THE LAW–MORALITY RELATION REVISITED
A Challenge to Established Traditions by the Australian Sceptical Approach

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Three long-established, competing frameworks for understanding the law–morality relation — the individual reason-based tradition (represented here by Rawls), the communitarian tradition (MacIntyre and Cotterrell) and the utilitarian or positivist tradition (Austin and Hart) — are challenged by some research into early modern thinkers like Hobbes, Hale, Pufendorf and Thomasius. More specifically, I use some work by Ian Hunter and David Saunders to present an approach to law-morality which I call the Australian sceptical approach. I present and promote this approach in terms of its two main features. The first is its use of historical research into a particular use of law in early modern Europe, by which law was combined with a pointedly restricted understanding of Western morality in a bid to stop the carnage being caused by religious wars — wars fought over competing visions of morality. The second is its deployment of this and other historical evidence in polemics against traditions that impose on the past and the present an over-arching philosophical position about, or theory of, law-morality, often in the service of arguments against the idea of law as a neutral instrument used to attain civil peace.

Introduction

At least three distinct frameworks for understanding the relation between law and morality have long been available to scholars concerned with the study of law and society.[1] One is the post-Kantian, individual reason-based framework, which, as its name suggests, locates morality in individual human reason and insists that it is this morality alone that is the foundation for law, a tradition to be represented here by John Rawls.[2] Another is the Aristotelian-Thomist communitarian framework, not without considerable Kantian influence, which

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[1] The disciplines or sub-disciplines included in this formulation might include, but not be limited to, law, legal studies, socio-legal studies, law and society, law in society, sociology of law and critical legal studies.

[2] Rawls (1971, 1993).

locates morality in the reason of the community and insists that it is this morality alone that is the foundation for law, a tradition to be represented here by Alisdair MacIntyre[3] and Roger Cotterrell.[4] The third, pushing in a different direction, is the utilitarian or positivist framework, which builds a philosophical wall to keep the domains of law and morality separate, to be represented here by John Austin[5] and HLA Hart.[6]

My primary aim is to present and promote a fourth distinct means of understanding law-morality, which I call the Australian sceptical approach.[7] I build this approach mainly from various works by each of Ian Hunter and David Saunders, though I do show how it relates to the broader history-of-thought tradition, of which it forms a distinctive part. This broader tradition, as it relates to the law–morality relation, has sought for some time to focus debate on some early modern legal and political thinking, especially on that thinking concerned to restrict the devastating effects of competing moral visions, usually as competing faiths or confessions, by restricting what was to be accepted within public life as morality. The works of Thomas Hobbes and Matthew Hale, writing in England in the second half of the seventeenth century, and Samuel Pufendorf and Christian Thomasius, writing in Germany only slightly later in that century and, in Thomasius's case, just into the next, provide good examples of this early modern thinking, though there are other writers from the period, like Hugo Grotius in the Netherlands, Jean Bodin in France and John Selden in England, who might also be mentioned.

The Australian sceptical approach is worth distinguishing from the broader history-of-thought tradition solely because of the dogged and uncompromising way in which it employs the broader tradition's two main features. The first of these two features is the use of detailed historical research into a particular use of law in early modern Europe, by which law was combined with a pointedly restricted understanding of Western morality — broadly, Judeo-Christian morality plus some features of ancient Greek and Roman morality plus the secular forms developed from this package — in a bid to stop the carnage being caused by religious wars, fought over competing visions of morality, and to prevent the recurrence of such wars, particularly in cases where they had developed into full-scale civil wars. The second feature is the deployment of this and other historical evidence in polemics against

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[3]   MacIntyre (1988).

[4]   Cotterrell (2002).

[5]   Austin (1861).

[6]   Hart (1958).

[7]   I cannot claim to have invented this label. I first heard it used by Robert Dingwall, at the international Law and Society gathering in Budapest in 1991, to describe the work of Hunter and Saunders (among others; he was kind enough to include my own work in this camp). I forgot about the term until very recently, when it was suggested to me by a colleague, Ian Cook, as a cover-all term for what I am trying to do in this article. In offering insightful comments on an earlier draft, he was completely unaware that I had heard the term, albeit only once, over four years earlier. I took the coincidence to be reason enough to use it in the way I do in what follows.

traditions that impose on the past and the present an over-arching philosophical position, or theory, of law-morality, often in the service of arguments against the idea of law as a neutral instrument used to attain civil peace — arguments sometimes known as 'critique'.

The fight against critique is certainly one intellectual battle in which the Australian sceptical approach stands out. Hunter traces the practice of critique back to some metaphysical philosophers' reactions against the work of the early modern law-as-an-instrument-to-attain-civil-peace thinkers. These reactions, he argues, were built around the 'Christian-Platonic pursuit of pure rational being', a pursuit 'that drove metaphysical philosophy for Liebniz through Wolff to Kant and beyond'. Hunter distances his position from that of any critical intellectual who 'views the past in terms of the unreconciled oppositions — between rationalism and voluntarism, intellectualism and empiricism — and finds his or her own ethical impulse in the need to repeat the moment of their Kantian reconciliation'.[8] Saunders, calling such intellectuals 'the new clergy of Enlightened critics', argues that in practising critique, they work to create 'a space of conscience ... as a zone of private freedom', one that is supposedly 'beyond the reach of the State and law ... their own "moral interior"'. One of the weapons these moral critics wield so successfully, he continues, is the idea of 'a moral "society", counterposed to the political State and projected in utopian images of future moral community and transformed humanity'.[9] In this way, they achieve much of their success by denying any history to their projects, presenting themselves instead as 'the disinterested voice of universal morality, not as one moral faction among others'.[10] Saunders is very keen that these 'heirs of their confessional forbears' learn a vital 'history lesson': 'When the early modern administrative State lost civil governance to spiritual salvation, all were engulfed by a war that none knew how to end.' Furthermore, he wants them to recognise the importance of the 'de-theologising programme that separated religion from government, morality from law, theology from public administration'.[11]

