



## Chapter One-A

# The Basic Structure and the Methodology of the Argument

At every level of organization, from the presumably hard-wired level of memory organization to the level of the design of social institutions, the best possible designs, given the constraints of finitude and time pressure, ... include some measure of arbitrariness and wise risk-taking. The [unconscious] organization of memory guarantees that only some approximately appropriate subset of relevant points will occur [consciously] to one in the time available. Any individual's personally developed style of self-control must buy some efficiencies at the expense of gambles on what is to be encountered. ... [As a result,] we all know the [following] feeling at times: the terrible existential funk into which ... we ... slid[e], self-defeatingly ... [*when some gambles have not gone our way.*] Fortunately, for most of us, these depressions soon pass, and we return to some constructive engagement ... with the world. *We break out of our slump, like the golfer who finally sees the wisdom in the curious advice of the pro: keep your head down and follow through.* Since we all know this feeling, we can all appreciate the ominousness of anything that purported to be the discovery or proof that free will is impossible for us. Having good reasons for wanting free will *is not*, of course, having good reasons for believing one has free will. ... What we want when we want free will is the power to decide our courses of action, and to decide them wisely, in light of our experience and desires ... We want to be agents, capable of initiating, and taking responsibility for, projects and deeds. All this is ours ... as a natural product of our biological endowment, extended and enhanced by our initiation into society. ... *There are real threats to human freedom, but they are not metaphysical.* There is political bondage, coercion, the manipulation inducible by the dissemination of misinformation, and the 'forced move' desperation of hunger and poverty. No doubt we could do a lot more to combat these impositions on our freedom, were it not for the curious sort of *self-imposed bondage* that we create by the very exercise of our freedom, and in the very acknowledgment of our responsibility for the chains, ropes, strings and threads of commitments (explicit and tacit) that tie us to our family and friends, that tie us to our life projects, and that make us increasingly immobile by appeals to radical action. ... I close with some advice on how to respond to these challenges ... Inquire closely about just what variety of free will is supposedly jeopardized by the argument. Is it, in fact, a variety of free will worth caring about? ... Ask yourself: can I even conceive of beings whose wills are freer than our own?

Daniel Dennett

## A. The Basic Thesis

The basic thesis of this text is disarmingly simple. It goes something like this ...

The way the vast majority of us think about the self, consciousness and free will is incorrect – dramatically out of step with what the majority of neuroscientists, cognitive psychologists, social theorists, economists and analytic philosophers currently have to say about those subjects. One consequence of these erroneous views is that the manner in which the majority of us understand ‘freedom’ – as a metaphysical term – is sharply at odds with how things actually are. We replicate similar kinds of errors when we think about how various forms of human association are constructed and how change actually occurs within such associations. Once again, epistemological fallacies with regard to social theory have the consequence of leading us to attribute far greater ‘freedom’ to groups (and individuals within groups) than they actually possess. This second misattribution of autonomy results in institutional political arrangements and constitutional doctrines that operate in a manner contrary to what we know about the human condition.

This book does not attempt to describe the self and the social correctly in order to establish basic truths about the world. Its descriptive efforts have a more modest, primarily instrumental end: an intuition that an accurate understanding of the self and the social will assist us in putting our constitutional theories and practices on a more solid footing. The book’s dual desire to reconceptualise ‘freedom’ in terms of ‘flourishing’ and to re-describe the commitment to ‘deliberation’ in politics in light of the more felicitous nomenclature of ‘experimentation’ is driven by a single goal: to offer a reasonably novel argument for altering a number of constitutional doctrines and political institutions so that they better fit the conditions under which we live in South Africa.

The first part of the introduction lays out the structure of the thesis and its methodology. I explain how my use of intuition pumps and experimental philosophy are designed to make controversial claims easier to swallow. I then trace developments in social theory that shore up the conclusions previously drawn up about the self. By breaking metaphysical bottlenecks regarding individual autonomy, it becomes easier to demonstrate how radical change in our society is possible without recourse to outré conceptions of free will. In a similar vein, arguments mounted in favour of choice architecture, evolutionary modelling and social capital theory are meant to nudge us away from staid classically liberal constitutional doctrines.

This broad project inevitably traverses a number of controversial subjects. Human beings have navigated and negotiated virtually every conceivable argument regarding free will and determinism over the last two and a half millennia. No claim here will settle this ancient debate. Likewise, relatively new disciplines, such as neuropsychology and choice architecture, attract a fair amount of criticism with respect to their most basic presuppositions. As a non-specialist in these fields, all I can say is that the positions that I stake out appear substantially more cogent than alternative arguments.

