalistic phase of Dilthey's project, any sense of justice would have to be a conative impulse or an urge with which the psychophysical life-unit tries to appropriate the world in which she dwells. And the resistance that her efforts encounter provide meaning to these attempts. 'Life grasps life': an amorphous vitalistic urge attempts to capture something equally elusive. And whatever meaning there is to be had resides in that very elusiveness.

This is Dilthey's 'minor jurisprudence in historical key.' Like its 'major' counterpart, Dilthey's jurisprudence begins with an attempt to provide a scientific foundation for understanding law as an element of human life. The attempt ends in failure, not because of a deficiency specific to law, but because all such foundationalist aspirations are destined to fail from the beginning. Our aim cannot, of course, be the rehabilitation of Dilthey's original foundationalist project in the hope of amending its supposed deficiencies. That would be futile. But neither do we have the luxury of abandoning ourselves to its inevitable failure. Like a mistake that we can foresee but must, nonetheless, make, a minor jurisprudence would, rather, involve the acknowledgement of a 'tragic failure' by embracing the full potential of the vitalism that Dilthey ends up with. In those vitalistic terms, the 'minor jurisprude' is no different to the psychophysical life-unit that she studies. She is driven by the same conative impulses, and she encounters the same resistances as the being whose world she attempts to grasp. Indeed, her grasping can itself only be a conative impulse among others, a desire to understand, and her understanding can only take place at the pressure points where that impulse meets its resistant counterparts. Like Honig's Antigone, the 'minor jurisprude' is not fully determined by the failure of her foundationalist task because the task itself is animated by life. And so the jurisprude is doomed – or more appropriately, perhaps, delivered – to her tragic fate.

Endnotes

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1. After a few scattered editions, Dilthey’s collected works are now being systematically translated into English in selection (Dilthey 1991; Dilthey 1996; Dilthey 2010a; Dilthey 2010b; Dilthey 2010e; see also Dilthey 1976b). The main editor and translator of the selected works has written an excellent introduction (Makkreel 1992; see also Hodges 2007; Rickman 1979; Lessing et al 2011).
2. Interestingly enough, in Gregory Leyh’s edited collection of essays on legal hermeneutics, Dilthey is mentioned but once, and, moreover, merely as part of the title of Richard Palmer’s more general introduction (Leyh 1992: xix).
3. In an article from 1994, I tried to read Franz Kafka’s short story ‘In the Penal Colony’ as what I called ‘minor legal literature’ or ‘minor jurisprudence’ (Minkkinen 1994) by drawing on an analogy from Gilles Deleuze and Félix Guattari (Deleuze - Guattari 1986). Whatever Kafka had to say about law should not, so I claimed, be understood as a form of theodicy as it usually is, but, rather, as the possibility for a new ‘politics of desire.’ As such, Kafka’s texts were inherently resistant to attempts to box them into conventional literary taxonomies. And it was this inherent resistance that, for me, provided the portal into his ‘minor jurisprudence’, as well. The same resistance namely allowed me to read Kafka, the ‘literary’ author, as a ‘jurisprude’ without having to resort to any interdisciplinary ‘law and literature’ maneuvers. By contrast, the tradition of ‘major jurisprudence’ has always included a taxonomical insistence. As an academic discipline, it creates systemic unities by classifying formalised concepts and doctrines that have first been identified and isolated (on ‘minor jurisprudence,’ see also Goodrich 1996; Tomlins 2015).
4. Elsewhere Dilthey develops this idea of a sense of justice as a form of empathic understanding. Just as the individual esteems herself as a person and defends the domain of her rights, she must also acknowledge the value of the other’s personality and respect her domain: ‘Thus we develop a sense of justice and lawfulness. Many feelings are involved in this process, ranging from the impulse to punish wrongdoing, on the one hand, to a sense of fairness on the other.’ (Dilthey 1996: 85)

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5. This would also suggest that the 'kinship of vitalism' in which I've included both Dilthey as a 'minor jurisperite' and Deleuze is not as far-fetched as it may first have seemed (see e.g. Nelson 2007; Marks 1998; Colebrook 2010; Negri 2001).
6. I have elsewhere dealt with such a desire for truth as a 'first philosophy of law' (Minkkinen 1999; on the political implications of such a desire, see Etxabe 2013).
7. De Mul's notion of how understanding transforms the tragic into tragedy is reminiscent of the way in which Hayden White and the early Paul Veyne emphasise the narrative nature of historical understanding (White 1975; Veyne 1984).

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