In using works by Hunter and Saunders as the basis of the Australian sceptical approach to law-morality, I am keen to confront the trend in the socio-legal academy that would have its members 'waging continual critical war on the early modern attempt to separate moral salvation from civil law and government'.[12] I follow these two thinkers in worrying about the continuing influence of Kant in this: '"Statutes and formulas ... those mechanical tools of the rational employment of [man's] natural gifts, are the fitters of an everlasting tutelage" ... Too tightly bound to worldly interests to carry humanity forwards to its truly moral future, positive law is at best a provisional substitute for inner morality and self-determination.'[13] It is as much of a

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8   Hunter (2001), pp ix–x.
9   Saunders (1997), p 8.
10   Saunders (1997), p 9.
11   Saunders (1997), p 85.
12   Saunders (1997), p 142.
13   Saunders (1997), p 142, quoting Kant.

concern to me as it is to Hunter and Saunders that, as the latter puts it: 'Kant's successors have the scent of moral victory. When law is reunited with morality, the Absolutist separation of religion from law … is reversed.' Like them, I fear that too many 'historical jurists have forgotten or never knew why Christian conscience was separated from the legal regulation of civil life'.[14]

I stress from the outset that the Australian sceptical attack on critique does not mean that Australian scepticism, or the history-of-thought tradition of which it is part, uses its historical research into early modern legal mechanisms to somehow debunk Western morality. It is not a Nietzschean project. As noted above, in treating seriously the history of particular legal mechanisms, the broader tradition also treats seriously the operation of Western morality, historicising it in the way the relevant early modern thinkers historicised it: not to reveal some hitherto hidden flaws of received religions — Hobbes, Hale, Pufendorf and Thomasius, being religious men despite occasional charges of atheism against some of them (particularly Hobbes),[15] accepted the moral values they received as vital guides to living and had no interest in any quest to condemn morality or, to risk an anachronism, to deconstruct it. These thinkers sought only to demonstrate that legal and political means to restrict the violence flowing from disputes about the best religious route to a perfect after-life were far superior to theological means, which simply compounded the violence.

I divide this article into two main sections. In the first, I further introduce the Australian sceptical approach as part of the broader history-of-thought tradition, with emphasis on its strident character. In the second, I set out some features — only a very limited number — of the three established traditions and offer some critical remarks about them. The remarks draw on the Australian sceptical tradition to highlight the limited historical awareness that dogs all three traditions because of their philosophical/theoretical nature. I hone in especially on the associated reliance on critique, a weakness displayed only by the individual reason-based and communitarian traditions. In the

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[14]   Saunders (1997), pp 142–43.

[15]   Saunders (1997), p 154 n 2 and Curley (1994), p xiii both dismiss various claims about Hobbes' supposed atheism. While Saunders (1997), p 154 n 2 leans towards the conclusion that he was a 'post-lapsarian Calvinist', Curley (1994), pp xiii–xv, drawing on evidence from Hobbes' autobiographical fragments and from the contemporary biographical notes of Aubrey, argues for a picture of him as an Anglican, though he admits that Hobbes was inconsistent. Rowse (1993), p 29 also has him as an Anglican, accepting his faith with equanimity when, in Paris in 1647, it was thought he was dying. As for Hale, Saunders (1997), pp 55–56 describes him as a very unusual Puritan, one who completely separated his piety from his work in the law. Hunter (2004a), p 675 offers a similar picture of the Lutheran Pufendorf, able to completely separate his religion from his work as a jurist and, in a piece with Ahnert and Grunert (Hunter et al, 2007, forthcoming), calls Thomasius's brand of Pietism an 'Epicurean form of Protestant Christianity' — 'a style of piety that was sceptical of the "visible" church with its creeds, sacraments and rituals, mute regarding the after-life, and focused on the achievement of inner peace through a calming of the passions and desires'.

conclusion, I assess the more pessimistic arguments of Hunter and Saunders about the chances of their type of arguments being heard in the modern academy above the din of critique.

It should be clear from this outline that the article is in no way intended as a comprehensive account of each of the three established traditions — a task far beyond its scope. As noted, I deal with only a few points from these traditions, taken from only some representatives of them and I deal with these points only in enough detail for them to collectively serve as a vehicle by which I can present and promote the Australian sceptical approach.

Three other points of clarification are necessary before I proceed. First, I do not grant to modern critical legal studies the status of a separate approach to law-morality, not in its 'society-as-morality' form,[16] its interpretative or hermeneutic form[17] or its ultra-Romantic 'aesthetics as anti-aesthetics' form.[18] These variations on the critical position are instead treated in the same way as the individual reason-based tradition or the communitarian tradition (or both), as 'heirs of their confessional forbears', taking up Saunders' claim that: 'Critique is religion by other means.'[19]

Second, I do not make a substantial distinction between morality and religion in dealing with the law–morality relation. This is not because I am not appreciative of the force of arguments about the need to do so — particularly arguments posed against the utilitarian approach[20] — but because the Australian sceptical approach, as I present it, effectively undermines the grounds for such a distinction, as was hinted at above, by arguing that the law–religion relations of early Christian, scholastic, Anglican, Lutheran and Calvinist (including Puritan) arguments became, in different ways in different countries at different times, the law–morality relation so familiar to the study of law and society. Rather, I follow Hunter and Saunders in putting the Australian sceptical approach's energies into distinguishing between, on the one hand, the notion of morality posited as a supra-law, supra-state guarantee of law and, on the other, those historicised and nuanced accounts of morality proposed by the relevant early modern thinkers who sought to contain morality by law in such a way as to help maintain civil peace — for example, Hobbes' account,[21] Pufendorf's account[22] and Thomasius's account.[23]

Finally, and consequently, I reject the tendency of moral philosophy to deride the restricted, historicised morality of these early modern thinkers by

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16   See Saunders (1997), esp pp viii–x, 32, 143–48.

17   See Saunders (1997), esp pp 107, 123–24.

18   For an explanation of 'aesthetics as anti-aesthetics', see Hunter (1992), esp pp 349–61; Wickham (2005); for its operation in 'critical legal studies', see Saunders (1997), esp pp 125–26.

