

EPISTEMIC UNCERTAINTY  
&  
LEGAL THEORY

EPISTEMIC UNCERTAINTY  
&  
LEGAL THEORY

By

BRIAN BURGE-HENDRIX, B.A. (Hons), M.A.

A Thesis  
Submitted to the School of Graduate Studies  
In Partial Fulfilment of the Requirements  
for the Degree  
Doctor of Philosophy

McMaster University  
© Copyright by Brian Burge-Hendrix, April 2004

DOCTOR OF PHILOSOPHY (2004)  
(Philosophy)

McMaster University  
Hamilton, Ontario

TITLE: Epistemic Uncertainty & Legal Theory

AUTHOR: Brian Burge-Hendrix, B.A. (Hons) (University of Alberta),  
M.A. (McMaster University)

SUPERVISOR: Professor Wilfrid Waluchow

NUMBER OF PAGES: vii, 208

# Abstract

Some legal theorists argue that legal determinations apparently based on moral arguments actually involve an appeal to extra-legal standards because legal reasoning and the conceptual structure of a legal system necessarily excludes morality (Exclusive Legal Positivism). Others argue that moral principles can be incorporated into legal systems (Inclusive Legal Positivism), or must be so incorporated (Dworkinian Interpretivism), where they operate *as* legal rules. Does Canada's *Charter of Rights and Freedoms* actually incorporate the moral principle of equality, or does it merely authorize judges to appeal to that extra-legal principle as a legitimate reason for invalidating those laws which violate it? To answer that question the philosophical legal theorist must evaluate and develop an account of juridical law in the face of *epistemic uncertainty* about the relation between law and morality (i.e. whether it is necessary or contingent). In this work I first consider the meta-theoretical characteristics of legal theories, particularly their methodologies and the evaluative criteria applied to them, so as to identify and make explicit the source of legal-theoretical epistemic uncertainty. I then argue for an approach to describing and explaining law whereby we neither ignore epistemic uncertainty nor dispense with it by means of a stipulative definition. This inclusive positivist approach, however, also requires that we abandon the ideal of a presuppositionless inquiry. Accordingly, I demonstrate how a descriptive-explanatory philosophical account of law can make use of a presupposition and, ultimately, offer a sound defence for it. Finally, through an analysis of some aspects of Canadian constitutional adjudication, I show that inclusive positivism is most able to describe and explain the legal-moral uncertainty exhibited by participants in legal systems of a certain type, and so offers the best philosophical account of legal practices as they are understood by those who instantiate them.

# Acknowledgements

*I wish, first and foremost, to acknowledge the immeasurable amount of love, encouragement, and support given by my partner: Kiersten Burge-Hendrix.* I cannot possibly put into words the depth of my gratitude towards, respect of, and admiration for her. Without her this thesis would not have been completed and, moreover, I would be lacking something *far* more important: the joy of our shared life together.

I am also very grateful to my parents-in-law, Tom and Carol Burge, for their love and encouragement. Without the myriad kindnesses—large and small—they have shown me over the years, I could not have written half as much half as well. I am proud to be their “second son.”

I am extremely fortunate in that I have many friends who, besides being of infinite value in and of themselves, have also provided valuable and practical insights on various parts of this work. Justin E.A. Busch and Karl Darcy Otto are especially implicated in the development and improvement of my arguments, and this work is undoubtedly the better for it. I also wish to thank Constantine Belegris, Barry Boroditsky, Robert Burch, May Chung, David Godden, Elisabeth Gedge, Jason Gorber, Ayumi Goto, Martin Kramer, Jeff Lawrence, Carole Leclair, Janine McCandless, Steffan Miles-Board, Nanette Morton, Mica the cat (who might have been Scipio Africanus, but alas. . .), and the city of Montréal.

It was a pleasure to work with my committee. Prof. Renato Cristi was a constant source of lively and insightful critiques as well as a convivial colleague. Prof. Violetta Ighneski was equally generous with comments and productive questions.

An immense debt of gratitude is owed to Prof. Wilfrid Waluchow. His very considerable knowledge of legal theory was always manifested with respect and consideration. Prof. Waluchow was an ideal supervisor and under his mentorship I have seen the very exemplar of the true scholar whose knowledge is given freely, generously, humbly, and sincerely. I am fortunate to have such a model with which to guide my own academic endeavours, and count myself even more fortunate by his gift of friendship.

PROPTER KIERSTEN...

...SINE QUA NON

# Contents

<b>Abstract</b>	<b>iii</b>
<b>Acknowledgements</b>	<b>iv</b>
<b>Contents</b>	<b>vi</b>
<b>1 The Importance of Meta-Theory</b>	<b>1</b>
1.1 Types of Meta-Theoretical Problems . . . . .	3
1.2 Epistemic Uncertainty . . . . .	6
1.3 The Second-Best Approach . . . . .	12
1.4 Two Challenges . . . . .	16
<b>2 Concept or Concepts of Law?</b>	<b>18</b>
2.1 “The” Concept of Law . . . . .	18
2.2 Concepts & Conceptions . . . . .	20
2.3 The Positivist View of Law . . . . .	24
2.4 Two Schemes for Doubting . . . . .	40
2.5 “Filtering” Pre-Theoretical Data . . . . .	52
2.6 Generality & Legal Theory . . . . .	55
<b>3 Choosing a Theory of Law</b>	<b>59</b>
3.1 Meta-Theoretical Values . . . . .	60
3.2 Morality and Significance . . . . .	62
3.3 Indirectly Evaluative Legal Theory . . . . .	66
3.4 Morality and Theory Choice . . . . .	69
<b>4 “Methodological” Positivism</b>	<b>77</b>
4.1 “Hybrid” Positivism . . . . .	77
4.2 Descriptive Explanations . . . . .	79

4.3	Starting Points . . . . .	89
4.4	Conceptual Analysis . . . . .	96
<b>5</b>	<b>Positivist Uncertainty</b>	<b>108</b>
5.1	Hard and Soft Positivism . . . . .	109
5.2	Public Guidance & The Extreme Scenario . . . . .	113
5.3	Law's Function & Law's Authority . . . . .	118
<b>6</b>	<b>Limits on Conceptual Analysis</b>	<b>126</b>
6.1	The Linguistic & Naturalistic Turns . . . . .	126
6.2	Elaborating the Constitution . . . . .	132
6.3	The Division of Labour Argument . . . . .	144
6.4	Constitutional Perspectives . . . . .	152
<b>7</b>	<b>Perspectival Differences</b>	<b>163</b>
7.1	The Middle Road . . . . .	164
7.2	A Burden of Proof . . . . .	168
7.3	"Prescriptive" Exclusive Positivism? . . . . .	169
7.4	The Descriptive-Explanatory Challenge . . . . .	176
7.5	Meeting the Descriptive Challenge . . . . .	180
	<b>References</b>	<b>203</b>



# Chapter 1

## The Importance of Meta-Theory

Constitutions are an important part of many modern legal systems, yet constitutional adjudication is perhaps the most difficult area of law to describe and explain. As a focus for theoretical inquiry, constitutional law raises difficult questions about the nature and purpose of legal theory in general and about legal positivism in particular.<sup>1</sup> These challenges are compounded by the fact that an analytical legal theory—a theoretical approach to law which “is concerned with explaining the nature of law by attempting to isolate and explain those features which make law into what it is”<sup>2</sup>—requires *meta-theoretical arguments* to support its substantive conclusions. This should come as no surprise, for whenever we argue about whether law can only be understood by means of constructive interpretation, or debate the possibility that we must employ a moral theory in order to properly identify the significant and important features of legal systems, or turn our attention to any number of equally difficult problems in legal theory, we are necessarily involved with a complex set of questions which require us to come to terms not just with law itself but also how we understand and characterize the phenomenon of law.

All legal theories take legal systems (sometimes even ‘law’ in a broader

---

<sup>1</sup> “According to many new ‘antipositivist’ scholars . . . constitutional law is the main test in order to show how incapable legal positivism is of producing a suitable understanding of the structure and the essence of contemporary legal systems” (Pino, “The Place of Legal Positivism in Contemporary Constitutional States”, 514).

<sup>2</sup> Dickson, *Evaluation and Legal Theory*, 17.

sense) as their object of explanation, yet the methodologies used to engage with that explanandum and the criteria used to decide which explanations are best are not to be found within the explanandum itself. Many of the necessary elements of a legal theory are theoretical practices which can to some degree be considered on their own, apart from law as an explanandum. In this respect, meta-jurisprudential inquiry contributes to our understanding of theoretical inquiry in general. Legal theorists' standards of success are in one sense unique to themselves: their standards apply to a particular subject matter and the questions they ask of it. In another sense, however, the standards of good legal theories are identical with those of successful theories in the physical sciences or in sociology. One benefit of paying closer attention to the meta-theoretical aspects of philosophic investigations into law is an increased awareness of the similarities and differences between different modes of theoretical inquiry.

Meta-theory is a ubiquitous and inescapable part of any serious attempt to understand juridical law in a careful and reflective fashion.<sup>3</sup> Yet controversy abounds at the meta-theoretical level. Even the claim that the foremost goal of legal theory is to increase our knowledge and understanding of the phenomenon of juridical law is contestable on meta-theoretical grounds. "Why seek knowledge," we might ask, "rather than improve our moral situation?" If we aim to develop the most thorough and enlightening explanation of juridical law, we ought not to assume that this or any other meta-theoretical question can simply be set aside. Unfortunately, meta-theoretical issues are rarely considered in a systematic and thoroughgoing fashion. Although every legal theory raises questions about theoretical adequacy and the associated problem of developing and applying standards of theoretical success—not to mention a multitude of other issues having to do with legal theory in general—the meta-theoretical aspects of analytical legal theory are usually considered only when especially intransigent problems arise.<sup>4</sup> In many cases the meta-theoretical underpinnings of analytical

---

<sup>3</sup> In contrast to the most general of the term 'law', which encompasses laws of nature and the law of excluded middle, the label 'juridical law' specifically indicates our primary area of interest: the norms and practices of human legal institutions. Neil MacCormick, however, offers a word of warning to the overly ambitious: "The law of a modern state is indeed an institutional order of great and bewildering complexity, so much so that no one can become truly expert in more than a relatively small domain within it" ("Norms, Institutions, and Institutional Facts", 326).

<sup>4</sup> "All legal theorists take an implicit stance on meta-theoretical or methodological

legal theories are merely implicit.

In this work my aim is to identify and render explicit some of the essential meta-theoretical tasks of analytical legal theories in order to illuminate the strengths of inclusive legal positivism and, in particular, the explanatory power of its descriptive explanation of constitutional adjudication. There are, however, reasons to be cautious, perhaps even somewhat sceptical, of meta-jurisprudence. It can supplant a real engagement with juridical law itself.<sup>5</sup> Nonetheless, we can improve our ability to understand juridical law and answer substantive questions about it by focusing on a few of the central meta-theoretical issues connected to analytical legal theory and to legal positivism in particular.

## 1.1 Types of Meta-Theoretical Problems

A few basic distinctions will help illuminate the nature and variety of meta-theoretical issues in legal theory. Most meta-theoretical questions and problems regarding analytical legal theory can be placed into three basic categories: methodological, evaluative, and relational.

Perhaps the most important meta-jurisprudential issue is that of methodology. *Methodological meta-theoretical questions* are implicit within any theory, so it is no surprise that they arise in legal theory as well. Theoretical methodologies are the *sine qua non* of any attempt to systematically analyze and explain human phenomena, yet they are almost always controversial. Many meta-jurisprudential debates focus on methodological issues, hence contemporary debates in legal theory are often recognizably similar to debates surrounding scientific and socio-scientific theories. One can always question whether a particular methodological approach is suitable in light

---

questions . . . Few, however, address such matters directly, and to the extent to which this does occur, the authors concerned often confine themselves to some relatively brief remarks in the course of pursuing some other agenda" (*Ibid.* 2).

<sup>5</sup> "Legal philosophers have lately become ever more preoccupied with questions, not so much about law, as about legal philosophy itself. To what extent is legal philosophy objective? To what extent is it value free? To what extent is it descriptive? And so on. If one always suspected that the philosophy of law is a self-indulgent pursuit—and I have heard many lawyers and law students express that view with great vigour—then this recent growth industry (the philosophy of the philosophy of law, or meta-jurisprudence, as one might call it) may strike one as positively narcissistic" (Gardner, Preface to *Evaluation and Legal Theory*, v).

of its subject-matter, and methodological questions of this sort are clearly meta-theoretical—they are not necessarily tied to any particular theory. For instance, we might consider whether conceptual analysis is a good way to examine law. Since conceptual analysis is used by many legal theories, the status of its explanatory adequacy is relevant to each of them; it is a meta-jurisprudential concern. Insofar as conceptual analysis is used in other types of theoretical inquiry, its theoretical utility and appropriateness is also a meta-theoretical issue in a more general sense.

Another type of meta-theoretical problem concerns the merits of a *particular* theory or the *relative* merits of different theories. For example, we might ask “What makes a legal theory successful?” or “How do we choose between legal theories which lead to contradictory, yet plausible and illuminating, explanations of the same subject matter?” Queries of this sort involve *evaluative meta-theoretical problems* concerning the assignment of value to theoretical explanations of a subject matter rather than the assignment of value to features of the subject matter itself. Meta-jurisprudential evaluation, then, is particularly concerned with the criteria we might use to identify successful legal theories. The determination of appropriate legal-theoretical values is one of the central tasks of meta-jurisprudence—meta-theoretical-evaluative criteria such as simplicity, explanatory power, and descriptive accuracy are commonly upheld as central to good analytical inquiry,<sup>6</sup> while moral-political values such as increased freedom or personal security are (less commonly) used to attribute merit to theories of law. The question of which particular values are most (or solely) laudable in philosophical theories of law (or philosophical theories in general) is an important question: such values are needed for the difficult tasks of theory evaluation and theory choice.

