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# The self and the ‘monkey selfie’: Law, integrationism and the nature of the first order/second order distinction



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## ABSTRACT

This paper discusses the distinction between first-order and second-order, understood as either an analytical or an ontological distinction. The distinction is shown to index an open-ended series of dualities, such as between action and reflection, event and category, instance and abstraction, variant and invariant, utterance and system-unit, language and meta-language, non-reflexive and reflexive. It is argued that debates about the first-order/second-order distinction ultimately implicate different models of the self, and that our understanding of the distinction depends crucially on notions such as self-insight, self-awareness and agency. In order to focus the discussion, the paper explores these issues in the domain of law, focusing on jurisprudential understandings of how non-human animals and human beings, systems and individuals, machines and people are held to differ. Law directs its reasoning to solving particular practical problems, yet it must make decisions which draw on particular intellectual or ideological positions.

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## 1. Introduction

The contrast between *first-order* and *second-order* invokes a potentially open-ended series of dualities, such as between action and reflection, event and category, instance and abstraction, variant and invariant, utterance and system-unit, language and meta-language, non-reflexive and reflexive. Debates about the first-order/second-order distinction, it is argued here, ultimately implicate different models of the self, given that our understanding of the distinction depends crucially on notions such as self-insight, self-awareness and agency. In order to focus the discussion, the paper explores these issues in the domain of law, focusing on jurisprudential understandings of how non-human animals and human beings, systems and individuals, machines and people are held to differ. Law directs its reasoning to solving particular practical problems, yet it must make decisions which reflect or draw on particular intellectual positions.

## 2. First and second-order

### 2.1. Ontological and analytical understandings

On the first-order level, there are non-recurrent, non-discrete events which can be located spatio-temporally (‘every utterance is unique in respect of both acoustic and communicational effect’, [Love, 1990](#), p. 101); on the second, there are units or entities that are identifiable by virtue of their repetition or iteration, that is in terms of some kind of abstraction ([Hutton](#),

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1990). Events may be similar to one another but never identical, except in respect of their postulated relation to an underlying abstract system. The flow of speech in a sound spectrograph is understood as dynamic precisely because it contrasts with the sequence of discrete, iterable units of phonemic representation or conventional alphabetic writing. Abstractions are often understood as templates which underlie or generate behaviour and which exist in each individual by virtue of social convention or as a consequence of systemic forces acting at the level of the individual. Alternatively, second-order constructs can be seen analytically, as reflexive generalities which constitute attempts to stabilize our grasp of the flow of communicational events. In this sense they are abstract concepts which express a particular analytical order, and can be questioned or challenged in terms of their applicability or descriptive status.

In attempting to set out in a precise manner the different kinds of relationships involved, one is both enabled and constrained by the intuitive affordance of print (Love, 1990, p. 106). One can deploy all kinds of punctuation conventions to distinguish the different ontological status of words. Each instance of the word 'mouse' is a member of the set *mouse*. But the attempt to clarify the ontological underpinnings of the first-order/second-order distinction leads into a philosophical maze which one might term a 'third-order' or 'meta-reflexive' discussion (Love, 1990; Hutton, 1990).

## 2.2. First-order and second-order across the disciplines

In some models of social action there may be no fundamental tension between the first-order and second-order levels. If for example 'the basic pattern of the culture' is assumed to be present in miniature 'in the internal structuring of each individual person', then the relation of the two levels is that between macrocosm and microcosm (De Laguna, 1949, p. 387, cited in Kroeber and Kluckhohn, 1952, p. 187). There is a presumptive alignment here between individual acts and macrosocial structures. But this is not always the case in explanatory or analytical models. In evolutionary theory, there is a tension between the first-order drive to survive and reproduce at the level of individual organism and the need at the systemic level for 'altruistic' behaviour. Altruistic behaviour reduces the fitness of the individual organism for the benefit of other members of the group. A game theoretical model has been applied to show that selfish behaviour can be functional at the group level. Selfish individuals have 'an incentive to punish other selfish individuals', and this increases 'the proportion of cooperators for them to exploit'. While this behaviour is not directed at benefiting others, 'it makes sense as an evolutionary strategy' at the level of group. A first-order bully creates conditions for greater second-order collaboration (Eldakar and Wilson, 2008, p. 6982).

Non-biological evolutionary models found in modern systems theory share this dual level of analysis. Systems theory, which emerged definitively in the late nineteenth and early twentieth century, in effect generalized from biological ecology to a wide range of social, legal, economic and political systems. For these systems models, both biological and non-biological, the situated goal-directed or intentional acts of individual selves are epiphenomenal to the order created. There is a disconnect between self-understandings at the level of the individual, and the values established at the level of system. The selfish bully is not consciously being altruistic.

Hayek's idealized notion of 'spontaneous order' expresses this evolutionary systems notion. For Hayek, system-level values in a market arise unpredictably out of countless individual, contextual, interested (or 'selfish') first-order acts. The relationship between goods and prices at the system level fluctuates within a continuous process of self-adjustment. The key is that there is no overall design or designer, rather (Hayek, 1982, 1, pp. 118–9):

a going order which nobody has designed, an order that has formed itself without the knowledge and often against the will of authority, that extends beyond the range of deliberate organization on the part of anybody, and that is not based on the individuals doing anybody's will, but on their expectations becoming mutually adjusted.

Hayek described the common law method of case-by-case adjudication carried out by non-specialist judges as piece-meal tinkering through 'immanent criticism' (Hayek, 1982, 1, p. 118).

Peirce's triadic semiotics and Saussure's structural semiology are the twin foundations of systems theories of the sign. The clearest statement of this systems view is in Saussure's *Cours de Linguistique générale* (1916). For Saussure, the values established by the system of *langue* are orthogonal or contingently related to the acts of individual agency in *parole*. The individual agent is blind to the overall pattern of value relationships at the level of system. Further, what ordinary people believe about language, for example that words are names of things, and how language actually works, are completely distinct. Individual willed actions in aggregate provide the 'energy' or 'environmental stimulus' that animates the system, but do not determine its internal structure, not its direction of change. This can be neither predicted nor controlled.

## 3. Insiders and outsiders

### 3.1. Structuralism

Structural linguistics and anthropology carry the implication that outsiders' accounts are uninformative, unless the 'native patterning' has been grasped (Sapir [1927] 1985, p. 547). Equally, for the structuralist, insiders cannot explain or analyze the structures in which they are implicated. Thus Bloomfield suggested that asking speakers of a language about the segment *cran* in 'cranberry' might elicit 'some false admission', such as that '*cran* means red' (1933, p. 160, see Harris, 2001, pp. 114–115). Structures evade insiders' conscious understanding and cannot be articulated by them, even as they form part of the collective unconscious (Lévi-Strauss, 1958, p. 25).

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