19   Saunders (1997), p x.

20   See Fuller (1958), esp pp 635–38; Pennock (1986), pp 2–3.

21   Hobbes (1962), pp 88–97, 114–29; *Leviathan* Part I, Chs VI, X, XI.

22   See especially Hunter (2001), pp 160–66; Hunter (2004a), pp 675–81; Pufendorf (1934), pp 3–144; *De jure naturae et gentium* Book I, Chs 1–9; Saunders (2002).

23   See especially Barnard (1988), pp 588–96; Hunter (2001), pp 197–273.

drawing a distinction between what is properly moral and what is prudent or instrumental.[24] The concern is misplaced. The early modern thinkers formulated their proposals with the sole aim of preventing people from continuing to kill one another in the name of some moral vision or other. Their proposals helped to develop mechanisms — mechanisms now sometimes known, collectively, as the modern state under the rule of law — which could only achieve this aim by remaining neutral towards all such visions. In this way, these early modern thinkers deliberately created a norm that was neither strictly moral nor strictly prudential. They even developed their own versions of what was involved in natural law to help them achieve this. Their accounts of natural law were based on the idea that God's will gave human beings a natural inclination to avoid death and pain but, in making them voluntarist creatures, did not give them enough reason to always act in a manner consistent with this inclination. While this limited amount of reason, these early modern accounts had it, is certainly not enough for human beings to fully comprehend God's will, it is enough for them to understand and to seek the protection of a strong ruler or sovereign.[25] As such, the 'but this is not truly moral' objections of moral philosophy are not helpful to an understanding of the subject-matter of the Australian sceptical approach.

The Australian Sceptical Approach to Law-morality as a Part of the History-of-thought Tradition

What I refer to as the broader history-of-thought tradition is sometimes known either as history of political thought or intellectual history. Whichever name is used, it is a field marked by one or other — sometimes both — of the two attributes stressed above: a commitment to the idea that no piece of political thought (which, for early modern Europe, necessarily includes legal and religious thought) is without its own historical context; and a commitment to use the evidence gathered in pursuit of any one or any number of such contexts against any attempt to grant to some piece of thought or other the status of a timeless universal truth — that is, to grant it immunity from its own particular circumstances. The broader tradition began to flourish in the second half of the twentieth century as a particular style of the history of ideas, treating political thought as political discourses, as modes of intellectual formation, marking itself off from the history of individual thinkers. This is not to say, of course, that the more polemical historians of political thought turned their backs on the many years of high-quality scholarship in the history of ideas tradition — far

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24   For a brief history of some important examples of this widespread philosophical reaction, see Hunter (2001), esp pp 364–76.

25   For explanations of and samples from Hobbes', Pufendorf's and Thomasius's accounts of natural law, see Behme (2002); Condren (2002); Haakonssen (1996); Hobbes (1962), pp 145–68; *Leviathan* Part I, Chs XIV–XV; Hunter (2001), pp 85–96, 171–80, 234–51; Hunter (2004b); Kriegel (2002); Pufendorf (1934), pp 179–230; *De jure naturae et gentium* Book II, Ch. 3; Pufendorf (1991), pp 33–38; *De officio hominis et civis* Book 1, Ch 3. For details of the very particular debate between Pufendorf and Leibniz on natural law, see Hunter (2004a), pp 675–89.

from it. It is to say, however, that they sought to broaden the older tradition so that it might have a wider impact.

An important early marker of the development of the history-of-thought tradition, at least for English-language readers, was the publication in 1957 of JGA Pocock's *The Ancient Constitution and the Feudal Law*, a breakthrough text for this approach.[26] Other important examples directly relevant to the English-language study of law-morality include the translation of Blandine Kriegel's history of morality,[27] the translation of Reinhart Koselleck's history of techniques of critique,[28] the translation of Carl Schmitt's attack on political romanticism,[29] the translation of Noberto Bobbio's study of Hobbes' relation to the natural law tradition,[30] Martin Kriele's essay on the nature of the differences between Hobbes and Hale,[31] Stephen Holmes' essay on the complexity of Bodin's sixteenth-century account of sovereignty and toleration[32] and Hans Schilling's essay on what is actually involved in confessionalisation (a term used by many intellectual historians to help describe what was actually involved in the many different events often summarised by the term 'Reformation').[33]

It will be remembered that I am claiming that the Australian sceptical approach is marked as a separate approach only by dint of the fact that it is especially vehement in its pursuit of its quarry. It is not distinct in wanting to break from the history-of-thought tradition. Indeed, Hunter and Saunders derive much of their polemics against the critics of law and state from among these sources. To give another taste of just how vehement the Australian sceptical approach can be, we can focus for a few moments just on Saunders' *Anti-lawyers: Religion and the Critics of Law and State*.[34] He takes the history-of-thought approach and, as has already been glimpsed, develops it into a powerful attack on the 'social critique of law'. He husbands the historical research provided by the above-listed sources, as well as other historical evidence he gathers himself, to establish two propositions. First, law should be understood as a means of 'ordering' developed in the light of concerns about the extraordinary amount of blood-letting going on in early modern Europe — in the second half of the sixteenth century, especially in France, and the first half of the seventeenth century, especially during the Thirty Years War in Germany and the Civil War in England — to impose peace upon warring religious forces, forces which showed every sign of preferring the destruction

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26 Since revisited by him: see Pocock (1987). For Pocock's own account of the formation of a distinct history-of-thought approach, in particular the history of British political thought, see especially Pocock (1985, 1988).