## B. Structure of the Text: The Self; the Social; the Constitutional

In some ways, this text begins at the end. The next section of the introduction (Chapter 1B) engages the limitations of several dominant theories that ground South African constitutional

discourse. My aim is to show how each set of working assumptions can be traced back to errant understandings of freedom in the context of the self and the social. These limitations in our existing metaphysics lead to the search for better explanations of the self in Chapter 2, a description of, and a prescription for, the mechanics of constructive change in social formations in Chapter 3 and an account of the basic tenets of experimental constitutionalism when married to a politics of flourishing in Chapter 4. After rehearsing this marriage of experimentalism and flourishing, Chapter 5 looks at the two primary theoretical innovations associated with experimental constitutionalism – shared constitutional interpretation and participatory bubbles – as well as a number of other supporting tropes. It then identifies a dozen species of political institutions and judicial doctrines in South Africa that currently hold out the promise of experimental governance. Chapter 6 slices up South African public law somewhat differently. It narrows our focus to two sectors: housing and education. The chapter indicates how our politicians, bureaucrats, citizens, social movements, lawyers, academics and jurists have already made use of the more rudimentary forms of experimental design implicit in our basic law. Questions of whom and what this radical, but constrained, approach to constitutional theory serve are taken up at greater length in both Chapters 4 and 7. The Court's gloss on the right to dignity, the right to equality, civil and political rights, community rights and a host of socio-economic rights reveal an intention to make good the promise of both traditional forms and revolutionary forms of individual flourishing and communal flourishing. In Chapter 8, the reasoning and the holdings of a score of Constitutional Court cases are compared with results that one might expect from a mode of adjudication fully committed to both experimentalism and flourishing. Chapter 8 reminds us that we live in a democracy and that emergent experimental institutions serve us best when they invite the participation of an active citizenry. The reader may be as surprised as the author to find that the Court has moved, over the last few years, towards such commitments, and that such commitments have, in a number of cases, yielded better results.

To make clear the cash value of the conclusions reached in each part of this thought project, the book examines the antics of objects, phenomena and practices with which we are all too familiar. Chapter 2 surveys driving, the composition of music, video games and spelling to explain the role consciousness plays in the self-correcting feedback mechanisms of human cognition. Chapter 3 utilizes psychotherapy, golf instruction, legal theory and triple bottom line corporate strategy to explicate how critical engagement with participants in a given form of life, and the measurement of successful responses within a social practice, operate as social feedback mechanisms and increase the potential for individual and group flourishing. Chapter 4's conclusions are buttressed by examples of emergent institutional design in the United States (eg drug treatment fora, education reform programs and family courts). Chapters 5's inferences draw support from South African rights, limitations and remedies analysis, our own quirky understanding of democracy, doctrines regarding constitutional jurisdiction, access and amici, as well as the status and success of provincial constitutions and Chapter 9 institutions. Chapter 6 constitutes an extended meditation on the fit between the theory adumbrated in this book and two well-ventilated bodies of public law. Chapter 7 spins out a theory of flourishing as old as Aristotle, but substantially recast and reinvigorated by development theory and the capabilities

approach. It then maps this theory onto South Africa's extant constitutional jurisprudence. In Chapter 8, my hypotheses about how experimentalism and flourishing might advance South African constitutional jurisprudence are tested against a score of cases that our Constitutional Court has generated over the past decade.

### C. Epistemic Commitments: Self, Society and State as Natural Phenomena

This book's methodology is distinct in two important ways from many similar kinds of synthetic projects in the law, the social sciences and the humanities.

First. The description of human nature and social formations strongly favours my prescriptions for South African constitutionalism. Depending upon the reader's perspective, that could be either a strength or a weakness of this project.

Second. This humanistic venture is not set in false opposition to the natural sciences. This project does not treat the human phenomena that it engages as radically different in kind from natural phenomena. Quite often when a scholar in the social sciences and the humanities makes a claim about treating theories about natural phenomena and theories about human phenomena in the same manner, it is based upon the assumption that theories in the natural sciences, like theories in the human sciences, are reducible in some way to claims about power or ideology.<sup>1</sup> The book adopts the opposite view. Power may, on occasion, influence what we come to study or what we claim to know.<sup>2</sup> (People are susceptible to all sorts of claims made by snake oil salesmen and brutal dictators. The universe is impervious to such charms or threats of violence.) The vast majority of truth claims are not reducible to, or even translatable into, ideologically inflected propositions.<sup>3</sup> Human beings are subject to the same causal laws that govern other physical objects in the world. Explanations of human phenomena require no special pleading – certainly none that we would otherwise accept with respect to accounts of other phenomena.<sup>4</sup> Moreover, the claims made on behalf of the model of the self and the social sketched herein accord with, and are often parasitic upon, recent learning in fields as diverse as genetics, neuroscience, evolutionary biology, cognitive psychology, behavioural economics, social capital theory, psychoanalysis, choice architecture and empirical and experimental philosophy. Of course, the laws which govern human phenomena are not fully reducible to laws which govern other natural phenomena.<sup>5</sup> Just as no one truly claims that biological properties is captured entirely by chemistry, or that chemistry is captured entirely by physics, human phenomena can never be entirely explained by the laws of biology, chemistry or physics.