Methodological and evaluative meta-theoretical questions may overlap. Some evaluative meta-theoretical questions implicate methodological meta-theoretical questions. We may, for instance, evaluate the relative merits of two different legal theories by determining which theory’s methodology is

---

<sup>6</sup> A meta-theoretical-evaluative criterion is an evaluative yet non-moral norm used to judge the merit of a theory (e.g., simplicity, coherence, explanatory power). See Waluchow, *Inclusive Legal Positivism*, 20. The same idea has also been elucidated by others using different labels. See Coleman, *The Practice of Principle*, 95; Dickson, *Evaluation and Legal Theory*, 178; Leiter, “Beyond the Hart/Dworkin Debate”, 23; Perry, “Hart’s Methodological Positivism”, 313–14; Summers, “Notes on Criticism in Legal Philosophy—An Introduction”, 10.

most productive or appropriate, and in this way our methodological meta-theoretical inquiry becomes part of a more far-reaching evaluative meta-theoretical inquiry. It is an inescapable feature of meta-jurisprudence that it is rarely possible to solve one type meta-theoretical problem without engaging another type of meta-theoretical problem in the process. For the purpose of explication, however, I will reserve the label ‘methodological meta-theoretical’ for problems regarding particular theoretical methodologies and apply the term ‘evaluative meta-theoretical’ to meta-theoretical problems regarding the general evaluation of a theory of law or comparative evaluations of two or more theories of law.

From the meta-jurisprudential perspective, methodological and evaluative questions are usually directed only towards theories of law.<sup>7</sup> Some meta-theoretical questions, however, are directed towards understanding the proper relation of theories of law to other types of theoretical inquiry, such as metaphysical or moral inquiry. Even the claim that legal theory might be in some significant sense independent of other types of philosophical inquiry is contestable. From an historical perspective, we can note that most philosophical accounts of juridical law tend to be much broader in scope than is the case with recent analytical legal theory, whose focus tends to rest more specifically on juridical law itself. But this has not always been so. Plato’s thoughts on law are closely tied to his metaphysics, such that the status of a legal edict is necessarily connected to an overarching Idea of justice; Cicero’s studies of law exhibit an inextricable dependence on a theory of nature, particularly human nature, and of nature’s imposition of certain requirements on any existent and enduring legal system; Aquinas’ theory of law is hermeneutical, in the strict sense of the word; Kant and Hegel’s forays into legal theory make extensive use of their own versions of philosophical anthropology; and so forth.

The presence of what we might call “hybrid-theoretical legal theories” is not merely an historical footnote. Many modern legal theories are hybrids. Critical legal theorists, for instance, often rely on Marxist or post-Marxist

---

<sup>7</sup> Usually, but not always. For instance, proponents of “naturalized jurisprudence” advocate using socio-scientific methodologies such as quantitative statistical analysis. One could say, then, that naturalizing jurists are concerned with methodological issues surrounding the use of statistical data, though it would be an open question as to whether this was a meta-theoretical concern about socio-scientific theories (because statistical analysis is a socio-scientific methodology) or with naturalizing legal theories (because naturalizing jurists aim to use statistical analysis in their legal theories).

theory in order to bring legal systems into a larger context of socio-economic interactions,<sup>8</sup> while proponents of naturalized jurisprudence argue that legal theory needs to make use of the conclusions and methodologies of the social sciences.<sup>9</sup> Some legal theorists even argue that legal theory is but a subdiscipline of political theory, or moral theory, or even metaphysics: Liam Murphy suggests that one of the most important issues in analytical legal theory—the question of moral constraints on “the grounds of law”—is best approached as “a practical aspect of political theory”<sup>10</sup>; Stephen Perry asserts that “legal theory inevitably incorporates political philosophy”<sup>11</sup>; and A.P. d’Entrèves argues that “legal and political philosophy are nothing else than natural law writ large.”<sup>12</sup> Claims such as these give rise to *relational meta-theoretical questions*. These invite us to consider whether legal theorists must take up other theoretical perspectives on human society in order to develop an explanation of law.<sup>13</sup>

The categories of *methodological, evaluative, and relational* meta-theoretical problems do not exhaust all the possible meta-theoretical issues in legal theory. Nor, as has already been noted, are they mutually exclusive. These categories will nonetheless enable us to clarify and explicate some important meta-theoretical problems involved in the philosophical description, analysis, and explanation of juridical law. By taking proper account of the more abstract and methodological aspects of legal theory, we cannot help but reach a better understanding of philosophical explanations of law.

## 1.2 Epistemic Uncertainty

Although every legal theory can be challenged both as a substantive explanation of juridical law and as a viable theoretical approach to providing such explanations, the meta-theoretical aspects of analytical legal philosophy are often given less attention than they deserve. Fortunately, detailed discus-

<sup>8</sup> See e.g. Unger, *The Critical Legal Studies Movement*.

<sup>9</sup> See e.g. Leiter, “Naturalism in Legal Philosophy”.

<sup>10</sup> Murphy, “The Political Question of the Concept of Law”, 384.

<sup>11</sup> Perry, “Hart’s Methodological Positivism”, 353.

<sup>12</sup> d’Entrèves, *Natural Law (2nd edn.)*, 19.

<sup>13</sup> Relational meta-theoretical questions may also overlap with an evaluative meta-theoretical project. For instance, if legal theory is necessarily a subset of political theory, then an important part of evaluating the adequacy and merits of a particular legal theory will necessarily involve vetting its credentials as a theory of politics.

sions of meta-theoretical problems have become increasingly prominent.<sup>14</sup> In “The Political Question of the Concept of Law,”<sup>15</sup> for instance, Liam Murphy draws attention to an important connection between the object-level of legal theory—the “hard data” of what makes particular legal propositions true within a particular legal system, or what Ronald Dworkin calls “the grounds of law”<sup>16</sup>—and the meta-level problem of evaluating and choosing among legal theories. Murphy’s substantive claims are controversial and of particular interest to analytical legal theorists who espouse the theoretical virtues of legal positivism, and an analysis of his discussion will help illuminate the complex of connections between analytical legal theory and some important meta-theoretical issues.

Murphy makes a variety of claims about legal theory: conceptual, descriptive, and normative. His intent is to prove that an irresolvable conceptual problem within analytical legal theory renders it unable to reconcile contradictory descriptive claims about law and thus leaves us with no alternative but to choose the best legal theory according to its moral consequences. I will first describe Murphy’s arguments regarding the conceptual and descriptive aspects of analytical legal theory, and then, in the next section, set out his suggested approach for choosing the best legal theory.

Murphy’s conceptual argument speaks directly to the features of the concept of law itself. He argues that “our” concept of law does not itself determine whether moral and political factors may play a role in adjudicating the truth of propositions of law in particular legal systems. In other words, our concept of law is *equivocal* with regard to the question of whether moral-

---

<sup>14</sup> The relatively small amount of scholarly work which explicitly focuses on meta-theoretical issues is especially evident in Anglo-American analytical legal philosophy. Interest in meta-theory, while always present to some degree, is steadily increasing. A recent collection of essays examining the issues surrounding H.L.A. Hart’s Postscript to the second edition of the *The Concept of Law* demonstrates a considerable degree of concern with the meta-theoretical issues involved in Hart’s theory, as well as analytical legal theory in general. See e.g. the collection of essays in Coleman (ed.), *Hart’s Postscript*. For an excellent and focused discussion of the meta-theoretical problems involving “indirectly evaluative” analytical legal theory, see Dickson, *Evaluation and Legal Theory*.

<sup>15</sup> Murphy, “The Political Question”, 317–409.

<sup>16</sup> “Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic. These more familiar propositions furnish what I shall call the ‘grounds’ of law” (Dworkin, *Law’s Empire*, 4).

political considerations might be used by courts to determine the validity or content of a law. Hence we do not know, as a conceptual matter, whether law and morality are necessarily separate, and so we are unsure whether we should support the thesis that law and morality are as a conceptual matter necessarily separate (exclusive legal positivism) or the thesis that law and morality are conceptually separable (inclusive legal positivism), or the thesis that law and morality are conceptually inseparable (Dworkinian interpretivism).<sup>17</sup>

There is a persistent and as yet unresolved contest between two descriptive theses about law: the descriptive version of inclusive positivism holds that “[as] a matter of observable fact, there are systems of law in which determinations of law are a function of moral considerations”<sup>18</sup> while the descriptive version of exclusive positivism holds that, as a matter of observable fact, there are no such legal systems where determinations of law are ever a function of moral considerations.<sup>19</sup> Hence descriptive-explanatory theories of law such as inclusive and exclusive positivism have failed to resolve the role of moral-political considerations in courts’ determinations of law.<sup>20</sup> This is so, Murphy claims, simply because the equivocality of the concept of law. Our understanding of law’s nature, its necessary characteristics, is indeterminate with regard to the relative merits of the conceptual and descriptive versions of inclusive and exclusive positivism.

The cause of positivist discord is not a lack of theoretical perspicacity. According to Murphy, disagreement about the concept of law is inevitable given that the equivocal positivist explanandum (the concept of law itself) does not clearly determine which version of legal positivism is correct. Hence legal positivists are in a state of *epistemic uncertainty*,<sup>21</sup> and this uncertainty is due in large part to what is arguably the characteristic methodol-

<sup>17</sup> I will usually follow Waluchow’s terminology when referring to the various types of positivist legal theories. See Waluchow, “The Many Faces of Legal Positivism”, 394.

<sup>18</sup> *Ibid.* 396.

<sup>19</sup> Dworkinian Interpretivism, for its part, holds that all legal determinations are an interpretation of law which puts its in its best moral light. On this view, all determinations of law necessarily involve substantive moral argument.

<sup>20</sup> For a discussion of the nature and aims of descriptive-explanatory legal theories, see Waluchow, *Inclusive Legal Positivism*, 40–41.

<sup>21</sup> The label is mine. Murphy attaches no particular label to a theorist’s perspective; instead he refers to the concept of law as equivocal. Saying that the concept of law is equivocal presupposes that a unitary theoretical concept of law is possible, and, moreover, that it is preferable. I discuss this further in Chapter 2.



ogy of traditional legal positivism.<sup>22</sup> Murphy is particularly concerned with the theoretical appropriateness and utility of conceptual analysis, which he takes to be the primary cause of epistemic uncertainty.

Drawing an analogy between the conceptual analysis of law and the conceptual analysis of knowledge, Murphy notes that the latter project has had some success because “undisputed examples of knowledge or its lack were used as the data around which to construct an account of the deep structure of our concept of knowledge.”<sup>23</sup> But the conceptual analysis of law, Murphy claims, is too ridden with disagreement and uncertainty regarding its “central” or “focal” case to proceed in a similar fashion.<sup>24</sup>

From a meta-theoretical perspective, Murphy’s most significant concern about neutral conceptual analysis is indirect rather than direct. Proponents of neutral conceptual analysis suggest that our judgment of the merits of legal theories be made on morally and politically neutral evaluative grounds. In other words, the evaluative meta-theoretical question of which legal theory is best ought to be decided by applying a set of neutral criteria to a legal theory’s explanation of law and to its methodological approach. If, however, the available neutral evaluative criteria are insufficient to single out the best theory of juridical law and/or the best way to develop a theory of law, then it follows that no resolution is possible without appealing to non-neutral evaluative criteria (e.g. moral-political consequences). Murphy argues for this conclusion, first, by calling into question the supposed neutrality of conceptual analysis, thus driving a conceptual wedge between neutral evaluative criteria and the methodology which goes along with them. He then tries to show that an especially prominent evaluative criterion—descriptive accuracy—is incapable of resolving the problem of epistemic uncertainty:

---

<sup>22</sup> As I see it, the category of “traditional legal positivists” includes Jules Coleman, H.L.A. Hart, Matthew Kramer, Joseph Raz, Wil Waluchow, and many others. It does not include Tom Campbell, who advocates an explicitly moral-political function for his variant of exclusive positivism, nor Neil MacCormick, who insists that any argument for the positivist’s conception of law will necessarily be “a practical and moral argument for conceptualizing law in a certain way rather than another way” (Neil MacCormick, “A Moralistic Case for a-Moralistic Law?”, 11) and also advocates exclusive positivism for moral-political reasons. Positivist theoretical approaches to law are in any case quite possibly too variable to merit continued use of “legal positivism” as a category for theory classification. See *sub* n. 44 on p. 16.

<sup>23</sup> Murphy, “The Political Question”, 372.

<sup>24</sup> The terms “focal sense” and “central case” of law come from John Finnis. See Finnis, *Natural Law and Natural Rights*.

since “disagreement about the role moral or political considerations can play in determining what the law is (as opposed to what it ought to be) . . . is not a disagreement that can be resolved just by looking at what lawyers do,”<sup>25</sup> it is not possible to adjudicate between the competing conceptual and descriptive claims by arguing that one of those claims more clearly fits with “what lawyers [and other legal officials] do.” Thus, even though “[i]t is clear to any honest investigator that lawyers appeal to moral and political considerations in their advocacy and that judges sometimes reach decisions in part on moral or political grounds,”<sup>26</sup> inclusive and exclusive positivists cannot conclusively show which of their theories has correctly described and explained its explanandum. By disallowing any determinative characterization of the true nature of object-level appeals to morality and politics, epistemic uncertainty appears to vitiate the theory-guiding norm of descriptive accuracy; and, insofar as it is the value of descriptive accuracy which drives the argument in favour of neutral conceptual analysis, the appropriateness of that methodology falls into question. Moreover, the problem of epistemic uncertainty cannot be avoided by arguing that one of the two main positivist theories is methodologically superior. That form of meta-theoretical argument, which examines the correct methodology for a proper philosophical understanding of law, can get no purchase here because inclusive and exclusive positivists share a methodology.<sup>27</sup>

If Murphy is correct, then it appears that traditional legal positivism has hit a roadblock. Traditional positivism’s insistence on the neutral evaluation of theoretical explanations of law, and other positivist methodological commitments, appear to lead to an inevitable and irreconcilable epistemic uncertainty regarding one of the most important characteristics of law, namely the relation or lack of relation between legal validity and moral judgments. Furthermore, if epistemic uncertainty entails that the best positivist theory cannot be determined either through the use of neutral evaluative criteria for assessing theoretical explanations or through the identification

---

<sup>25</sup> Murphy, “The Political Question”, 372.