27 Kriegel (1995).

28 Koselleck (1988).

29 Schmitt (1986).

30 Bobbio (1993).

31 Kriele (1969).

32 Holmes (1988).

33 Schilling (1986).

34 Saunders (1997).

of entire populations over any settlement which gave theological ground to their enemies. Second, this way of understanding law should be seen to be in direct opposition to (especially) the individual reason-based and communitarian approaches to the law–morality relation, which have never stopped trying to undermine it:

> After the carnage of religious civil war, in early modern Europe law emerged as one of the few non-religious orderings of civil life. Yet the separation of law from religion has never been complete. Religious fundamentalists and critical intellectuals alike persist in seeking to realign the conduct of government and the legal apparatus in accordance with moral principle — whether individual or communal self-determination.[35]

In this way, for Saunders, while the creation of this type of law as 'ordering' was 'an exceptional accomplishment' in 'a proselytising religious culture', today it is still an incomplete accomplishment, 'our own unfinished business'. The 'separation of spiritual discipline from secular government and conscience from law was never complete'. While one of the culprits behind this 'unfinished business' is undoubtedly religious fundamentalism, in the Western intellectual world another culprit needs to be confronted: 'the more refined yet no less incessant claims of critical intellectuals to reshape governmental institutions and the legal apparatus in accordance with a moral principle, typically some vision of individual autonomy or communitarian self-determination'.[36]

In line with this, Saunders goes on to argue that all purveyors of social critique of law (read moral critique) have successfully dehistoricised their very own persona — the critic. They see themselves, and are widely seen, as the true representatives of universal and timeless 'humanity', not at all as figures 'unable to find a place' in the operations of the state, not at all as those who thrive in 'safe and elegant settings' as they develop 'that habit of mind that criticises the State that supports it', not at all as those unable to face the fact that without the state and the law they so deplore, they would have 'no secure platform from which to project their vision of a new society and to preach their faith in redemptive moral politics'.[37]

What the critics have succeeded in fixing in place, as was suggested in the introduction, is 'the image of a moral society beyond the reach of the State', a society grounded 'in inalienable rights and fundamental freedoms. Stripped of its historical role as the grantor and protector of religious freedom, the State was recast as the great threat to freedom.'[38] The critics have 'reoriented themselves to a future society where morality would again govern and where men, escaping the confines of coercive legal citizenry, would at last be freely

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[35]   Saunders (1997), p i.

[36]   Saunders (1997), p viii.

[37]   Saunders (1997), p 9, quoting Koselleck.

[38]   Saunders (1997), pp 9–10.

themselves'.[39] In this way, critics have learned to promote their idea of 'the individual moral conscience ... as the ultimate site of an uncompromising universal adjudication' and their idea of having 'a moral society ... supersede the administrative State', and they have learned that the best way to promote these ideas is to produce 'a constant moral dissatisfaction with existing institutions', institutions they condemn as unworthy, when measured against 'images of a future moral society'.[40]

Three Established Traditions of Studying Law-morality and the Australian Sceptical Challenge

In this section, I repeat, I am outlining some aspects of the three established traditions by which to study law-morality and criticising them, both for the limited historical awareness associated with their philosophical/theoretical approaches and, in the first two cases, for their reliance on critique.

The defining feature of the post-Kantian individual reason-based approach to the law–morality relation is the idea that societies can only be properly formed and governed along the lines of a consensus reached *by individuals, qua individuals,* on the basis of their universally shared yet individual reason. This is to say that when the individuals come together to form the crucial consensus, they do not lose their individuality — the collective never dominates the individual. It is in this light that we must approach Rawls' remark that 'a society is well-ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice'.[41] If law is to be truly in the service of a morality driven by individual human reason, it must, according to Rawls, be consistent with the 'public conception of justice' — understood, of course, in individual terms.[42] This notion — an individual-centred 'public conception of justice' — is thus the key to Rawls' method of ensuring that law is always subservient to morality. By Rawls' influential account, morality, while sourced entirely in individual human reason, only gains its force by the fact that such reason leads many of its holders — those who have developed their reason thoroughly within themselves — into forming a rational consensus, the very basis of society and its government, and therefore its law. Rawls' argument is that society, government and law exist only inasmuch as fully reasoning individuals come together and achieve a consensus so strong that every one of them, as individuals, 'accepts and knows that the others accept the same principles of justice' and that 'the basic social institutions generally satisfy and are generally known to satisfy these principles'.[43] As Rawls says of his remarkable notion, 'one may think of a public conception of justice as constituting the fundamental charter of a well-ordered human association'.[44]

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[39]   Saunders (1997), p 10.

[40]   Saunders (1997), pp 10–11.

[41]   Rawls (1971), pp 4–5.

[42]   Rawls (1971), p 5; see also Rawls (1993), pp 212–54.

[43]   Rawls (1971), p 5.

[44]   Rawls (1971), p 5.

It might be thought that in *Political Liberalism*,[45] a book published over 20 years after the first edition of *A Theory of Justice* appeared, Rawls backed away from his commitment to the centrality of fully reasoning individuals. It is certainly the case that he put more emphasis in this book on the role of the state than he had in *A Theory of Justice*. In the later book he argues, in pragmatically insisting on the right over the good, that the state must maintain civil peace by actively remaining neutral in contests between different conceptions of the good.[46] Furthermore, he says that the question of whether or not the idea of fully reasoning individuals is central 'depends on whether we can learn and understand it, on whether we can apply and affirm its principles and ideals in political life, and on whether we find the political conception of justice to which it belongs acceptable on due reflection'.[47] But this apparent backing away is just that — apparent. Behind the state's neutrality, even behind this suggestion that we might take or leave the centrality of fully reasoning individuals, none other than the figure of the truly fully reasoning individual still stands. Just look at how the 'we' who is asked to do the taking or leaving, the 'we' who is invited to recognise and approve of the state's neutrality is characterised. This is Rawls' 'super we' — the philosophically aware super-reasoning individuals. Those whose reasoning capacities let them down, briefly or forever, might well choose not to accept the centrality of the idea of the fully reasoning individual, might well choose not to give their 'due' consideration and approval to the neutral state, acting on the behalf of those who are wise enough to give their blessing to it. No damage will be done. They can be acknowledged by the philosophical cognoscenti, their right to stop at insufficiently 'due' reflection recognised, for all that is really needed in Rawls's schema is the cognoscenti, the super-reasoning individuals.

The post-Thomist communitarian tradition also believes a consensus formed using human reason is at the centre of the law–morality relation. However, for thinkers in this tradition, individual reason is just a beginning-point: it can never be more than that. For them, reason has a role in morality only when it is expressed collectively, as a community. The community consensus decides which moral goods are the driving force, and objects, of law, leaving the individuals to play a very minor role. Indeed, the thinkers in this tradition insist that individuals be seen only as community members. It is because of this focus that the communitarian thinkers are critical of the individual reason-based thinkers, believing them to be too rationalistic, too much focused on individuals. MacIntyre criticises Rawls in just these terms.[48] For MacIntyre, moral goods like justice are only available via participation in a community, the only force that can possibly decide what morality is.[49] The law's purpose, for the communitarian tradition, is imposing communally determined morality.