### D. Methodological Commitments

The primary audience for this book is the lawyer, jurist and legal academic working in South Africa – and for the growing number of international scholars interested in comparative constitutional law. Natural scientists will find nothing new here as pertains to their own disciplines. They may, however, find that they have more to say about matters beyond their professional silos – in particular, moral, legal and constitutional theory in South Africa.

The justification for the selective engagement with complex natural phenomena is not that the truth or the strength of the book's philosophical claims do not much matter. Quite the opposite.

They do. However, this book is not primarily about the virtues of theories of determinism as opposed to the vices of doctrines that support free will, nor is it generally about the grounds for preferring choice architecture over deliberation when trying to enhance the results of collective action. That this book is ultimately about South African constitutional law doctrine – because that is my area of expertise – raises other questions about the content of this work.

Legal academics, lawyers and judges who have read this work in various forms over the past decade have often asked a single question: are the descriptive accounts of the self and the social really necessary for a work that has as its primary aim a minor re-conceptualization of the way in which we think about constitutional law in South Africa? As noted in the Preface, several fellow academics have asked whether the ‘is’ with respect to the self and the social entails an ‘ought’ with respect to the constitutional.

As I contend in the Preface, my answer to these questions about both content and method is ‘Yes’. (Following Bernard Williams, I see little reason to fear what some philosophers often call, with disdain, the ‘naturalistic fallacy’,<sup>6</sup> and have no reason to think that we should not be able to draw inferences in ethical matters from non-ethical propositions. For reasons already assayed, my method seems preferable to GE Moore’s naive intuitionism.<sup>7</sup>) At the very least, the book’s non-ethical propositions can be tested, and the logical relationship of ethical to non-ethical propositions assessed. Someone could write about the subject matter traversed in chapters 4, 5, 6, 7 and 8 of this book without engaging the subject matter covered in Chapters 2 and 3. However, because a genuine re-conceptualization of South African constitutional politics turns on a better account of the self and an enhanced depiction of social phenomena, this book elucidates those improved portrayals. We have the good fortune to live at a time when these understandings of the self and the social have already been canvassed at great length across a broad array of disciplines by a large number of scholars. (The convergence of views across scholarly domains over the last decade supports the cogency, as Rehg would have it, of the book’s overarching arguments.) By first laying out some empirically compelling views about the self and the social, this book may convince at least some readers that the politics prescribed provides the best fit for the individuals, the groups and the sub-publics that populate the Republic of South Africa.

Let me put the matter slightly differently.

### *1. Intuition Pumps*

The accounts of the self and the social, in Chapter 2 and Chapter 3, are – in addition to being stand-alone theories – intuition pumps. Intuition pumps are rhetorical devices, commonly used in philosophy, that are designed by their creators to draw the reader’s attention to certain features of a philosophical problem. By emphasizing critical features of a problem, often isolating them from other features, the writer hopes to make it easier for the reader to see the problem and to appreciate the novel explanation proposed. My views on the self and on the social are intuition pumps in the sense that these characterizations of the self and of the social emphasize certain views about ‘trial and error’ and ‘feedback mechanisms’ that hold true not only for the self and the social, but for the political and the constitutional. (NB: If the reader

wants to understand the basic conceptual framework that drives this project, then she would best keep the notions of trial and error and feedback mechanisms firmly in mind.)

Intuition pumps better serve my efforts than does a term like ‘proof’. No matter how accurate my philosophical and sociological views may be, there are simply too many nation-states and too many constitutions that do not permit a theoretical fit between my account of the self and the social, on the one hand, and my account of constitutional politics, on the other.

## 2. *Experimental Philosophy and Empirical Philosophy*

For those readers already inclined towards support of a largely secular, radically heterogeneous, socially democratic constitutional project, my accounts of the self and the social do the necessary heavy lifting. Again: these accounts cannot prove my preferred model of constitutional politics. But they do serve as evidence of a certain kind. This evidence suggests that if ‘this’ is who we really are in radically heterogeneous, socially democratic constitutional states, then ‘these’ are the constitutional doctrines and political institutions that will serve us best.