<sup>26</sup> *Ibid.*

<sup>27</sup> Though inclusive and exclusive positivists do share most of the same methodological commitments, it may be unwise to claim that they are methodologically identical. Murphy appears to assume that they are, or at least are sufficiently identical with regard to the context of his argument. I consider positivist methodological commitments in greater detail throughout Chapters 4–7.

of the only or most appropriate methodology for legal theory,<sup>28</sup> then one might question the utility and validity of such criteria as well as the positivist methodology itself. And this is exactly what Murphy, himself a self-proclaimed legal positivist, has done. He is not inclined, however, to abandon legal positivism in some form, since the difficulties in which positivism finds itself are not due to a misguided theoretical project or poor choice of explanandum. Murphy notes, correctly, that “we have a genuine conceptual question: does, or should, our concept of law allow that legal questions can be answered in part by reference to political considerations?”<sup>29</sup>

Murphy’s argument regarding epistemic uncertainty is meta-theoretical through-and-through, for he claims:

1. The methodology of politically neutral conceptual analysis is a counterproductive means for explicating the concept of law.
2. The corresponding morally and politically neutral evaluative criteria for theory choice are impotent in the face of epistemic uncertainty.
3. Therefore, there is no alternative but for legal theory to be practiced as a subset of political theory which . . .
4. . . . aims to produce the best moral consequences.

We can note, first, that (1) is a methodological meta-theoretical claim regarding neutral conceptual analysis. Secondly, (2) is an evaluative meta-theoretical claim having to do with theory choice. And, finally, (3) is a relational meta-theoretical claim regarding legal theory and its supposedly necessary connection to political theory which, Murphy suggests, leads us directly to (4). The structure of Murphy’s overall argument is such that (1) and (2) are claims grounding an argument regarding the nature and attendant methodological inadequacy of conceptual analysis, while (3) and (4) reflect a conjointly meta-theoretical and morally normative argument as to the proper methodology and primary goal of a theory of juridical law (given the circumstance of epistemic uncertainty).

<sup>28</sup> One meta-theoretical issue I do not directly address, but which is related to some of the problems I do discuss, is the question of whether legal-theoretical methodologies can be evaluated (in terms of their value to legal theory) *independently* of the theories and theoretical conclusions in which the methodologies play a role. (See Dickson, *Evaluation and Legal Theory*, 12–15.) I suspect, however, that what I call descriptive/conceptual reciprocity makes the isolated evaluation of methodology impossible for at least some legal theories, positivism included. See *sub* § 2.3.

<sup>29</sup> Murphy, “The Political Question”, 372.

### 1.3 The Second-Best Approach

Firmly placing himself in a growing minority among legal positivists,<sup>30</sup> Murphy argues that the *moral-political consequences* of an account of the concept of law are sufficiently important as to entail that legal theorists ought to resolve the theoretical dilemma of epistemic uncertainty by affirming exclusive positivism. This is a controversial claim. While it is the case that many early legal positivists advocated positivism as a theory of law in part because of its putatively beneficial moral-political consequences, it is also the case that an overwhelming majority of contemporary legal positivists are opposed to choosing a legal theory on moral-political grounds.<sup>31</sup> Currently, it is far more common for *opponents* of legal positivism to cite the merits of so-called substantive legal positivism—legal positivism construed as a moral-political imperative—than it is for proponents of legal positivism to do so.<sup>32</sup> There are, however, exceptions to this trend,<sup>33</sup> and in any case our taking notice of the fact of substantive disagreement highlights the overall uncertainty—moral as well as epistemic—which has led Murphy to take the position he now advocates.

Murphy believes that legal theorists ought to be exclusive positivists because (i) epistemic uncertainty makes it impossible to choose between exclusive and inclusive positivism on the bases of either meta-theoretical factors or evaluative standards such as the accuracy of their descriptions of law, and (ii) exclusive positivism will lead to the best moral-political consequences. The second point suggests that Murphy rejects the Neutral Rationale Thesis, which holds that “One ought not to defend the adoption of a definition or conception of law, or claims about our present conception and

<sup>30</sup> See Murphy, “The Political Question,” n. 6 on p. 373.

<sup>31</sup> Jeremy Bentham, John Austin, and H.L.A. Hart—the last only for a time, and then only sporadically—argued in favour of a positivist theory of law because they felt that it would be more capable of improving our moral situation than the other available legal theories. For an interesting and lucid non-positivist argument towards the same end, see Soper, “Choosing a Legal Theory on Moral Grounds”.

<sup>32</sup> See David Dyzenhaus, “Positivism’s Stagnant Research Programme”. Dyzenhaus characterizes ‘substantive positivism’ as a legal theory “based in political morality and designed to have an effect on practice” (p. 717) and characterizes “the substantive, fully political positivist positions” as “the true standard bearers of the tradition” (p. 709). Cf. Perry, “Hart’s Methodological Positivism.”

<sup>33</sup> See *supra* n. 22 on p. 9.

theoretical commitments concerning the nature of law, on moral grounds.”<sup>34</sup> Interestingly, Murphy does seem to accept the Neutral Description Thesis, which asserts that “It is both possible, desirable, and philosophically enlightening to describe (and explain) a legal system as it is without at the same time engaging in its moral evaluation.”<sup>35</sup>

Murphy’s consideration of the problem of epistemic uncertainty leads him to conclude that the uncertain situation in which positivists find themselves makes it impossible for them to choose between competing theories of law *unless they resort to moral-political arguments*. “To proceed from here [the standpoint of epistemic uncertainty],” Murphy opines, “the natural course is to ask *why* the dispute about the boundaries of law matters, and choose our methodology accordingly.”<sup>36</sup> He goes on to make a reasonable (though contestable) observation, namely that the “political dimension of the dispute over the place of moral and political considerations in the grounds of law matters more than any purely intellectual concerns we might have.”<sup>37</sup> But one can concur with Murphy’s claim that the “existing equivocal concept of law has a central place in political practice and argument”<sup>38</sup> and still be disturbed by the idea that the moral-political importance of legal theory demands that we choose our legal theory on moral-political grounds, just as one might be disturbed by the claim that, since nuclear physics has moral-political consequences, we ought to choose our theory of physics on moral-political grounds.

Murphy nonetheless insists that “[w]e must . . . approach our question about the concept of law as a practical aspect of political theory.”<sup>39</sup> This strategy amounts to abandoning the Neutral Rationale Thesis and allowing moral-political considerations to supplant morally and politically neutral standards of theoretical adequacy and explanatory power. Murphy’s approach is thus even more of a challenge to legal positivism than epistemic uncertainty itself. This is so because, as a solution for getting past the epis-

<sup>34</sup> Waluchow, “The Many Faces of Legal Positivism”, 398.

<sup>35</sup> *Ibid.* While Murphy himself does not mention the Neutral Rationale Thesis, his rejection of Dworkin’s interpretive theory of law seems to be based on his acceptance of something very like the Neutral Rationale Thesis as well as what he considers to be the adverse moral-political consequences of Dworkin’s theory. See Murphy, “The Political Question”, 373, 397–409.

<sup>36</sup> Murphy, “The Political Question”, 383.

<sup>37</sup> *Ibid.* 383–384.

<sup>38</sup> *Ibid.* 383.

<sup>39</sup> *Ibid.* 384.

temic roadblock without abandoning legal positivism, Murphy would have us abandon some of the central meta-theoretical commitments of the better forms of legal positivism, commitments which follow from accepting the Neutral Rationale Thesis.

Murphy's espousal of a morally and politically normative version of exclusive positivism is all the more disturbing because he attributes the necessity of this approach to conceptual and descriptive difficulties. Unlike Tom Campbell, who recognizes that inclusive positivism may be a better *theoretical* account of law, but who believes that our *practical* moral situation would be improved by implementing a strict separation of law and morality so far as is possible, Murphy's grounds for preferring fully normative legal theory are an admixture of meta-theoretical, conceptual, descriptive, and normative reasons. As I read his argument, however, Murphy's primary reason for rejecting morally and politically neutral legal theory is the supposedly insurmountable epistemic difficulty of knowing the "real" grounds of law.<sup>40</sup> It is not completely clear whether Murphy would choose a theory of law on moral grounds were it not for the problem of epistemic uncertainty, but all the available indicators suggest that Murphy would be happy enough to refrain from choosing a theory of law according to its moral-political consequences if it were the case that we were not deadlocked by epistemic uncertainty. Thus it seems that Murphy resorts to moral-political argument because it allows him to remove the roadblock of epistemic uncertainty. We can, then, characterize Murphy's solution to theory choice as a *second-best approach*: a strategy which is taken up only as a result of the theoretical dead-end in which analytical legal theorists (supposedly) find themselves.

Murphy's suggested solution for the deadlock of epistemic uncertainty, namely choosing the means for developing the concept of law which is most likely to lead to good moral and political consequences, is both controversial and far-reaching. While the availability of a variety of theoretical goals—providing good explanations, engendering moral improvement, etc.—allows one to argue that the "best" legal theory is the one which creates the great-

---

<sup>40</sup> Jules Coleman, who refers to Murphy's strategy as a means for "engineering" or "legislating" the concept of law, seems to concur with my characterization of Murphy's position. See Coleman, *The Practice of Principle*, 208. Coleman attempts to refute Murphy's claims by first denying that "there are compelling reasons for a disciplined, precise concept of law" and then denying that "the tools available to conceptual analysis are inadequate to that task" (*Ibid.* 209). While I agree with Coleman, I will offer another reason to reject the engineering approach.

est moral improvement in human legislative activity, or the highest degree of economic efficiency, or the fewest number of lawyers, it is rare for a legal positivist like Murphy to abandon meta-theoretical-evaluative criteria in favour of evaluative standards based on putative moral-political benefits.<sup>41</sup> As important as epistemic uncertainty may be, Murphy's argument is perhaps most significant in that, if it were to be accepted, we would be forced to become sceptics with regard to the very possibility of understanding law as it is, as opposed to how we would like it to be. Murphy's positivism entirely abandons the possibility of non-sceptical, descriptive explanations of juridical law.<sup>42</sup>

As legal theorists, should we take our collective uncertainty or lack of consensus regarding the real grounds of law as a sign that we can only hope to argue for law as it ought to be and never hope to understand it as it is? I aim to show that epistemic uncertainty is not an insurmountable problem for a legal theorist who aims to produce a descriptive-explanatory theory of law. Accordingly, I will argue that, even though we should accept Murphy's claim that our knowledge of the "real" grounds of law is often uncertain, the mere fact of our uncertain knowledge does not necessarily entail that we ought to abandon those legal theoretical approaches which are (so far as possible) morally and politically neutral. There may be good reasons to eschew morally and politically neutral legal theories in favour of a morally proactive approach, but epistemic uncertainty is not one of them.

Nonetheless, epistemic uncertainty is a serious challenge for any legal theory which does not simply presuppose the actual force, or lack thereof, of moral-political considerations in determinations of the validity or content of a law.<sup>43</sup> If Murphy is correct, epistemic uncertainty is a potentially fatal challenge to traditional legal positivism. Yet it seems to me that the legal theory most capable of dealing with the fact of epistemic uncertainty is a

---

<sup>41</sup> It is rare because there appear to be good theoretical reasons to separate our descriptive and moral aims. See *sub* Chapter 3.

<sup>42</sup> Unless, of course, his moral-political argument is wholly persuasive to everyone involved with legal systems, so that in time our concept of law will have acquired the character of Murphy's version of it, absolutely and without exception. In other words, if Murphy's argument were to completely transform legal practices, then his concept of law will then be the most accurate one.

<sup>43</sup> Murphy accuses Hart of making exactly this sort of presupposition: "[*The Concept of Law*] largely takes for granted that law should be conceived of in a positivist manner, and then proceeds to describe the complex structure of law, so understood" (Murphy, "The Political Question", 373). I defend the presupposition in § 2.3.

variant of inclusive positivism.<sup>44</sup> It has the means to come to terms with the problem of epistemic uncertainty so reaffirm the possibility of choosing and developing a theory of law without resorting to criteria based on uncertain (because merely putative) moral-political consequences. In short, I aim to undermine Murphy's attempt to use epistemic uncertainty as the grounds for an argument which asserts that we have no viable alternative but to use consequentialist moral-political criteria in order to choose a theory of law, and to show why epistemic uncertainty actually gives us another reason to prefer inclusive positivism.

## 1.4 Two Challenges

The foregoing survey of the meta-theoretical aspects of Murphy's argument makes it clear why epistemic uncertainty is both a challenging problem and a plausible reason for the apparent theoretical deadlock afflicting the various positivist theories of law. We must consider two important meta-theoretical problems before attempting to refute Murphy's claims regarding descriptive accuracy, epistemic uncertainty, and the need to choose a legal theory on moral grounds. Both of these problems must be confronted by every legal theorist who does not want to simply presuppose the nature of law:

1. The methodological meta-theoretical problem of how we may best conceptualize law as an explanandum suitable for explication by a descriptive-explanatory theory of law.
2. The evaluative meta-theoretical problem of determining the proper manner in which to evaluate legal theories, particularly the issue of

---

<sup>44</sup>I use the term 'legal positivism' with some trepidation. To understand just how difficult it has become to even speak of legal positivism as a coherent category for theory classification, see Fűßer, "Farewell to Legal Positivism: The Separation Thesis Unraveling" and take particular note of Fűßer's observation that, at present, the meaning of the Separation Thesis is "hopelessly ambiguous." See also Perry, "The Varieties of Legal Positivism". While Fűßer and Perry help to untangle the various permutations, explicit and implied, of the central claims of legal positivism, it is Waluchow who provides the most comprehensive survey of the different versions of this school of legal theory. See Waluchow, "The Many Faces of Legal Positivism." Waluchow observes on p. 390 that "legal positivism' is understood in so many different ways that it has become almost meaningless to speak of legal positivism without stating precisely the sense of meaning in which one takes that term, the kind of legal positivism one has in mind." I describe the kind of legal theory which I take to be positivist in § 2.3.



whether (morally and politically) neutral evaluative criteria are sufficient evaluative standards.