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[45]   Rawls (1993).

[46]   I thank one of my anonymous referees for this important qualification.

[47]   Rawls (1993), p 87.

[48]   MacIntyre (1988), pp 337–48.

[49]   MacIntyre (1988), esp pp 1–46.

The idea that law might have a role as a neutral force for achieving social peace by actually preventing each and every community from imposing its particular morality on the others is anathema to communitarian thinkers, just as much as it ultimately anathema to the thinkers of the individual reason-based tradition to have the law play this role over and above individuals. This feature of the communitarian tradition can best be seen in the work of Cotterrell, a leading communitarian socio-legal scholar. Cotterrell insists that 'law's ultimate authority' lies in the morality of the community. He urges his readers to 'reassert links between law and morality, viewing morality as the varied conditions of solidarity necessary to the diverse kinds of relations of community that comprise the social' and, even more, to engage in a 'powerful moral critique of law'.[50]

The Australian sceptical approach, as I am building it, seeks to undermine the notion that this level of reason is a universally shared attribute of human beings, whether as individual reason or community reason, by historicising it. This approach traces the idea of universal reason back to the ancient, particularly Platonic, premise of *homo-duplex*. By the *homo-duplex* premise, as Hunter summarises it,[51] humans have two natures: a sensuous nature, by which they experience empirical realities; and a rational or intelligible nature, by which they reason, crucially allowing them the capacity to rise above their 'other', baser, empirical nature. Referring to *homo-duplex*, or at least to a key aspect of it, by the term 'quasi-Platonic moral cosmology', Hunter is especially keen for his readers to see what was made of this premise in its seventeenth century Christian-metaphysical revival, through the work of Leibniz in the seventeenth century, and especially the work of Kant in the eighteenth century.[52] It is not too difficult, I argue, to see the vital role *homo-duplex* plays in the thinking of adherents of both the individual reason-based approach to law-morality and the community reason-based communitarian approach. After all, in exploring the question of how 'the figure of the community of intelligible beings' became so widespread:

> Kantians — from Kant himself through to modern American Kantians such as Wood, Rawls and Korsgaard — have answered this question in a remarkably uniform manner. They argue that all individuals are led to this figure of thought because humans simply *are* sensuously affected rational beings, which means that all must experience the inner conflict between their participation in rational willing and the distractions of their sensuous inclinations.[53]

The direction of my Australian sceptical arguments on this front is clear enough: the notion of universal supreme reason, individual and community, is an intellectual device which, like all other intellectual devices, has a history

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50 Cotterrell (2002), pp 638–43.

51 Hunter (2001), p 20.

52 Hunter (2001), p x.

53 Hunter (2005b), p 15.

and limits. As such, its claim to the status of supra-empirical universal bedrock should be taken as a marker of its Platonic and Kantian heritage, not of its close fit with the nature of the universe. Hunter argues that 'such moral anthropologies as *homo duplex*' are best seen, 'not as reflexive recoveries of a universal moral identity, but as instruments of self-problematisation preparatory to particular kinds of self-cultivation or spiritual grooming'.[54] From here, I suggest, it is easy enough to see the role the *homo-duplex* device actually does play:

> The role of the *homo duplex* figure is to induct those exposed to it into a particular way of relating to themselves, namely, as beings capable of pure rational intuition and self-governance but distracted by sensuous inclinations and desires. Transmitted to university students via accounts of the limits of the human understanding and will — in comparison with a divine mind and 'holy' will — this way of relating to the self is designed to induce a particular kind of self-dissatisfaction: how galling that my capacity for pure moral willing should be corrupted by my sensuous inclinations. This induced metaphysical pathos is in turn the stimulus to a work of intellectual self-refinement, imagined in terms of transcendence of the lower sensuous self and participation in the community of rational beings. The result is the spiritual grooming of the metaphysician, culturally recognised as a personage whose inner rational self-purification has given him access to the 'higher' noumenal standpoint of a being no longer mired in the world of space, time and sensuous interests.[55]

In this way, for me, every adherent of the individual reason-based approach to the law–morality relation, such as Rawls,[56] as well as every theorist of the communitarian tradition, should be seen to be people taking on a 'culturally recognised persona', one which allows them to assume that their own 'inner rational self-purification' has given them access to a 'higher' standpoint, to assume that they are 'no longer mired in the world of space, time and sensuous interests' as they go about the business of imposing a particular vision of morality on the instrumental operation of law.

An Australian sceptical argument that I would apply to the individual reason-based tradition alone is one that historicises the notion of the public conception of justice, showing that Rawls' approach actually side-steps the empirical history of its own assumptions about 'public'. In this way, I would

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54   Hunter (2005b), p 16.

55   Hunter (2005b), p 16.

56   In presenting an Australian sceptical response to Rawls' formulations, it is necessary that I say something about Rawls' occasional adoption of Hobbesian propositions, for it is sometimes argued (see, for example, Campbell, 1981, p 88) that Rawls is in fact borrowing quite a deal from Hobbes' 'social contract' theory. In the two of Rawls' texts featured here, it turns out Hobbes is little more than a whipping boy, providing Rawls with bleak images of the 'state of nature' that suit his philosophical framework. See Rawls (1971), pp 240, 269, 346; Rawls (1993), pp 54, 287, 347.

have this argument undermine claims by the proponents of the individual reason-based approach that this notion, too, is universal. That is, I would use it to deny claims like Rawls' that the notion is 'implicit in the public political culture of a democratic society'.[57] In other words, where the individual reason-based approach seeks to provide a philosophical basis for the universality of what it calls 'public', I would counter with historical arguments drawn from the Australian sceptical approach. These historical arguments would thereby be offered in support of a quite different notion of the 'public', one which encapsulates the idea that law was and remains the main public weapon of a bid to put an end to the public expressions of religious feelings which were, in the sixteenth and seventeenth centuries, intended to give people the strength to kill, in the name of the salvation of those killed as well as those doing the killing.[58] For the Australian sceptical approach, of course, this remarkable legal effort was an empirical achievement, not a metaphysical one. As such, it cannot be taken to be the basis of a philosophical account of the nature of 'public', a 'general theory' of 'public'. Instead, I suggest, the best that can be done — and this is the best that the Australian sceptical approach can ever do, being, I stress again, a historical approach rather than a philosophical or theoretical one[59] — is to retrieve the details of the achievement, highlighting the differences in its form in different countries and highlighting its fragility and partiality, in a bid to prevent it being taken for granted.