My confidence in making such a statement has much to do with the current success of experimental philosophy. As Joshua Knobe and Shaun Nichols contend: ‘The goal [of experimental philosophy] is to determine what leads us to have the intuitions we have about free will [and] moral responsibility . . . . The ultimate hope is that we can use this information to help determine whether the psychological sources of the beliefs undercut the warrant for the beliefs.’<sup>8</sup>

That thesis addresses two overlapping concerns. First, it exposes the inconsistency of the answers that well-informed lay persons – and here I mean the South African legal audience to whom this work is primarily addressed – often offer to basic metaphysical and ethical questions. Second, conclusions drawn from experimental philosophy and empirical philosophy clear away these mischaracterizations and enable the more dramatic points registered by neuroscientists, cognitive psychologists and analytic philosophers to secure greater traction.<sup>9</sup>

## Endnotes

1. Post-structuralist accounts of science tend to conflate proposition (1) that some, if not all, scientists may be motivated by interests not intrinsic to the matter under study, with proposition (2) that the scientific method, as practiced by a community of scholars, generates verifiable truth propositions about the world. For such theorists, proposition (1) taints proposition (2) in a manner that invariably relativizes the manner in which truth propositions in terms of proposition (2) are produced. P Feyerabend *Against Method* (1975); P Feyerabend *A Farewell to Reason* (1987). As I have suggested in the Preface, and further note in Chapter 3, this account of how science operates is simply wrong, and the truth of proposition (1) and the truth of proposition (2) have no bearing on the truth of each other.
2. See W Rehg *The Cogent Science in Context* (2008).
3. S Woolman ‘Language, Power and the Margin: Eliot’s Philosophy of Language, Wittgenstein on Following a Rule, and Statutory Construction in *Thembekele Mankayi v AngloGold Ashanti Limited*’ (2012) 128 *South African Law Journal* 434. This point is decidedly Davidsonian. As Davidson writes in his ‘Introduction’ to *Inquiries into Truth & Interpretation*: “Schnee ist Weiss” is true in the mouth

of a German speaker if, and only if, “snow is white” has to be taken not merely as true, but as capable of supporting counterfactual claims. ... [O]ne can say that it is no accident that “Schnee ist Weiss” is true if and only if snow is white; it is the whiteness of snow that *makes* “Schnee ist Weiss” true.’ D Davidson ‘Introduction’ *Inquiries into Truth and Interpretation* (1984) xiv (emphasis added). Davidson clearly has in his sights the claims of conceptual relativism that mark the writings of Kuhn and Feyerabend in the philosophy of science. Davidson writes: ‘Philosophers of many persuasions are prone to talk of conceptual schemes. Conceptual schemes, we are told, are ways of organizing experience: they are systems of categories that give form to the data of sensation; they are points of view from which individuals, cultures or periods survey the passing scene. There may be no translating from one scheme to another, in which case the beliefs, desires, hopes, and bits of knowledge that characterize one person have no true counterparts to the subscriber to another scheme. Reality is relative to a scheme: what counts as real in one system may not in another.’ D Davidson ‘On the Very Idea of a Conceptual Scheme’ *Inquiries into Truth and Interpretation* (1984) 183, 183. Davidson concludes: ‘Conceptual relativism is a heady and exotic doctrine, or would be if we could make sense of it. The trouble is, as so often in philosophy, that it is hard to improve intelligibility while retaining the excitement.’ Ibid. About the confusion associated with conceptual schemes, he argues: ‘[T]he only possibility at the start is to assume general agreement on beliefs ... . The guiding policy is to do this as far as possible ... . The method is not designed to eliminate disagreement, nor can it; its purpose is to make meaningful disagreement possible, and this depends entirely on a foundation – *some* foundation – in agreement ... . We make maximum sense of the words and thoughts of others when we interpret them in a way that optimizes agreement ... Where does that leave the case for conceptual relativism? The answer is, I think, that we must say much the same thing about differences in conceptual schemes as we say about differences in belief: we improve the clarity and bite of declarations of difference, whether of scheme or opinion, by enlarging the basis of shared (translatable) language or of shared opinion. ... In giving up dependence on the concept of an uninterpreted reality, something outside all schemes and science, we do not relinquish the notion of objective truth – quite the contrary. ... [G]iving up the dualism of scheme and world, we do not give up the world, but re-establish unmediated touch with the familiar objects whose antics make our sentences and opinions true or false.’ Ibid at 197. Davidson’s theories on truth and interpretation owe a direct debt to Wittgenstein. Both Davidson and Wittgenstein are concerned with what happens when ‘language goes on holiday’. L Wittgenstein *Philosophical Investigations* (GEM Anscombe, trans, 3rd Ed, 1953)(original emphasis) § 38. For further argument on these points, see S Woolman ‘On the Common Saying “What’s True in Golf is True in Law”’: The Relationship between Theory and Practice across Forms of Life’ (2010) 25 *Southern African Public Law* 520; S Woolman ‘Between Charity and Clarity: Kibitzing with Frank Michelman on How to Best Read the Constitutional Court (2010) 25 *Southern African Public Law* 491; GPS Backer & PMS Hacker *Skepticism, Rules & Language* (1984). See also S Woolman ‘Law, Power and the Margin’ (supra).