These problems serve as our foci for the next two chapters. My discussion of (1) necessarily digresses from a direct consideration of Murphy's epistemic uncertainty argument, but the discussion will help us to understand why positivists refer to "the" concept of law, and why doing so involves a defensible presupposition which is, unfortunately, rarely defended. By examining how legal theorists deal with the pre-theoretical data from which they begin their theoretical inquiry, we shall acquire a deeper insight into an important meta-theoretical commitment (often only implicitly) held by legal positivists. (2) is a perennial question in philosophy of law, but it occupies conceptual terrain which deserves further exploration. While there have been many debates about the relevance of the moral consequences of a legal theory, and about the role that those consequences may properly play in legal theory (or not), Murphy's second-best approach is significantly different from past discussions of the topic insofar as he uses the fact of epistemic uncertainty to ground an argument for developing a concept of law so as to achieve the best moral consequences. To understand this important difference, we must develop a general overview of the meta-theoretical problems involved in theory choice.

## Chapter 2

# Concept or Concepts of Law?

Most legal theorists recognize that the relative merits of the various theoretical accounts of the concept of law are a matter for persistent disagreement. There is no consensus as to which account of law is best, nor is there even a consensus regarding the very possibility of singling-out a particular theory of law as solely correct or definitively superior. Indeed, not everyone accepts the notion that all actual legal systems—never mind all *possible* legal systems—can be encompassed by a single concept of law at all, save one which is so general as to be trivial or misleading. And so there are disputes over whether “the” theory of law could exist and whether, if it did exist, it could be identified as solely correct with respect to “the” concept. The meta-theoretical problem of theory-choice cannot, therefore, be separated from the meta-theoretical problem of determining whether there is only one concept of law. We shall consider the second problem in this chapter so that we can deal with the former problem in the following chapter.

### 2.1 “The” Concept of Law

*If* it is indeed appropriate to speak of a single concept of law as the appropriate theoretical focus for philosophical legal theorists, *then* it is not unreasonable to observe, as Murphy does, that those same legal theorists are faced with an equivocal concept of law insofar as the different accounts given by a wide variety of often discordant legal theories appear to attribute a *mélange* of contradictory propositions to that particular concept.

An important aspect of philosophical inquiry, however, involves bringing to light our presuppositions in order to see whether they are defensible. One rarely-questioned presupposition in legal theory is the notion that there is only one concept of law. And yet this presupposition has direct and serious consequences for legal theory. The claim that there is only one concept of law entails that any right-minded legal theorist is *ipso facto* providing an account of *that* concept. This presupposition is so common as to be nearly universal, yet its widespread acceptance may either be a sign of its soundness or of its simply having been taken for granted because of a lack of critical reflection. There would be serious repercussions for Murphy's epistemic uncertainty argument, not to mention analytical legal theory in general, if it were the case that this presupposition is incorrect.

In this chapter we shall consider the concept (or concepts) of law from a meta-theoretical perspective. Accordingly, we must be careful not to equate our meta-theoretical conclusions with claims about actual legal systems. It is clear that many legal practitioners differ in their opinions of both the nature of juridical law and the status of particular claims regarding the laws of a particular legal system. Thus they differ in their individual conceptualizations of law, which is of course an important if not always central aspect of their own legal practices.<sup>1</sup> This raises an important meta-theoretical methodological question: Should a legal theorist account for the conceptualizations already present in the legal practices of particular legal systems? There are three possible answers to that question: yes, no, and yes & no. Inclusive positivism entail the 'yes & no' answer, and in doing so it offers a theoretical middle road between the extremes of the first and second answers. One of the aims of my presentation in this chapter is to lay the groundwork for a more detailed discussion of the need for a good legal theory to take account of, or at least not dogmatically discount, the concepts at work within actual legal systems.<sup>2</sup> In any case, when I speak of 'legal theory' in this chapter I am *not* referring to what we might call 'practical legal theory' in the sense of the (implicit or explicit) conceptual commitments and practices which might be attributed to particular legal practitioners. For now, we will steadfastly maintain our meta-theoretical perspective in order to consider, from that point of view, whether there are good methodological reasons to presuppose a single concept of law.

---

<sup>1</sup> See *sub* §§ 5.2 & 6.4.

<sup>2</sup> See *sub* Chapter 7.

## 2.2 Concepts & Conceptions

Even if juridical law does in fact have a discernible nature, one which is common to all actual legal systems, when describing the current state of legal theory it may be more accurate to recognize the existence of a *variety of concepts* developed by a number of legal theorists each attempting to come to terms with the nature of law. After all, there are many significant differences between juridical law as described by Ronald Dworkin and as described by Joseph Raz, to mention only two contemporary legal theorists. It is clearly correct to claim that the Dworkinian and Razian accounts of juridical law diverge widely, so why ought we to regard them as different accounts of the same concept rather than two entirely different concepts?

A good reason to distinguish between Razian and Dworkinian theories of the concept of law—rather than suggest that Raz and Dworkin have different *concepts* of law—is that *prima facie* it appears that Raz and Dworkin are both trying to elucidate the same phenomenon: juridical law. To say that they each have their own concept of law might have the unfortunate consequence of implying that neither Raz nor Dworkin have the same object of explanation in mind. If debates amongst legal theorists, Raz and Dworkin included, really do have a common focus on juridical law, then it would in fact be a good idea to distinguish between competing theories of that particular object of analysis and explanation rather than assuming that there are, as it were, ontologically discrete concepts of law.

Dworkin himself presents the concept/conception distinction for that very reason. While discussing the controversial notion of what courtesy requires in specific circumstances, he usefully distinguishes between concepts and conceptions by suggesting that the difference involves

a contrast between levels of abstraction at which the interpretation of *the* practice can be studied. At the first level agreement collects around discrete ideas [concepts] that are uncontroversially employed in all interpretations; at the second the controversy latent in this abstraction is identified and taken up [to produce conceptions].<sup>3</sup>

Applying this distinction to juridical law would entail that the concept of law is already present in the explanandum itself.<sup>4</sup> The conceptions of that

---

<sup>3</sup> Dworkin, *Law's Empire*, 71, emphasis added.

<sup>4</sup> It can even be taken *as* the explanandum in the way that many analytical legal

concept result from the various legal theories employed to explicate the concept which is already present.

Dworkin's description of the concept/conception distinction is helpful, but for our purposes it must be attenuated. Theoretically adequate explanations of law, according to Dworkin, must attempt to portray law in its best moral light. A legal theorist could, however, develop a conception of law which is not a Dworkinian interpretation portraying law at its moral best. For our purposes, then, we must be careful to remember that with respect to the concept/conception distinction's use in legal theory, explanations of the concept of law need not be Dworkinian interpretations.<sup>5</sup> With this caveat in mind, however, we can employ the concept/conception distinction to mark the difference between a theoretical explanation of juridical law and the actual nature of juridical law, whatever that nature might be.

Thus we are now able to focus on the difference between the inclusive positivist conception of law the exclusive positivist conception. Given their contradictory relationship, it seems that only one conception could be accurate with respect to the concept each conception is meant to elucidate. Murphy claims that our concept of law is equivocal in part because neither the inclusive nor the exclusive conceptual thesis regarding law is clearly superior: the inclusive positivist *conception* of law, which holds that law and morality may be connected, contradicts the exclusive positivist *conception*, which holds that law and morality are necessarily disjoint. This is the case even though the two competing conceptions are both attempts to describe and explain what law really is. They are offered as descriptive explanations of the nature or *concept* of law.

There is nothing inherently wrong with the concept/conception distinction. Indeed, it serves several useful purposes. In the first place, the distinction signals the fact that competing legal theories offer different, sometimes even contradictory, descriptions and explanations of law. Legal theorists disagree about the true nature of law just as physicists disagree about the true nature of sub-atomic particles. To say that contradictory physicist-

---

theorists do, in which instance we would say that the concept of law is part of the pre-theoretical data. See *sub* §2.5. Murphy appears to see things this way, and that may be why he fails to fully separate the meta-theoretical and object-level aspects of our epistemic uncertainty.

<sup>5</sup> We need not quibble about whether every explanation is an interpretation. There is a sense in which explanations must be interpretive. The relevant issue, however, is whether it is Dworkin's sense which applies.

type explanations of sub-atomic particles are conceptions of the concept of such particles would likewise signal that the theories of sub-atomic physics underlying the different conceptions disagree in their accounts of the true nature of the relevant phenomena.

The concept/conception distinction also implies that our understanding of law may develop to the point whereby we are able to determine which legal theory most accurately describes and explains “the” concept of law. If we were to acquire a sufficient degree of understanding, then we would (in that ideal world) be able to dispense with the (attenuated) concept/conception distinction entirely. We would know what “the” concept of law is, hence there would no longer be any need to distinguish between competing conceptions of that concept. In this way, the concept/conception distinction is a useful means for demarcating legal-theoretical descriptive explanations of the nature of law from the nature of law itself. Lacking perfect knowledge of what law really is at the object-level, legal theorists aim to develop, to the best of their ability, theoretical explanations of it.

The concept/conception distinction serves useful methodological and epistemic purposes by reminding us of the manner in which we try to come to terms with the phenomenon of law and of the competing theoretical accounts which necessarily arise due to the fact that we do not have a perfect understanding of law. Although the concept/conception distinction is useful, it is also mildly obfuscatory. Compared with the realm of sub-atomic particles, juridical law has an additional level of complexity: legal systems are human institutions whose participants have their own views regarding the practices which make such institutions possible. The nature of juridical law may entail that a certain participant’s perspectives on law, such as that of a judge, involve a particular stance or attitude towards it. For example, Hart argues that the officials of a legal system must view violations of that system’s secondary rules as grounds for criticism even though citizens themselves may be quite ignorant of those rules.<sup>6</sup> Official participants in a

---

<sup>6</sup> Hart argues that the “two minimum conditions necessary and sufficient for the existence of a legal system” entail that “those rules of behaviour which are valid according to the system’s ultimate criteria of must be generally obeyed” and that secondary rules of recognition, change, and adjudication “must be effectively accepted as common public standards of official behaviour by its officials” (Hart, *The Concept of Law* (2nd edn.), 116–17). Hart also claims that “the reality of the situation is that a great proportion of ordinary citizens—perhaps a majority—have no general conception of the legal structure or of its criteria of validity. The law which he obeys is something which he knows of only

legal system—lawyers, judges, and legislators—also have their own ideas about how juridical law works or ought to work. The forms and standards of legal practice may be introduced, modified, or abandoned over time. And so, unlike the realm of sub-atomic particles, the realm of human legal institutions necessarily involves human participants whose own perspectives, behaviours, and ideas regarding law are part and parcel of those institutions. A descriptive-explanatory account of “the” concept of law must, therefore, take some account of the attitudes, practices, and ideas which belong to the participants in and subjects of legal institutions. Yet disagreement about the nature of juridical law occurs not only at the level of legal theory, but also at the level of legal practice. While the concept/conception distinction helps signal the fact of disagreement amongst legal theorists, it does risk obscuring the degree of what we might call “internal disagreement,” even though such disagreement is common within actual institutions of juridical law.

More importantly, the use of the concept/conception distinction is often, though not always, concurrent with the *presupposition* that juridical law has a particular nature (and only one) which the various competing conceptions of it aim to illuminate.<sup>7</sup> In other words, analytical legal theorists often presuppose that there really is only one concept of law which is fully coincident with law at the object-level, such that most all actual systems of law are considered to be tokens of the same type.

Given its usefulness in analyzing law and distinguishing between different theoretical accounts of the nature of law, one can defend the concept/conception distinction on methodological and epistemic grounds. But what of its obfuscatory tendencies? Ought we to accept the distinction’s tendency to downplay internal disagreement about the nature of law (or of a particular legal system)? Perhaps. Later we shall consider whether it is possible to retain the concept/conception distinction in legal theory without minimizing the fact of internal disagreement. The more immediate challenge, however, is to justify the presupposition that law has a single, distinct nature expressible in terms of a single overarching concept of law.

---

as ‘the law’” (*Ibid.* 114).

<sup>7</sup> See e.g. Dickson, *Evaluation and Legal Theory*, 17–19.

## 2.3 The Positivist View of Law

Proper philosophical analysis requires us to avoid presuppositions whenever possible. This is especially true of a minimalist legal theory, and legal positivism is or at least can be a minimalist theory of law. If we are to accept Murphy's claim that "the" concept of law is equivocal because of contradictions between the conceptions of law offered by legal theorists, then we must first secure the claim that there is in fact one single overarching concept of law. To do otherwise is to overlook or wilfully ignore the conceptual possibility that the category of juridical law may in fact encompass more than one concept of law, such that apparently contradictory theoretical conceptions of "the" concept of law may not actually contradict each other because they are accounts of different explanatory objects.<sup>8</sup>

There are too many legal theories to be readily condensed in a comprehensive survey. Since our focus in the present inquiry is on the meta-theoretical issues connected with legal positivism, we need a reasonably detailed account of how legal positivists approach the problem of describing and explaining juridical law. Legal positivism is of interest not only because of its considerable influence on how we conceive of law and of the task of legal theory, but also because it, perhaps more than any other type of contemporary legal theory, has attempted to come to terms with and reflect upon its own methodological and conceptual foundations.