One example will have to suffice here, to do with the formation of a legal conscience in England.

The English Calvinists of the early seventeenth century, Saunders tells us, sought to impose their own form of polity above the civil polity, in their bid to build a new '"sphere of relations" … relations [that] were to be "the model for all social life"'.[60] The Puritans, as they have come to be known, were determined that 'the courts of men and their authorities' be always 'under conscience'.[61] The effect of the Puritan intention, Saunders argues, was to subordinate 'Positive law … to Christian conscience'.[62] For Saunders, while the 'Puritan lifestyle produced remarkable men and women, able to set … themselves above the worldly sphere' by great discipline and restraint, their success in promoting the idea that they were 'a law unto themselves' was equally a success in promoting the idea that 'existing law' can never have 'an authentic ethical value of its own'.[63] He quotes Thomas to help show that the label 'Age of Conscience' is appropriate as a description of seventeenth century England: 'For much of the century it was generally believed that conscience, not force of habit or self-interest, was what held together the social and political order … Every attempt by the State to prescribe the forms of

[57]   Rawls (1993), p 223.

[58]   Saunders (1997), p 75.

[59]   I thank one of my anonymous referees for insisting that I stress this point.

[60]   Saunders (1997), p 19, quoting Little.

[61]   Saunders (1997), p 19, quoting Little.

[62]   Saunders (1997), p 19.

[63]   Saunders (1997), p 20, quoting Little.

religious doctrine and worship tested the consciences of those who believed it was their duty to obey the laws of the land but were also persuaded of the truth of a rival creed'.[64]

Against this supra-social, supra-political, supra-state notion of conscience was pitted the alternative notion advanced by Hobbes and by Lord Nottingham, among others: 'a conscience that was strictly "civil and political", namely pacific and prudent'.[65] On the one hand, then, was a religious-moral conscience 'regulated by the "truth of a creed"', while on the other was a legal conscience, 'regulated by the "laws of the land"'.[66] The legal type of conscience was developed over several centuries. Saunders focuses on the influence of the publication, in 1528 and 1530, of two dialogues by Christopher St German, 'a barrister of the Middle Temple in London', under the title *Doctor and Student*. St German deliberately set out 'to demonstrate that the common law rather than the decrees of the church should govern the consciences of Englishmen'.[67] St German's basic argument eventually became widely accepted in the common-law milieu and, by the end of the sixteenth century, Selden, Hale and Lord Nottingham were all arguing forcefully about the need to keep religious conscience out of the law.[68] It was, at least in part, on the basis of the official separation of law from religious conscience in the court of equity that the law's 'positivity' was founded: 'This self-limiting conscience of the court is the law's positivity, its delimitation of its jurisdiction and its objects of administration.'[69]

This separation, it must be remembered, was achieved in a climate in which 'Christian enthusiasms ... sought to impose confessional conscience across the whole of life'. It was clearly no mean achievement, making it 'possible to adjudicate legally rather than confessionally'.[70] As Saunders says, with considerable understatement, it 'merits our appreciation'.[71]

An Australian sceptical argument that I would apply to the communitarian tradition alone is one concerned to build on the point I have made quite a few times, albeit obliquely, that 'community' more often than not refers to a 'community of souls', to 'moral community'. This is to say that, more often than not, 'community' refers to that force which the law had to deal with in the early modern era in order to achieve and maintain civil peace: 'The population of citizens was overwhelmed by the community of souls' such that the state had to separate itself from the church, to 'de-confessionalise' its domain.[72] I would use this argument, with the support of the historical

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[64] Saunders (1997), pp 21–22, quoting Thomas.

[65] Saunders (1997), p 22.

[66] Saunders (1997), p 22, quoting Thomas.

[67] Saunders (1997), pp 23–24, quoting Yale.

[68] Saunders (1997), pp 25–26.

[69] Saunders (1997), p 26.

[70] Saunders (1997), p 27.

[71] Saunders (1997), p 29.

[72] Saunders (1997), pp 8, 15.

evidence the Australian sceptical approach provides, to demonstrate the lengths to which early modern thinkers like Pufendorf and Thomasius had to go to take the law out of the hands of 'the community'. Perhaps the best example is the determination of these two German thinkers to help found a new body of law, one designed precisely to ensure that the church could not dominate the state, one which served a form of sovereignty restricted 'to the purely worldly domination of a territory', a new form of natural law that became a new form of public law.[73]

In the foreword to his 1707 translation of Grotius for a German audience, Hunter tells us, Thomasius focused especially on '*jus publicum* and *Staatsrecht*', or public law of the state.[74] Hunter pays particular attention to the form of *Staatsrecht* that both Pufendorf and Thomasius intended would completely separate state from church, 'the theologically indifferent *Staatskirchenrecht*':

> It was indeed through the protracted elaboration of the political-legal instruments required to deal with the religious civil war that German political or public law ... gradually became independent of Roman law, employing the latter's categories for the scaffolding for these great works of legal construction, but filling them with contents suited to purposes unknown to the Roman legists.[75]

This move effectively 'detached German *jus publicam* from all higher-level moral and theological ends, thereby allowing it to be treated as a set of purely instrumental commands required to achieve social peace'.[76]

Before we leave the communitarian tradition and move to the utilitarian tradition, I want to stress how important Cotterrell thinks it is that communitarian accounts of law-morality be posed as 'theories', specifically 'to address the nature of contemporary law', to help law 'to map and organize the sociolegal realm'.[77] He does not, of course, supply a discussion of the historical circumstances in which the idea of separating theory and fact was generated, believing theory to be universal and timeless. In fact, as I have suggested, these circumstances had much to do with the attempt by philosophy to impose itself as a universal, timeless means of knowing. As a ready guide to

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[73]   Only the particular forms of German public law discussed below are meant by the term 'public law' here. By sticking only to particular instances of law in this manner, I am not allowing the Australian sceptical approach to buy into Austin's taxonomical concern that the distinction between public and private law is ultimately meaningless — 'erroneous and pregnant with error ... every department of law, viewed from a certain aspect, may be styled private: whilst every department of law, viewed from another aspect, may be styled public': Austin (1861), p cvii.