4. See G Ryle *The Concept of Mind* (1949). Ryle describes the persistence of such distinctions as category mistakes. We would be rightly perplexed if a visitor to the University of the Witwatersrand, after having been shown all the lecture halls, playing fields, offices, laboratories, academics, students and staff, still asked, ‘But where is the university?’ The mistake is in thinking the university represents something over and above its constituent parts. Something similar occurs in discussions of the self and consciousness. The mistake is in thinking that there is something – the mind – over and above the physical constituent parts that make up an individual’s brain, in particular, and body, more generally, that give rise to thought and, more importantly, action. For an application of Ryle’s thesis to South African constitutional law, see S Woolman ‘Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on *Barkhuizen*’ (2008) 125 *South African Law Journal* 10 as cited in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another* 2009 (4) SA 529 (CC) at para 216, fn 30.



5. It would be easy to reduce an explanation of why we hold individuals morally and legally culpable for their actions to Darwinian and utilitarian accounts of how a commitment to individual responsibility results, generally, in the increasingly successful life chances of other individuals and in the overall welfare or 'happiness' of any given society. However, such an account is insufficiently rich to explain why individuals and societies that come to accept deontological and other non-consequentialist explanations of moral, political and legal responsibility are justified in doing so. We shall see in Chapter 2's discussion of 'the radically heterogeneous natural self' that deontological thought has a rather archaic neurological basis (to be found in areas of the brain that have controlled our flight or fight responses for millions of years). It does not follow that the German disposition towards deontological thought *qua* Kant is somehow less compelling. German post-World War II constitutionalism constitutes a rather remarkable collective response to Nazi Germany's behaviour in World War II (namely, the Holocaust as well as the mass murder of non-Jewish groups – gays and lesbians, the Roma, the Poles and Soviet prisoners of war). That the German Federal Constitutional Court has held that it would unjustifiably violate the German Basic Law's commitment to dignity and to life to allow the German military to shoot down an airplane captured by terrorists in order to save many more German lives from being lost if the hijacked plane were allowed to crash into a densely populated area in German territory is fascinating. The Federal Constitutional Court found s 14(3) of the Aviation Security Act of 2005 constitutionally infirm on the grounds that it was incompatible with the right to life under Article 2.2 of the Basic Law in conjunction with the guarantee of human dignity under Article 1.1 of the Basic Law. (2005) 115 BVerfGE 118, 1 BvR 357/05. The Court did allow that the matter legitimately fell within the purview of the Federal Government and those organs of state (the police) that handled domestic matters such as terrorism. I can't imagine that the South African Constitutional Court would reach the same outcome. A *prima facie* violation of FC s 10 and FC s 11: sure. An unjustifiable limitation of those rights: surely not.
6. B Williams 'The Linguistic Turn' in *Ethics and the Limits of Philosophy* (1985) 120.
7. GE Moore *Principia Ethica* (1903).
8. J Knobe & S Nichols 'An Experimental Philosophy Manifesto' in J Knobe & S Nichols (eds) *Experimental Philosophy* (2008) 3, 7. See also S Nichols & J Knobe 'Moral Responsibility and Determinism: The Cognitive Science of Folk Psychology' (2007) 41 *Nous* 663.
9. This book's claims about the self and the social, like those made by Knobe and Nichols, are meant to have an 'indirect impact'. Knobe and Nichols 'An Experimental Philosophy Manifesto' (*supra*) at 8. While Knobe & Nichols are interested in whether and how one can develop 'a theory about underlying psychological processes that generates people's intuitions', I am interested in whether we can use such theories to determine 'whether or not those intuitions are warranted'. *Ibid*.