### Law as an Explanandum

Legal positivists developed an independent theory of law—independent, that is, of true moral principles, a doctrine of historical progress, and ideal metaphysical entities—by taking up a particular stance towards law *as an object of theoretical explanation*. From the positivist's theoretical perspective, the existence of legal systems is "simply" an observable fact about human communities and a particular legal system is so in virtue of "social facts" manifested by the presence of institutional rule-systems which gov-

---

<sup>8</sup>Persistent and seemingly irreconcilable theoretical disagreement—especially disagreement regarding appropriate theoretical methodologies and meta-theoretical-evaluative criteria—can be a sign of implicit, hence unrecognized, differences in the objects of explanation. I have argued elsewhere that this is the case with theoretical disputes regarding another complex social phenomenon: the creation, evaluation, and theoretical explanation of music. See Brian Hendrix, "Tchaikovsky versus the Western Canon".



ern conduct. For the legal positivist, then, institutions of juridical law are taken generally as the explanandum of an analytical legal theory. Initially, these institutions are taken as they appear “simply as a fact”<sup>9</sup> which can be approached and analyzed without assuming that all such instances of the object have a particular moral status.<sup>10</sup> Jules Coleman calls the idea that “law’s possibility must be explained in terms of social facts” the Social Fact Thesis, and he correctly observes that “nothing is more important to legal positivism.”<sup>11</sup>

While Coleman links the Social Fact Thesis to the existence conditions of juridical law, the thesis is also a methodological precept whereby the apparent structure and functioning of certain visible social institutions is deemed sufficient to consider applying to them the label ‘legal system’—regardless of their moral status. Put roughly and for the sake of contrast, we might say that legal positivists examine particular legal systems in order to discover and explicate juridical law *as* a concept. In other words, positivists try to glean conceptual truths from legal phenomena. What we might think of as a converse approach works in the opposite direction: it examines legal systems *by means of* an already determined concept of law which is explicitly constrained or conditioned by *a priori* requirements of morality, history, or metaphysics. By taking a view of law which rejects, for instance, an *a priori* moral restriction on the content of purported laws, legal positivists advocate a *minimalist methodology* for legal theory—an approach to law as an object of theoretical explanation where that object is, so far as possible, understood on its own terms.<sup>12</sup>

There is an important subtlety here, one which we can elucidate with a distinction. Henceforth, let us call any actual legal system or the set of all actual legal systems the *explanandum*: the actual phenomenon (or set of phenomena) we aim to describe and explain. To begin to develop a theoret-

---

<sup>9</sup> See Villa, “Legal Theory and Value Judgments”, 451; Bobbio, *Giusnaturalismo e Positivismo Giuridico*, 105–07.

<sup>10</sup> This is not to say, however, that particular instances of legal systems, or legal systems in general, cannot have moral (or perhaps even metaphysical) relevance.

<sup>11</sup> Coleman, “Incorporationism, Conventionality, and the Practical Difference Thesis”, 115–16.

<sup>12</sup> This rough description is somewhat misleading, however, since positivists do employ conceptual arguments in order to re-categorize the data which forms their object of explanation. Raz and other exclusive positivists suggest that the conceptual necessity of legal systems having to claim legitimate authority contradicts the apparent “fact” that principles of morality can serve as criteria of legal validity. See *sub* § 7.4.

ical explanation of that explanandum, however, we must “filter” the immense amount of pre-theoretical data the explanandum comprises. We are not, for instance, concerned with whether judicial decisions are handwritten or typewritten, or with the colour of judges’ robes. While the explanandum comprises all legal systems and their features, our *explanatory object* is the generalized or filtered set of data with which we work. Legal positivism is minimalist in that it refrains from imposing *a priori* constraints on that object.

### Methodological Minimalism

Unfortunately, legal positivism’s methodologically minimalist approach is often misunderstood. For instance, much has been made of the positivist’s long-standing distinction between law and morality, yet we should be careful not to give this distinction more significance than it merits. By accepting the idea that the existence condition of a juridical law is its enactment by a human authority and its integration into an institutional system of a particular type, the positivist legal theorist is especially well-placed to highlight the difference between a law’s existence and whatever other metaphysical or moral properties it may have. While positivists have not shied away from making this distinction forcefully and often, it is worth noting that non-positivist legal theorists are also able to distinguish between the existence of a law and the moral status of its substantive content. Cicero’s insistence upon the direct connection between a “true law” and immutable eternal principles, to cite just one example, did not prevent him from noting that law was commonly thought to be separable from what was just or fair or reasonable. Although Cicero argued that “true laws” must adhere to natural law, he grudgingly recognized that “it will sometimes be necessary to speak in the popular manner, and give the name of law to that which in written form decrees whatever it wishes, either by command or prohibition.”<sup>13</sup> The distinction between the existence of a law and its merits, moral or otherwise, was neither introduced by nor does it require positivist legal theory. Although that distinction is especially important with regard to the historical origins of legal positivism, we should be careful not to think of it as the hallmark of contemporary legal positivism.

---

<sup>13</sup> Marcus Tullius Cicero, *De Legibus*, 319.

Most positivist legal theorists do, however, insist that law can be an object of theoretical inquiry where that inquiry refrains from holding metaphysical presuppositions or engaging in moral justification.<sup>14</sup> For them, the distinction between a law's existence and its moral or metaphysical properties demarcates the proper boundaries of legal theory: legal positivists reject the relational meta-theoretical (methodological) position which entails that a legal theory must *also* be a moral, political, or metaphysical theory. The positivist's aim is to present a minimalist account of juridical law: "law without trimmings."<sup>15</sup> Positivists hold that juridical law exists because legal systems exist and legal systems and the legal rules they instantiate exist regardless of their moral merits. A legal system may, for instance, impose slavery on some or even most of its subjects. Hence a positivist legal theorist need not assert true facts about objective morality, nor view law in light of a political theory, nor incorporate principles of speculative metaphysics.

It can thus be said that positivist legal theory is a minimalist one, at least when compared to the natural law theory of Cicero or the wholly systematic approach of Hegel.<sup>16</sup> Positivists argue that we need not espouse or rely on controversial and quite possibly extraneous claims regarding eternal principles or other abstract entities in order to be legal theorists; rather, they believe that legal systems can be usefully examined and explained without appeal to divine reason or the forms through which human freedom has been actualized throughout its long history. The distinction between a law's existence and the moral value of its content, as well as the distinction between the mere existence of a legal system and its overall moral value,

---

<sup>14</sup> A thorough explanation of legal systems, however, often requires that we take note of those features which have moral significance. This is a kind of moral *evaluation*, though it is not a moral *justification*. See *sub* §3.2.

<sup>15</sup> See e.g. Kramer, *In Defense of Legal Positivism*.

<sup>16</sup> The account of positivist methodological minimalism which I provide in this subsection is not to be confused with Perry's notion of "methodological positivism," which is "the view that legal theory can and should offer a normatively neutral description of a particular social phenomenon, namely law" (Perry, "Hart's Methodological Positivism", 353). The reasons for the dissimilarity arise not from any disagreement with the definition just cited, which could serve my account just as readily as Perry's, but with Perry's notion of what it means for a theory to be "normatively neutral." Perry conflates all normative claims with moral claims, and so when he expands upon his account of methodological positivism the result is something quite distant from my account of positivist methodological minimalism. In Chapter 4 I argue against Perry's claim that "normatively neutral descriptions" cannot further our understanding of law.

leaves a conceptual space for describing and explaining juridical law without reference to its “true” moral standing, thus minimizing the need for legal theorists to be moral theorists at the same time. One may be a legal positivist and accept the *possibility* that there is such a thing as an objectively and uniquely true moral system, but one cannot be a legal positivist and claim that knowledge of that system is *necessary* for legal theory.

Unfortunately, the minimalist character of positivist legal theory has also been misconstrued as suggesting that juridical law can be understood in the same way we understand static physical entities such as rocks. Yet legal positivism is very different from naïve scientific positivism, and so positivist legal theory is not susceptible to the devastating critiques which have relegated scientific positivism to the history of ideas. Legal positivists do not confuse laws with physical entities like rocks: the “social fact” of a law’s existence is not like the “physical fact” of a rock’s existence, and the notion that a legal system is a human social institution does not imply that it is conceptually or formally identical to an ossified rock-formation. Positivist minimalism asserts that laws exist “by position” insofar as they are set down in a particular way within a particular context. Yet positivists also recognize that the means of creating and enforcing law are related to the larger context of human society and, most importantly, to the means by which human beings regulate and exert control over each other. The context into which the positivist places the phenomenon of juridical law is not the seemingly static schema of physical entities like rocks, but the dynamic give-and-take of human relationships. The explanandum that is juridical law is qualitatively different from mere things.

Positivism’s methodological minimalism does not render it conceptually impoverished nor otherwise incapable of furthering our understanding of juridical law and, consequently, of ourselves. The minimalist approach of legal positivism is first and foremost a methodological strategy: the positivist aims to understand legal systems as a type of given social fact in order to further our knowledge of this particular type of human institution, as opposed to furthering our knowledge of morality or history. This is not to say, however, that a better understanding of juridical law cannot aid our understanding of morality or history. Rather, it is to note that the primary aim of legal positivism is to give an account of law; whatever other benefits might accrue from that account, however significant, are secondary.

It is equally important to note that nothing in legal positivism precludes other ways of examining law, whether those alternatives be premised

upon an objective morality or necessary stages in human history or whatever other approach proves to be insightful. At most, the legal positivist will insist that these non-minimalist inquiries into juridical law ought to be embarked upon only after we have developed a minimalist description of juridical law so as to give ourselves a clear picture of the nature of that institution. Thus, while positivists insist that legal systems can be observed “empirically,”<sup>17</sup> this approach does not disallow *subsequent* theoretical projects which aim to examine the moral status of legal systems or particular laws. Legal positivists do not suggest that questions having to do with juridical law’s moral merits or historical significance are wrong-headed or pointless. What the positivist insists upon is not moral blindness, but rather the possibility of developing a theory of law which is relatively independent of moral, metaphysical, and other theories whose scope goes beyond a focused analysis of the institutions of human juridical law.<sup>18</sup> That is why many of the meta-theoretical debates about legal positivism have to do with the proper scope and boundaries of legal theory.

Positivism’s methodological minimalism demands, in the first place, that the legal theorist presuppose as little as possible, and secondly, that more general and ambitious theoretical approaches to law—such as subjecting it to critical morality or evaluating its role as a causal force within history—are best begun only after we have developed a reasonably thorough description of the structure and necessary elements of legal systems.

## The Positivist Presupposition

It might be said that the goal of developing a “presuppositionless science” or philosophical theory has been the Philosopher’s Stone of modern theoretical inquiry. A theory requiring some particular presupposition or set of presuppositions is at the very least regarded as dependent upon some more general scheme which justifies those presuppositions without having any of its own; at worst, theoretical inquiries which admit to their own use of presuppositions are thought to be inherently biased and obfuscatory. Some scholars believe that bias is unavoidable and thus equate all forms of

---

<sup>17</sup> That is, without presupposing abstract moral or metaphysical features. Throughout this work I use ‘empirical’ in this sense unless otherwise specified.

<sup>18</sup> This characterization of legal positivism represents one of the rare points of agreement between positivists and anti-positivists. See e.g. Soper’s discussion of Hart and Dworkin’s views in Soper, “Searching for Positivism”, 1742–43.

theoretical inquiry to little more than professions of a particular ideological outlook. I am not concerned here to settle such grand ideological debates. Regardless of the real status of the possibility of a presuppositionless inquiry into anything, it is more important at this juncture that we come to understand the relation of positivist legal theory to its own presuppositions.

Legal positivists generally believe that legal theory is best practiced as an independent discipline which presupposes nothing except the equation of a variety of apparently similar social institutions with the descriptive category 'legal system'.<sup>19</sup> It is important to recognize that this *is* a presupposition. Indeed, it would be foolish to claim otherwise. Just as the terminological similarity between 'legal positivism' and 'scientific positivism' invites misunderstanding of the nature of legal positivism's empiricism, the not altogether uncommon assertion that in legal positivism "nothing is presupposed" or that "we begin from a neutral position" invites considerable misunderstanding of the nature of the neutrality to which legal positivism properly aspires. A very brief digression will make it clear why *legal positivism is not, can not, and should not be perfectly presuppositionless*.

A theory of law must presuppose, at the very least, that there is something which admits of explanation. More specifically, it must presuppose that juridical law exists. If there is no such thing as juridical law then it follows that there is no such thing as legal theory. It is perhaps more correct to say that if there is no such thing as juridical law, then there *ought* to be no such thing as legal theory, since, however unwise it might be, it is possible to develop a theory in order to describe and explain a non-existent phenomenon. In any case, with regard to any reasonable legal theory, the important question is not *whether* we must presuppose something, but *how* and *why* we decide to presuppose it. What makes it possible to argue that legal positivism is a (relatively) neutral theory of law is the self-reflective and forthright manner whereby it presupposes its explanatory object.

A theory of law clearly requires an object of explanation. It must, from the nearly infinite amount of data present in the explanandum itself, identify a more coherent and potentially explainable focus for theoretical inquiry. For positivists, the phenomenon of an apparently similar set of legal institutions and practices is taken as the explanatory object. "But," we might ask, "what is law?" *That* question can only be answered either by asserting that

---

<sup>19</sup> That is, positivists presuppose that the phenomenon of juridical law (the explanandum) can be approached *ab initio* as if it were one explanatory object.

the nature of law is discernable *a priori* (as Cicero argues), or, alternately, by making use of a provisional definition of law which allows for theoretical inquiry to begin but which may be modified as work progresses so that the result of the inquiry—an account of the nature of law—is not simply an elucidation of a stipulative definition.

We have already seen that legal positivists aim to minimize theoretical presuppositions and commitments by taking law “as it is” or “empirically” or “simply as a fact.” This is a methodological approach which makes use of a *provisional definition* insofar as methodological minimalism depends upon the presupposition that the explanandum of legal theory—juridical law—is present and largely recognizable “as it is.” In short, at the beginning of his theoretical inquiry the legal positivist defines law as a social fact or set of social facts which is made manifest by particular forms of social institutions and practices. As the positivist legal theorist inquires further into the nature of these institutions and practices, his definition of law and his scheme for categorizing the institutions and practices (as being legal institutions and practices or not) is refined.