[74]   Hunter (2001), pp 63, 76–77.

[75]   Hunter (2001), p 83.

[76]   Hunter (2001), pp 83–84; see also Hunter (2004b, 2005a); Thomasius (2004, 2007, forthcoming).

[77]   Cotterrell (2002), p 636, n 2).

the Australian sceptical response to any demand for such theories — which will always, remember, be a historically based approach — a one-line point from Saunders is hard to beat: 'Theories that would transcend circumstance have ... their own circumstantial conditions.'[78] From this perspective, of course, 'the theorist' becomes a figure who announces his or her presence by 'claiming to see the hidden structure of underlying rules that the pre-theoretical [investigator] does not even know to look for'.[79]

It is this line of Australian sceptical criticism, I argue, that best fits the utilitarian tradition. This tradition, as was noted in the introduction, is as keen as the Australian sceptical approach to have law stand on its feet and not bow down to morality, as the other two established traditions demand it should. But where the utilitarians are pointedly philosophical — seeking to build a general philosophical or theoretical means to show how law and morality can and should be separated — the Australian sceptical approach is situational, empirical and historical, in the ways we have seen. Let us now turn to some details about the utilitarian tradition, by way of brief summaries of each of a work by Austin and a work by Hart, and to a detailed example which demonstrates how different the Australian sceptical approach is from its utilitarian cousin.

Austin's foundational *Province of Jurisprudence Determined,*[80] first published in 1832, is a treatise born of the utilitarian philosophical project, yet with clear political intent — 'Bentham and Austin were not dry analysts fiddling with verbal distinctions while cities burned, but were the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws'.[81] Austin's book, surely one of the more methodical texts ever produced, distinguishes the ground of both a general and a particular jurisprudence — each of which deal with positive laws — from the ground occupied by any one of the following three categories, with which jurisprudence is too often confused: 'The divine laws, or the laws of God: that is to say, the laws which are set by God to his human creatures'; 'Positive morality, rules of positive morality, or positive moral rules'; and, 'Laws metaphysical or figurative'.[82]

Hart's famous essay 'Positivism and the Separation of Law and Morals'[83] is a clear exposition of the separation of law and morality by which the tradition is usually defined. Hart is sure that Bentham and Austin did not reject 'the intersection of law and morals', for example accepting that 'many legal

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[78]   Saunders (1997), p 52. Another guide to Australian sceptical criticisms of the role of theory and theorists can be found in the collection of seminar papers from a seminar entitled 'History of Theory', with an introductory essay by Hunter, gathered on the website of the Centre for the History of European Discourses: www.ched.uq.edu.au/theory.html.

[79]   Saunders (1997), p 54.

[80]   Austin (1861)

[81]   Hart (1958), p 596.

[82]   Austin (1861), p xxxix.

[83]   Hart (1958).

rules mirrored moral rules or principles'.[84] Instead, they insisted on only two things: 'it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law'.[85] He goes on to defend the tradition in terms of its separation of law from morals, its 'purely analytical study of legal concepts' and its use of the 'imperative theory of law — that law is essentially a command'.[86]

The rigorous philosophical nature of both these thinkers' projects is plain to see. While neither is a stranger to history, using it often, they always use it only to buttress their philosophical approaches — in Austin's case, to help build a guide to jurisprudence that will be good for all circumstances. One of the clearest examples of Hart's commitment to philosophy comes in one of his discussions of/replies to critics of utilitarianism, which are dotted throughout his piece, in this case Radbruch's objection that Nazi law was so immoral it could not be called law. Hart argues that a law can be disobeyed because it is immoral but it is still a law, leaving the distinction between law and morality intact.[87] Hart fails to see the possibility of dealing with the separation between law and morality in purely historical terms — as an artefact of particular moves around the de-theologisation of the civil sphere for the sole purpose of achieving and maintaining civil peace, in particular ways in particular places. Hart, like Austin and Bentham before him, is not prepared to let the historical evidence stand as proof that the separation of law and morality was and remains entirely empirical, with no lessons to be learned for the sake of

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[84]   Hart (1958), p 598, quoting Austin.

[85]   Hart (1958), p 599.

[86]   Hart (1958), p 601.

[87]   Hart (1958), pp 615–21. Compare Hart's philosophical way of dealing with Nazi law's relevance for law-morality (and, for that matter, the equally philosophical route taken by his main critic, Lon Fuller — see Fuller (1958), esp pp 646–61), with one of Saunders' historical asides. In defending the early modern project of historically separating law from morality, Saunders confronts the by now standard sociological argument against the 'de-confessionalising' of law and government, itself a general, universal statement, this time as a piece of 'social theory'. This standard sociological argument has it that: 'Nazism is what eventuates when formal law and bureaucratic government go unchecked by moral principle.' (Saunders, 1997, p 143) The most prominent example of this argument in sociological theory is Bauman 1989. Saunders gathers evidence to establish that the '"Utopian self-exultation"' of the Nazis, the source of their '"hitherto unprecedented crimes"', was a product not of their adherence to the separation of law and morality, but to their total rejection of this tradition (Saunders, 1997, p 143, quoting Koselleck). 'The Nazi political regime viciously attacked the professional neutrality of German State lawyers and bureaucrats for following "an enterprise ... empty of moral worth" and a "merely external and formalistic concept of duty" ... With the Nazi seizure of power ... an overwhelming moral and political fervour "superseded the conventional dualism of state and society, as well as the separation of powers and the positivist tradition in private and public law"' (Saunders, 1997, p 143, quoting Caplan).

humanity, no general philosophical import — though, of course, with long-standing and continuing practical import.

A useful way to illustrate this important distinction between an intellectual means to build a universal system for separating law and morality on the one hand, and a more situational, relevant-only-to-some-circumstances-in-some-places account of some instances of its separation on the other, is to recall aspects of the exchange between Hobbes and Hale over the former's attack on the common law in his *Dialogue Between a Philosopher and a Student of the Common Laws of England*. As Hobbes' command theory of law is a touchstone of the utilitarian tradition, Hobbes' side of the exchange can be taken to be a prototype of this tradition's way of approaching law-morality, while Hale is, albeit on this matter only, a more important figure for the Australian sceptical approach to law-morality than is Hobbes.

Saunders pays much attention to Hale's direct response to Hobbes — his 'Reflections on Mr Hobbes his Dialogue of the Lawe', widely circulated and debated as a response to the even more widely circulated and debated *Dialogue*[88] — to establish two joint propositions. The first proposition is that, where Hale treats 'the common law as a definite but limited exercise of reason, inseparable from the uses which historically constituted that particular legal conduct ... Hobbes was less the positive realist ... than a philosophical fundamentalist promulgating a normative order abstracted from circumstance'. The second is that, 'Where Hobbes treats particular practices that are transparent to a reason that is universal, Hale sees particular conducts that are distinguished by their locally "habituated use and Exercise" of reason'.[89]

In line with these propositions, Saunders highlights some of the more extreme propositions Hobbes puts in the mouth of his Philosopher, such as the one that claimed 'that, thanks to his natural reason, he could master the legal art in no time at all' — 'within a Month, or two make my self able to perform the Office of a Judge'.[90] Hale was able to counter this point by reversing 'Hobbes' dismissal of existing law as an inferior practice of reason': 'Taking up the cause of law's technical reason ... the prudential Hale is proof against perfectionist claims.'[91] He provides a quote from Hale to back up this vital point:

> The Inconvenience of an Arbitrary is intollerable, and therefore a
> certain Lawe, though accompanied with some mischiefe, is preferrable

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[88] Saunders (1997), pp 40–41. The practice of widely circulating and debating important arguments in preference to, or preparatory to, publishing them was quite common at the time. Hobbes' *Dialogue* was not printed until 1681, two years after he died and six years after Hale died, while Hale's 'Reflections' was not printed — despite its wide currency in the late seventeenth century and to some extent since — until 1921 (Saunders, 1997, p 159, n 6). Hale's 'Reflections' is available as an appendix to one of the volumes of Holdsworth's history of English law (Holdsworth, 1945).

[89] Saunders (1997), pp 41–42.

[90] Hobbes (1971), p 56.

[91] Saunders (1997), p 42.

before itt. But it is not possible for any humane thing to be wholly perfect.[92]

Hale comes out on top here, this is to say, not by countering Hobbes' philosophy-to-provide-all-the-answers with a common-law version of the same thing, but by doing precisely the opposite. For Hale, 'common law reason offers no ... magic instant. On the contrary, it is the slow and unplanned aggregate of many judgments.'[93]

In his points against Hobbes, Hale might just as well be commenting on the great theorist's modern-day heirs in the utilitarian tradition: 'There is no short cut to lawyerly competence via "Theoryes". The alternative to theoretical breakthrough is more arduous and less exciting.'[94] In other words, 'the limits to the practice of English legal reason are no disadvantage, given the particular purpose of that reason'.[95] For Hale, as for so many other common lawyers, 'much reading, observation and study', along with 'administrative function and professional routines', provide the practice of law with more than enough coherence and consistency, 'a ground in principle of foundation in theory' is unnecessary.[96]

Conclusion

Are Saunders and Hunter right to feel pessimistic about the chances of their type of arguments being more widely adopted in the law-and-society academy or in the humanities academy? To help provide some context for an answer, here are four brief examples of expressions of doubt from Saunders, one of them echoing Koselleck's doubt, and one from Hunter:

> This will not find easy acceptance, given our own constant exposure — through German Romanticism and critical theory — to moral criticism of the State.[97]

> If Koselleck is right, with ever more students trained by critical intellectuals ... there will be a persisting religious revenge on existing institutions.[98]

> those few ... who argue for an anti-theocratic plurality of 'orderings of life' ... risk rejection in a humanities academy more theological than it knows.[99]

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[92]   Saunders (1997), pp 43–44, quoting Hale.
[93]   Saunders (1997), p 44.
[94]   Saunders (1997), p 44, quoting Hale.
[95]   Saunders (1997), p 44.
[96]   Saunders (1997), p 45, quoting Hale.
[97]   Saunders (1997), p 85.
[98]   Saunders (1997), p 142.

> The separation of law and morality is anathema in an academic milieu
> where moral rules and political principles are taken as the proper basis
> for law and government.[100]

For his part, Hunter is concerned that, especially because they are based
on the retrieval of a 'bleak Epicurean' cosmology 'suited to a Europe still
dealing with the aftermath of a period of protracted religious warfare', the type
of arguments he employs will be 'unfamiliar and hostile' to most modern
readers.[101]

As a preamble to my answer, as to whether the two thinkers are too
pessimistic, I point out that all of the remarks reproduced immediately above
were composed and published before the terrorist attacks on New York and
Washington took place, let alone those in Bali, Madrid and London. At that
time, I suggest, it was a reasonable of them to guess that the reception of their
approach would be forever coloured by the tendency of most people in the
academy to see human beings as morally worthy and ultimately deserving,
rather than as fundamentally dangerous.

In the light of my judgment that the intellectual climate has changed, even
if only marginally, such that their type of thinking will now be allowed a better
hearing than it could have hoped for five years ago, my answer is to say, with
some trepidation, that Hunter and Saunders are not right to be so pessimistic.
Maybe now there is more room in the academy for their type of arguments,
which I have here fashioned into an 'approach' — more room, that is, for
arguments dedicated to the retrieval and re-presentation of some legal and
political thinking that succeeded in limiting widespread killing born of
competing moral visions, where strictly moral thinking had only made the
situation worse. It would be rash to go any further than 'maybe', so that will
have to do.

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[99]   Saunders (1997), p 143.
[100]   Saunders (1997), p 143.
[101]   Hunter (2001), p x.

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