The primary function of the positivist’s provisional definition of juridical law is to allow for theoretical inquiry to begin: the definition simply allows for the identification of an object of explanation. *It is a provisional definition, not a stipulative definition.* As a deeper understanding of juridical law is progressively developed the positivist may arrive at conclusions which make changes in his meta-theoretical commitments necessary, e.g. a modified methodology or a modified definition of ‘law’. There is, for instance, no methodological or conceptual necessity in positivist legal theory which would preclude a considered conclusion asserting that what initially appears to be a nearly universal system of regulating human conduct is actually a set of superficially similar yet at a deeper level quite different systems. The explanandum may in fact be two or more discrete explananda. Thus the positivist may eventually take the position that although the twentieth-century Canadian system of juridical law appears to be of the same type as the late-republican Roman system of law, each is in fact a categorically different creature.<sup>20</sup> Hence the legal positivist is, or at least ought to be,

---

<sup>20</sup> I am not claiming that this is the case. In fact, it is difficult to imagine something close to law as we know it which, upon closer consideration, would in fact be something else. But my point stands: there is no *methodological* or *conceptual* encumbrance within the positivist legal theory which would prevent positivists from arriving at such a conclusion.

neutral even with regard to the accuracy of his initial definition of the object of inquiry.

One could just as readily claim that the term ‘legal system’ ought to be reserved for those institutions which enforce a particular set of moral norms, or which meet with the approval of the Pope, or some other criterion. If we were to take up Cicero’s approach to understanding law, for instance, we would necessarily presuppose that there exists an immutable natural order of the universe, an order discoverable by the correct use of reason, which provides the normative standards whereby we can conclusively determine whether a legal decree is a true law and whether it is accurate to characterize a particular institution as a legal system.<sup>21</sup> Thus the boundaries of our explanatory object would be fixed insofar as we would begin our legal-theoretical inquiry already having in hand a stipulative definition of what is and is not law, as well as what is and is not a legal system, such that the result of our legal-theoretical inquiry could never lead to the consequence of our having to change those definitions.

Many positivist legal theorists are unwisely tempted to use the wrong sort of argument to defend what is in fact a definition susceptible to re-definition upon further consideration. One can easily confuse the fact that juridical law *can* be approached in an empirical manner such that legal systems appear to be nearly universal amongst human societies with the much stronger claim that all the various examples of extant legal systems *really are* functionally, structurally, or conceptually equivalent. We can defend the perspicacity of an initial definition by showing that it makes it possible for us to develop a sophisticated legal theory with great explanatory power. That is, we can convincingly establish the accuracy of a tentative definition once we have developed a legal theory whose conclusions support it. Doing so does not involve us in a *petitio*, though one may mistake it for such. So long as our considered conclusions do not require the definition itself then our theoretical claims may stand on their own and support each other. But we must always be careful not to confuse the mere beginning of our analysis with our considered, defensible conclusions.

---

<sup>21</sup> When referring to Cicero’s theory of law, I shall use ‘legal decree’ to refer law understood “in the popular manner” and ‘true law’ to refer to a legal decree which meets the conditions of justice Cicero sets out, namely adherence to the immutable and eternal natural law.



## Moral Neutrality

Of course, pointing out that it is possible to treat juridical law as an object of theoretical explanation without having to determine its moral merits does not amount to proving that we *ought* to proceed in this manner in order to best understand law.<sup>22</sup> The legal positivist's decision to minimize presuppositions requires justification. Although there are many possible justifications, for the most part they fall into two general camps: *moral* justifications and *meta-theoretical* justifications.

The usual positivist justification for refusing to presuppose the truth of a moral theory, and for refusing to consider theories of moral justification to be an essential part of legal theory, is a meta-theoretical one: we can supposedly arrive at a clearer and less distorted description of our explanatory object (juridical law) by *not* submitting it to direct moral evaluation while we are attempting to describe it. While this is a controversial claim, we need not get into the details of that debate yet, except to note that some non-positivist legal theorists have argued that law has an essentially moral component such that any theoretical account of law must necessarily take up and apply a moral theory.<sup>23</sup>

Another positivist justification for a minimalist methodology hinges on the claim that, because there is so much controversy surrounding the very possibility of a correct moral theory, never mind a uniquely correct one, it is better to develop a legal theory which does not rely on such a theory. This claim, too, can be challenged on the same grounds as have already been mentioned, namely that legal theorists need to distinguish between true law and legal decrees, that this distinction requires direct moral evaluation, and so avoiding any commitment to a moral theory would itself distort the explanatory object. From this non-positivist perspective which holds that

---

<sup>22</sup> Here is as good a place as any to note the semantic ambiguity of 'ought.' As Hart observes, "The word 'ought' merely reflects the presence of some standard of criticism; one of these standards is a moral standard, but not all standards are moral" ("Positivism and the Separation of Law and Morals", 69). Hart's observation is as applicable to meta-jurisprudence as it is to particular theories of law.

<sup>23</sup> As we shall see, there is some merit to this argument. The important question, however, is not whether a moral-theoretical perspective is necessary for understanding law, but whether law can be an object of theoretical explanation without being subjected to moral-theoretical determinations of its moral value. In other words, the important question is whether we can understand law to some significant degree without having a moral theory determine the existence conditions of law *a priori*.

legal theory is inextricably connected to moral truth, the act of trying to avoid the contested ground of moral theory amounts to abandoning the possibility of understanding the essence of law. In any case, the legal positivist rejects such a view and aims to avoid presupposing the truth of a moral theory in order to approach the object of theoretical inquiry in a relatively unbiased manner.

We can also note that the positivist's methodological justification for minimizing presuppositions may serve as a premise in an argument purporting to show that the positivist theoretical methodology ultimately makes a stronger moral critique of law possible: "If we want to subject juridical law to moral critique," so the argument goes, "then we ought first to get a clear picture of what exactly juridical law is, and the clearest picture will result from a description and elucidation of law which does not depend upon direct evaluations of the moral merits of particular legal decrees." While this argument claims that a particular type of legal-theoretical explanation can aid our moral-theoretical inquiries, *it is not in and of itself a moral argument*. It does not claim that positivist legal theory is *itself* morally beneficial; rather, the argument claims that a positivist legal theory is beneficial to our moral theorizing (a feature which itself may or may not be moral beneficial<sup>24</sup>) because it ultimately presents us with a thorough and (so far as possible) undistorted account of law which can then be taken up from the moral-theoretical perspective and, as it were, submitted for moral judgment. Indeed, if we first develop a morally-neutral, undistorted account of law then we will be better prepared to engage in a moral critique of it from the perspective of many different moral theories, rather than the single theory we might have presupposed to be correct had we not chosen positivist methodological minimalism. According to this argument, then, positivist legal theory is of *instrumental value* to moral theory: it presents the least distorted account of a morally significant human social institution and allows for the moral appraisal of that institution by any number of moral theories.

---

<sup>24</sup> If, for instance, the Ten Commandments accurately reflected the true precepts of morality, then it could well be the case that our moral situation would be most improved by an unreflective adherence to them. One could even argue—on utilitarian grounds, for instance—that a universally accepted (though wholly false) moral code is of greater value than any number of true moral propositions. It is most unfortunate that philosophers are prone to assume that a better theoretical account of some important human phenomenon necessarily results in the improvement of our moral situation.

The foregoing argument is, properly speaking, a relational meta-theoretical argument: it claims that positivist legal theory has benefits which can accrue to other sorts of theories. As we shall see, one example of this sort of argument can be developed by means of a charitable interpretation of H.L.A. Hart's Argument from Intellectual Clarity. The relational meta-theoretical argument establishing legal positivism's utility for moral critiques of law may, however, be confused with a quite different sort of argument. So-called "causal/moral arguments" suggest that adopting a particular theory of law will lead to good or bad moral consequences, and that these consequences serve as good reasons to accept or reject that legal theory.<sup>25</sup> This form of argument is especially controversial since it suggests that we ought to choose our theoretical approach according to its moral benefits rather than its ability to reveal the truth of the matter. Most modern legal positivists reject the idea that a straightforward moral argument of this type has any relevance to choosing a good theory of law.

In any case, the minimalist methodological approach of legal positivism does not deny the importance of subjecting law to moral criticism. Rather, it takes the methodological approach thought to be best-suited to the development of a good theoretical account of law; it claims to offer meta-theoretical benefits which accrue to other theoretical approaches to understanding or even criticizing juridical law; and it may even lead to better moral consequences than a non-minimalist theory of law (though this may not be a valid meta-theoretical reason to prefer positivist legal theory).

## Descriptive/Conceptual Reciprocity

Liam Murphy's discussion of descriptive claims about law and their relation to conceptual claims about law, especially conceptual claims about "the" concept of law, highlights another meta-theoretical issue within legal positivism: *the reciprocal relationship between descriptive and conceptual claims regarding law*.<sup>26</sup> Simply put, it is the case that, if a theoretical account of the nature of juridical law is to be based in large part on the characteristics of actual legal systems, then that theory's descriptive claims will circumscribe the scope and content of its conceptual claims.

---

<sup>25</sup> See Waluchow, *Inclusive Legal Positivism*, 86–98.

<sup>26</sup> The label is mine, though I am certainly not the first to take note of the phenomenon. See Waluchow, "The Many Faces of Legal Positivism", n. 22 at 396.

The relationship between a theory's descriptive and conceptual claims is subtle but extremely important. Consider the following example of how it affects evaluative meta-theoretical judgements. In her discussion of methodology in legal theory, Dickson suggests that an analytical legal theory is best identified according to its criteria of success rather than its methodology or subject matter.<sup>27</sup> Her focus is on the methodology of analytical legal theory, so we might expect her to concentrate solely on methodological questions rather than the substantive claims of particular theories. For example, we might expect a meta-theoretical analysis of methodology to set aside the exclusive positivist claim that law and morality are necessarily separate as well as the Dworkinian interpretivist claim that unstated political principles are always salient features in the correct legal interpretation of particularly difficult cases. Setting-aside such substantive claims would allow Dickson to more narrowly focus on her primary concern—the role of evaluation in legal theory—in light of the *methodological* commitments of exclusive positivists and Dworkinian interpretivists. Dickson, however, chooses not to limit her analysis in this way. Instead, she notes that “it is most likely not possible to adjudicate conclusively between the various methodologically approaches . . . without also delving into many other questions regarding the correctness of the theories of law which those methodologies support.”<sup>28</sup>

Although it raises the possibility that both analytical legal theory and her own meta-theoretical evaluative project may be futile,<sup>29</sup> Dickson's attribution of a necessary connection between methodological commitments and substantive theoretical claims is extremely important. No legal-theoretical methodology should be evaluated in isolation from its substantive conclusions. For instance, the exclusive positivist project of describing and explaining legal systems without assuming that they are morally justified is supportable if and only if the separation thesis is true. Likewise, the Dworkinian descriptive claim that unstated moral-political principles are always judicial grounds for determinations of legality in so-called hard cases relies upon the supposed necessity of (Dworkinian) constructive interpretation.

Since the phenomenon of law does not uncontroversially appear “as it is,” a meta-theoretical evaluation of several legal theories will normally be

---

<sup>27</sup> See Dickson, *Evaluation and Legal Theory*, 17–18. Since analytical legal theorists employ a number of methodologies and focus on a wide variety of subjects, Dickson's definitional schema is an appropriate one.

<sup>28</sup> *Ibid.* 14.

<sup>29</sup> See *ibid.* 19.

unable to fully separate the value of their substantive conclusions from the value of their theoretical methodology. This difficulty is even more pronounced when we consider a legal theory's conceptual claims, since concepts are even less amenable to simple observation. Thus it is the case that most every substantive conclusion may be challenged on methodological (or other meta-theoretical) grounds, and most every methodology (or other meta-theoretical commitment) may be challenged on the basis of its substantive conclusions.

The challenge presented by the reciprocal relationship between descriptive and conceptual claims—or, if one prefers, the reciprocal relationship between (most) theoretical methodologies and the substantive claims they provide—is especially evident when we consider a minimalist legal theory like legal positivism. If, for example, there were no observable legal systems where legal validity appeared in some instances to be partly determined by moral judgments, then the observable facts of the matter, once fashioned into descriptive claims regarding actual legal systems, would seem to speak against the conceptual thesis of inclusive positivism. These descriptive claims would not, of course, be dispositive. Even if there were no observable legal systems where legal validity depended upon morality, it could still be argued such a system is possible. Positivist methodological minimalism, however, rejects *a priori* moral and metaphysical presuppositions, and so positivists exhibit a greater reliance on their descriptive claims: the conceptual claims of a positivist legal theory are not to be tested against overarching moral or metaphysical theories, but against actual observable legal systems. Thus the positivist who wants to describe law “as it is” will be hesitant (though not necessarily always unwilling) to make conceptual claims which have no corollary in descriptive propositions. While it is not the case that positivists outrightly deny the validity of a conceptual claim for which no corresponding descriptive claim can be adduced, the legal-theoretical strategy of describing and explaining law “as it is” ensures that a positivist legal theorist will attempt so far as possible to link conceptual propositions to the observable characteristics of actual legal systems.

Descriptive/conceptual reciprocity is much less troublesome for legal theorists who presuppose moral or metaphysical constraints on actual legal systems. Cicero could claim that all currently observable “legal systems” are not actually legal systems (systems of true law) because they fail to uphold the essential principles of natural law. Hence Cicero's theory of law, like most classical natural law theories, avoids the descriptive/conceptual

problem by defining law *a priori*. It is possible, on Cicero's account, for no legal systems to exist, and yet his legal theory still holds. But the legal positivist who focuses on actual legal systems would be lost if there were no "true" legal systems in existence with which she might begin the project of describing law in order to explain it. The goal of describing law "as it is," in other words, moderates the use of purely conceptual arguments whose conclusions contradict the observable characteristics of actual legal systems. It may be the case that this aspect of legal positivism is what leads Jules Coleman to observe, in the context of his own version of legal positivism, that "a commitment to the *revisability* of all beliefs is (if anything is) the hallmark of the pragmatic attitude."<sup>30</sup> If giving due weight to the problem of descriptive/conceptual reciprocity leads to taking up descriptive/conceptual reciprocity as a methodological principle, then Coleman is correct to say that, in this sense at least, positivists are pragmatists.

## Caricature

We have briefly considered the two fixed points of reference with regard to positivist legal theory: (i) avoiding unnecessary presuppositions, and (ii) delaying more ambitious theoretical approaches to law, such as a moral critique, until we have a relatively detailed account of law's features. But in what sense is the sketch of legal positivism just given a caricature or distortion?

In the first place, I have spoken of positivist legal theory as if it were homogenous, but this is not really the case. There are many varieties of legal positivism, and it may be misleading to suggest that they form a general category at all.<sup>31</sup> Campbell's legal theory of ethical positivism, for instance, is premised upon the moral benefits of positivist legal *practices* rather than the theoretical benefits of positivist legal *theory*.

In presenting my sketch of positivism I have also emphasized its methodologically minimalist character even though that mode of emphasis risks obscuring some of the richer forms of positivism. Legal positivists such as Waluchow and Coleman insist that morality *may* play an important role in particular legal systems, and so we should be careful not to confuse methodological minimalism with a view of law whereby laws are merely

---

<sup>30</sup> Coleman, *The Practice of Principle*, 8.

<sup>31</sup> See *supra* n. 44 on p. 16.

rules that function as part of a formal system which necessarily lacks substantive moral content. One persistent and very misleading caricature of legal positivism equates it with what we might call *legal formalism*—the idea that actual legal decisions are arrived at as it were mechanically or algorithmically, without regard to the connections between juridical law and its social, political, and moral contexts.<sup>32</sup>

My portrayal of legal positivism as a minimalist theory may also suggest that minimizing theoretical presuppositions amounts to rejecting the existence of morally significant aspects of juridical law. This is not the case, however, and eventually we shall have to consider whether methodological minimalism is a good way to identify and take account of the morally significant elements of legal systems.

Finally, I have not elaborated on the fact that theoretical explanations are in some sense necessarily interpretative and selective, especially when they are explanations of social facts and particularly when they are explanations of concepts human beings use to understand themselves. That is also ground we will have to cover at a later point.

## Positivism and the Concept of Law

Modern legal positivists hold that a proper philosophical investigation into the phenomenon of juridical law involves elucidating the systematic character of legal systems, the tasks and terms of legal practice, and the relation of law to its subjects and administrators as well as their beliefs about and attitudes towards their legal system. The general aim is to understand the pre-theoretical data—the social phenomena of institutions we generally and unreflectively refer to as legal systems—in light of common characteristics rather than contingent particularities.

The hoped-for product of a sustained legal positivist inquiry, then, is a descriptive explanation of legal systems based on an abstract and theoretically manageable presentation of the common features of systems of juridical law where those features are shown not to be a mere aggregate of characteristics but rather elements of a complex system. Some of these elements are amenable to empirical observation, such as the existence of a system of courts, while others are deducible or inferrable on the basis of conceptual necessity, such as Raz's service concept of authority. Other ele-

---

<sup>32</sup> See e.g. Schauer, "Positivism as Pariah".

ments, such as Hart's notion of a rule of recognition, are theoretical terms for juridical characteristics not always recognized by the participants within a particular system. Hart's rule of recognition allows him to explain how questions of legal validity avoid an infinite regress by identifying a particular kind of "social rule" even though that rule may not be explicitly acknowledged in every legal system. The rule of recognition, then, is both a theoretical concept used to describe and explain legal systems as well as a practical social rule which (explicitly or implicitly) forms part of a legal system's institutional practice. Explanatory concepts "focus attention on elements in terms of which a variety of legal institutions and legal practices may be illuminatingly analysed and answers may be given to questions, concerning the general nature of law, which reflection on these institutions and practices has prompted."<sup>33</sup>

Moreover, ever since Hart offered influential arguments regarding the importance of "the internal point of view," it has become clear that legal theorists must consider certain attitudes held by participants within or subject to the system. It is not only important to describe and explain the institutional and conceptual characteristics of legal systems, but also to explain how legal practices are understood and applied *by* participants in those systems. There are limits to this important requirement, however, for it is always possible that the participants within a particular system are mistaken or wilfully delusional with regard to what they are actually doing. Like anthropologists or sociologists, analytical legal theorists who attempt to provide descriptive explanations of juridical law cannot always take "self-reports" at face-value.

Accordingly, positivists analyzing "the concept of law" are engaged with the institutional, conceptual, and (in some sense) the perspectival features of legal systems, generally understood. In short, for positivists the concept of law is a theoretical object of explanation encompassing the relevant pre-theoretical data, including and especially the necessary relations (or lack thereof) between the elements of that object.

## 2.4 Two Schemes for Doubting

Now that we have a working description of legal positivism, its methodology, and its presuppositions, we can consider the very idea of "the" concept of

---

<sup>33</sup> Hart, *The Concept of Law*, 240.



law. Murphy's account of epistemic uncertainty itself presupposes a single concept of law. Our aim is to understand why the positivist presupposition of a single concept of law is problematic and to determine whether it is a necessary presupposition, or even a defensible one.

In the following two subsections I offer two schemes for doubting the claim that there is an overarching or unitary concept of law. I call these "schemes for doubting" because they are not fully-presented arguments; rather, they draw our attention to certain features of legal systems and in doing so they provide reasons to be sceptical of the notion of an overarching concept of law. The first scheme is historical in nature. It draws upon the fact that over time legal systems have exhibited significant institutional variations. This scheme is also external with respect to law at the object-level.<sup>34</sup> The second scheme for doubting presents the same type of reasons as are presented by the first scheme. In the second scheme, however, the external differences between legal systems at the object-level are cultural rather than historical.

The schemes for doubting use claims made about law at the object-level as possible reasons for questioning the existence or methodological necessity of a single meta-level concept of law. That is, they give rise to the possibility that legal theorists require several theoretical or meta-level concepts of law in order to understand the full range of actual social institutions which we commonly and unreflectively refer to by means of a single label: 'legal systems'. My primary aim in presenting these schemes for doubting is to illustrate a meta-theoretical problem regarding the relation between an ontological/epistemic question about law at the object-level and a methodological meta-theoretical question. The ontological/epistemic question asks, "Are all actual legal systems manifestations of one basic type of social institution?" The methodological meta-theoretical question asks, "Should legal theorists purposely attempt to develop a single overarching concept of law?"

The first question is ontological insofar as it asks whether there is one basic type of human institution which subsumes all actual legal systems. This same question can be seen as an epistemic query insofar as it asks whether as legal theorists we need more than one basic or fundamental category of juridical law in order to properly categorize all actual legal systems.

---

<sup>34</sup> 'Object-level' refers to law as it actually exists in a particular legal system. 'External' reflects our legal-theoretical perspective insofar as the legal theorist's observation of dissimilarities between two different (object-level) legal systems is given from a theoretical perspective rather than from "within" one of those legal systems.

The methodological question follows from the ontological one: the actual status of the institutional form (or forms) we observe in “legal systems” ought, ideally, to answer the second question for us: if legal systems are all of a type, then there is a strong presumption in favour of an affirmative answer to the methodological question. Resolving these two questions will allow us, first, to develop a better understanding of the relationship between positivism’s descriptive and conceptual claims, and second, to consider the appropriateness of legal-theoretical methodologies which presuppose a single meta-level concept of law, which we shall call a ‘unitary’ concept of law.<sup>35</sup>

## The Historical Doubt

Any legal theorist examining the German legal system of a few centuries ago will encounter the interesting phenomenon of *Spruchkollegien*. *Spruchkollegien* were (relatively) modern institutional manifestations of the ancient practice of *ius respondendi*,<sup>36</sup> a practice which gave academic jurists legal adjudicative authority and made possible what James Whitman terms “professorial adjudication.”<sup>37</sup> Professorial adjudicative practices were significant features in the functioning of the sixteenth-century German legal system,<sup>38</sup> hence any thoroughgoing descriptive account of that system must come to terms with this institutional feature.

Let us take it “as it was” and allow that the sixteenth-century German legal system was an actual legal system. The minimalist methodological approach of legal positivism allows that assumption, since in the initial stages of analysis positivists are willing to apply the descriptive label ‘legal system’ to any social institution which appears *prima facie* to be sufficiently similar to other apparent legal systems. In this case, the sixteenth-century German system appeared to serve certain functions commonly associated with legal systems, such as the guidance of conduct by means of explicit

<sup>35</sup> Cf. Eekelaar, “Judges and Citizens”, 504–07.

<sup>36</sup> Roughly speaking, *ius respondendi* involves the practice of having academic jurists submit their answers on questions of law to a judge, whereupon those answers were binding on the judge (given certain constraints). See e.g. Buckland, *A Text-Book of Roman Law from Augustus to Justinian*, 24–27.

<sup>37</sup> Whitman, *The Legacy of Roman Law in the German Romantic Era*, 34–36.

<sup>38</sup> It is, of course, more precise to say “the German legal systems” or “the legal systems of the principalities that were later to become modern Germany.” For simplicity’s sake, I shall discuss them collectively as ‘the sixteenth-century German legal system’.

and authoritative rules, and it seems to have instantiated certain institutional features commonly associated with legal systems, such as legislators and courts. Moreover, the particular function of *Spruchkollegien*, namely their role in resolving legal questions by means of professorial adjudication, appears to have been an extremely important element of the larger system to which it belonged, such that the system would not cohere had *Spruchkollegien* suddenly disappeared.<sup>39</sup> Hence *Spruchkollegien* appear *prima facie* to be significant institutional elements within the sixteenth-century German legal system—they are at least significant enough to be included in a descriptive explanation of that system.

Imagine, then, that there exists an intrepid legal theorist who decides to give a descriptive explanation of juridical law by focusing not the subset of pre-theoretical data representative of modern municipal legal systems, as H.L.A. Hart does, but instead on a different subset of the pre-theoretical data, one which includes the institutional elements of the very different sixteenth-century German legal system. Both types of legal system are part of the legal theorist's explanandum insofar as each appears at first sight to be an instance of a legal system. Yet the historical legal theorist's explanatory object does not include modern municipal legal systems—they have been "filtered out" as it were—while the Hartian legal theorist's explanatory object does not explicitly include professorial adjudication. We can now ask whether a thoroughgoing description and explanation of law *as it manifested itself in sixteenth-century Germany* would, on account of the presence of *Spruchkollegien*, necessarily elucidate of a different *concept* of law that developed in Hart's account of modern municipal legal systems.

Note, first, that the absence of professorial adjudication in modern municipal legal systems makes Hart's theoretical data quite different from that of our hypothetical historically-inclined legal theorist. Since *Spruchkollegien* served as an integral part of the sixteenth-century German legal system, and

---

<sup>39</sup> Even if this were not so—that is, even if *Spruchkollegien* were not an integral feature of the sixteenth-century German legal system—it seems unlikely that we would be unable to find another historical example which raises a similar problem, namely the existence of a legal institution whose function was both necessary to the legal system of which it was a part yet has no obvious counterpart in modern municipal legal systems. Anyone who does not find the example of *Spruchkollegien* especially problematic is welcome to address the even more bizarre (to our eyes) practice of the ancient Romans who referred controversial cases to a tribunal of the greatest jurists of all time, though those jurists were in fact dead. The decisions of the tribunal, however, were no less authoritative for being hypothetical.

since there is no obvious analogue to *Spruchkollegien* in modern municipal legal systems, it is not unreasonable to question the very possibility of explicating a unitary concept of law which encompasses both systems. If it is the case that the positivist descriptive explanation of the concept of law is satisfactory only when it elucidates the fundamental institutional structure of legal systems, then it may have trouble coming to terms with legal systems containing institutions which are central to the function of that system and yet are not to be found in other apparent legal systems.

And so the sceptical, historically-inclined legal theorist might ask, "How can an overarching concept of law comprehend the essential features of legal systems when actual legal systems have structures which are both indispensable to their functioning and unique to themselves?" In reply, the positivist is bound to point out that the significance of the difference between apparent legal systems which have *Spruchkollegien* and those which do not have them cannot be determined *a priori*, but only from a careful examination of those facts and their conceptual entailments. This positivist response is a good one—it is in keeping with the provisional nature of a positivist's definition of her explanatory object—but it does not avoid the problem with which the sceptic is concerned, namely the positivist's presupposition that there is a unitary concept of law (however provisional its initial definition might be). Accordingly, the sceptic might pointedly ask, "How can you decide *in advance* that 'the concept of law' encompasses both the sixteenth-century German legal system and modern municipal systems without begging the question of whether there is just one concept of law?"

While the positivist can reply to the sceptic by suggesting that *Spruchkollegien* may not be as unique as they appear, or may not in fact have served a vital function in the sixteenth-century German legal system, these observations can only be supported in one of two ways. First, the positivist could treat the provisional definition of law as a stipulative definition, thus making use of the definition to show that the role of *Spruchkollegien* is either not essential to law nor uncommon to all actual legal systems. Once again, Cicero's theory of law is a good example of a legal theory which explicitly takes such an approach. Unless *Spruchkollegien* can be shown to be necessary for the recognition or instantiation of the essential principles of natural law, they would not (on Cicero's view) entail a radical incommensurability between legal systems which have professorial adjudication and those which do not. For the positivist, however, that sort of response to the sceptic would be a very bad one because it defines juridical law *a priori*

and renders the concept of law immutable to empirical counter-examples.

Alternatively, the positivist legal theorist could offer no immediate response and instead simply continue to develop a theory of law such that she can eventually determine the relative significance of *Spruchkollegien* (and show that they are either not integral or not uncommon) without relying upon her provisional definition. This strategy would avoid *a priori* restrictions on, or determinations of, the nature of juridical law. It would defend the initial presupposition of a unitary concept of law by arriving at true propositions regarding the nature of law where those propositions are not logically dependent upon that definition. It is important to note that these true propositions would not be *logically* dependent on the initial definition. They would, however, be *methodologically* dependent on the definition insofar as the theory which produces those propositions requires the definition in order to begin the analysis of actual legal systems.

As it stands, the historical doubt regarding the applicability of a concept of law encompassing both the sixteenth-century German legal system and modern municipal legal systems is inconclusive. In part this is because the legal positivist can defend her initial presupposition of a unitary concept of law by arriving at true propositions which speak to the accuracy of the presupposition without relying on in the way that conclusions drawn from a stipulative definition rely upon that definition. Note, however, that this approach actually sets aside the ontological question until the theory has more-or-less run its course: the presupposition of a unitary concept of law is not defended by showing immediately that the nature of law is such that there is only one concept of law—"the" concept of law—but is instead defended by arriving at true propositions which support the conclusion (rather than the presupposition) that there is only one such concept. Although this is a workable approach, and may in fact be the only available means for defending a single overarching concept of law without presupposing the nature of law *a priori*, it does not in any way prevent the historically-inclined legal theorist from doing the same thing. In other words, it would be open to the historically-inclined legal theorist to presuppose that the sixteenth-century German legal system is radically different from modern municipal legal systems, and then to develop an account of each type of system anticipating the conclusion that juridical law is ontologically disparate.

From the perspective of meta-theoretical evaluation—that is, from the perspective of determining whether a theory of law is a good one and whether it meets its own objectives—the historical sceptic has raised the

possibility that the legal positivist's presupposition of a unitary concept of law may result in a form of historical blindness. The positivist's legal theory is supposed to provide a general description and explanation of the formal and structural components of a system of law. Insofar as a positivist theory of law is intended to be a *general* theory of law—a theory of the nature of law, not of the characteristics of one particular legal system—that theory ought to be applicable to any legal system. It is unclear whether, with respect to a particular legal system, a legal positivist's descriptive explanation must be sufficiently detailed as to account for something like *Spruchkollegien*. That particular institutional element does, however, appear to be unique, and it certainly played an important role in one particular legal system. In this way, the historical doubt raises an important methodological issue. Legal positivists aim to give a general account of law, but it may be the case that the positivist's presupposition of a unitary concept of law leaves no room for taking account of an apparently unique yet important feature of a particular legal system, even though that feature may have some significance in a general theory of law. How can a positivist know whether she must take account of something like *Spruchkollegien*, if at all?

### The Cross-Cultural Doubt

Another possible disadvantage of a unitary concept of law arises in light of the different socio-cultural contexts of contemporary legal systems. It *may* be the case that by presupposing a unitary concept of law, the legal positivist does not take account of the significance of the relation between law and particular cultures—or, if one prefers, the difference between law and particular world-views. If it is the case that legal systems are conditioned by the cultures in which they exist, then that fact has important implications for legal theory, not least of which is the possible existence of ontologically disparate legal systems which do not share a single concept of law.

Though he does not share their views, Jare Oladosu relates some concerns raised by African legal theorists, who are wary of legal positivism's tendency to gloss over cultural differences:

To the extent that legal positivism claims to be a universally valid and applicable theory ... its credibility would be substantially diminished if it can be shown to be either *incapable of providing an adequate description of, or of responding adequately to, the peculiar*

*jurisprudential experiences and needs of certain cultures*, or, to be peculiarly susceptible to morally undesirable consequences, when put into practice in certain cultural milieu.<sup>40</sup>

Oladosu has here specified two concerns about legal positivism. First, that it may be “incapable of providing an adequate description of, or of responding adequately to, the peculiar jurisprudential experiences and needs of certain cultures”; and second, that legal positivism may be “peculiarly susceptible to morally undesirable consequences, when put into practice in certain cultural milieu.” We have already found reasons to doubt causal-moral arguments which attack descriptive-explanatory theories of law such as inclusive positivism, so we shall set aside that concern to consider the problem of, as it were, a-cultural accounts of law.

Oladosu’s phrase ‘the peculiar jurisprudential . . . needs’ of certain cultures is vague. At this point, we shall consider ‘jurisprudential needs’ to refer to the need for a good descriptive account of law. While Oladosu is clearly correct to note that “[t]he adoption or rejection of theories on conceptual and/or on pragmatic grounds is an integral part of the enterprise of theory construction,”<sup>41</sup> our present focus is on the conceptual grounds for theory choice rather than the moral grounds of improved legal practices.<sup>42</sup> Let us consider, then, the first cross-cultural doubt in the attenuated form we have given it.<sup>43</sup>

How might legal positivism fail to describe and/or explain African legal systems? Oladosu points out that one of legal positivism’s African critics, F.U. Okafor, demands that legal theorists take account of “the unique characteristics of African ontology and, by extension, the unique characteristics

<sup>40</sup> Jare Oladosu, “Choosing a Legal Theory on Cultural Grounds: An African Case for Legal Positivism”, 1, emphasis added. Oladosu’s article is a very well-presented and extremely interesting presentation of the cross-cultural issues which arise in legal theory, particularly with regard to descriptive-explanatory legal theories.

<sup>41</sup> *Ibid.*

<sup>42</sup> In other words, we are affirming the ‘or’ of the ‘and/or’ as an exclusive disjunction and choosing the first disjunct.

<sup>43</sup> Keeping in mind, however, that deciding to focus on conceptual issues rather than pragmatic concerns neither implies nor entails that pragmatic concerns are unimportant; rather, it is simply the case that we have so far determined: (1) that causal-moral argumentation is not an appropriate means for evaluating the descriptive-explanatory abilities of a theory of law; and (2) that our present intention is to understand the conceptual difficulties involved in giving an account of a unitary concept of law.

of the social institutions that evolved from that ontology.”<sup>44</sup> Okafor claims that there was a uniquely African, traditional world-view which informed African legal institutions prior to colonization. This world-view supposedly undergirded a traditional African jurisprudence. If this was so, and traditional African legal systems were fundamentally different than their non-African counterparts because they were premised on an ontology entirely foreign to that of modern municipal legal systems, then a unitary concept of law may be an epistemological error, hence a methodological disaster.

Consider Okafor’s claim that traditional African jurisprudence and the ontology which grounded it entailed, among other things, that there is a necessary connection between law and morality.<sup>45</sup> It is important to note that Okafor specifically limits his claim to African legal systems—“there cannot be any separation of morality and legality *in the African legal experience*”<sup>46</sup>—rather than arguing that *all* legal systems exhibit a necessary connection between law and morality. Nonetheless, Oladosu convincingly refutes the existence of a specifically African ontology, which he regards as “exotic but largely illusory.”<sup>47</sup> He goes on to argue, first, that Okafor fails to engage with contemporary legal positivists, preferring instead to consider legal positivism only so far as it was extended by John Austin. Secondly, Oladosu observes that the notion of traditional African jurisprudence is inaccurate because “the African continent has been too culturally diverse and heterogeneous for anything remotely approximating to a dominant legal philosophy, identifiable with the whole continent, to have emerged.”<sup>48</sup> Thirdly, Oladosu points out that African cultures are not immutable entities fixed in time, but have been shaped by “centuries of exposure by African societies to profound cultural influences from other lands.”<sup>49</sup>

Regardless of Okafor’s failure to prove that there is a uniquely pan-African world-view conjoined with a single traditional African jurisprudence, it does not follow that in the face of cultural differences a unitary concept of law is unproblematic. The driving force behind the positivist’s

<sup>44</sup> *Ibid.* 8. Oladosu is summarizing Okafor’s “Legal Positivism and the African Legal Tradition”.

<sup>45</sup> See Okafor, “Legal Positivism and the African Legal Tradition”, 160.

<sup>46</sup> Oladosu, “Choosing a Legal Theory on Cultural Grounds”, 11, emphasis added. Oladosu is here quoting Okafor.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*



presupposition of a unitary concept of law is the fact that, as Hart puts it, a general theory of law appears to be an appropriate way to describe an institution which “in spite of many variations in different cultures and in different times, has taken the same general form and structure.”<sup>50</sup> Hart also believes, quite correctly, that a good philosophical account of law must take account of at least some of the perspectival features of legal systems. A cross-cultural doubt regarding the presupposition of a unitary concept of law could take the form of an attack on Hart’s theoretical starting point.

Hart’s general theory of law, supposedly applicable to all legal systems, takes as its descriptive starting-point the familiar phenomenon of modern municipal legal systems. From there, Hart goes on to develop a general theory of law which focuses on the institutional features of legal systems, particularly their normative rules. As his account of law develops, the initial starting-point becomes less important as the theory becomes more abstract and general. Note that Oladosu’s refutation of a uniquely African ontology helps secure at least the *possibility* that Hart’s starting point is a suitable one for a general theory of law. Yet that same refutation offers a reason to be sceptical of Hart’s methodological starting-point. In order to show that there was no uniquely pan-African traditional jurisprudence, Oladosu notes that Africa is and has been home to a wide variety of different cultures. In his later arguments in favour of legal positivism as a model for legal practices, Oladosu reinforces the fact of cultural diversity:

It is a fact that many of the entities that pass for sovereign nation states in present day Africa are conglomerations of many different ethnic nationalities, who were arbitrarily lumped together by the colonial powers. . . But the elements of cultural diversity that characterized pre-colonial African societies have survived in the new nation states. The cultural differences are manifested in the various aspects of life, in different *institutional structures and social practices*, ranging from the most sacred—religious beliefs—to the most mundane, say, attitude towards commerce.<sup>51</sup>

An African legal theorist, then, might reasonably wonder whether a general theory of law whose methodological starting-point is culturally conditioned in the way which Hart’s appears to be can give an adequate account of an African legal system.

---

<sup>50</sup> Hart, *The Concept of Law*, 239–40.

<sup>51</sup> Oladosu, “Choosing a Legal Theory on Cultural Grounds”, 22, emphasis added.

The cross-cultural doubt arises from the fact that different cultures may manifest different *institutional structures* as well as different *social practices*, and these are the very features which Hart focuses on in order to give a general account of law. Hart's view is that legal systems themselves manifest a particular kind of institutional structure with particular social practices, and that these institutional forms and social activities can be seen even, perhaps especially, when we take a very broad historical and geographical view of the different times and places in which legal systems have existed and continue to exist. Hart may be right. It certainly appears to be the case that there is an historically and geographically persistent form of social organization which, in its fashion, guides human conduct. Yet Hart elaborated a general theory of law by analyzing the time and place he was familiar with. To do so he presupposed that an account of a unitary concept of law was ontologically, epistemically, and methodologically sound. It is not unreasonable to find a quite opposite significance in the brute fact of "multiculturalism."

Why not presuppose, instead, that legal systems are ontologically disparate due to the formidable and pervasive influence of different cultural norms and practices? Consider the vivid picture Oladosu paints of the Nigerian legal context:

There are close to three hundred natural languages in Nigeria—and that is not counting the many dialects of each. . . Islam is the religion of the North, the Roman Catholic Church is dominant in the East, Islam and Protestant Christianity co-exist in the West. There are, of course pockets of believers in various indigenous African religions in all the regions. Each of the major religious sects boasts of a dizzying array of sub-sects, ranging from extreme orthodoxy or fundamentalism to permissive liberalism, analogous, one might say, to the varied dialects of the natural languages. Added to these are a host of other cultural differences which. . . are reflected in matters ranging from beliefs about matrimony and paternal obligations, to beliefs about the appropriate relationship between rulers and their subjects, to the morality of interest-charging. Nigeria, one can only conclude, is one spectacular geographical artefact.<sup>52</sup>

Like the historical doubt, the cross-cultural doubt forces us to question the viability of a unitary concept of law. Whereas the historical doubt focus on

---

<sup>52</sup> *Ibid.* 23.

the fact that *Spruchkollegien* were an integral and significant feature of the sixteenth-century German legal system, the cross-cultural doubt focuses on the fact that cultural diversity is a feature of many societies under the rule of law. It follows that culturally-diverse institutions and social practices may help shape particular legal systems. Given that this may be so, we have at least one other reason to consider a unitary concept of law to be suspect.

## Resolving Doubt

A general theory of law allows for a robust account of the concept of law insofar as at some point of increasing generality the concept (as described) will be sufficiently abstract as to be universally applicable. Thus the positivist could do away with the historically-inclined legal theorist's scepticism by first accepting the claim that *Spruchkollegien* were a unique and integral institutional component of the sixteenth-century German legal system, yet then go on to show how a sufficiently abstract account of the concept of law comprises that unique component. If, for example, the positivist were to assert only that law is simply a system of rules, he would encounter no difficulty in claiming that both modern municipal legal systems and the legal system of sixteenth-century Germany are systems of rules and thus forms of law—the uniqueness of *Spruchkollegien* does not lay in their not being rule-oriented. Nor does the positivist need to define law quite so abstractly: Hart's claim that a legal system results from the union of primary and secondary rules and of a pattern of behaviour exhibiting the acceptance of those rules by the officials of the system according to a master rule<sup>53</sup> is equally applicable to both modern municipal legal systems and that of sixteenth-century Germany. The same methodological strategy—pitching one's explanation at a suitably abstract level—is also capable of dispensing with the cross-cultural doubt. Hart's basic schema of a legal system is sufficiently abstract to allow for a wide range of quite diverse social institutions and practices. Notice, however, that in putting the sceptic's objection to rest in this fashion, the positivist has once again moved away from the epistemic/ontological question—"Are all actual legal systems manifestations of one basic type of social institution?"—to the meta-theoretical issue of what degree of conceptual abstraction or generality is suitable.

---

<sup>53</sup> See Hart, *The Concept of Law*, 80–81.

In any case, we have seen that the positivist has two ways to counter the sceptical historical doubt: (1) to persuade the sceptic to patiently await a complete theoretical analysis which (hopefully) will prove the *Spruchkollegien* do not present a challenge to the use of an overarching concept of law—that is, to show that the presupposition of an overarching concept of law can be defended by arriving at true propositions which demonstrate that a modern municipal legal system and the sixteenth-century German legal system are tokens of the same type; (2) to pitch the positivist analysis at a level of abstraction such that both types of legal system are clearly encompassed by the presupposed concept of law. Regardless of which approach the positivist takes, once a full-blown theory of law is developed she *may* arrive at conceptual conclusions which indicate that she has been too charitable in assuming that a purported legal system is such a thing. The reciprocal relationship between descriptive claims and conceptual claims allows for the former to provide the data in light of which the latter are relevant, and for the latter type of claim to provide grounds for revising the former type of claim. *The important point is that the epistemic/ontological and meta-theoretical questions are closely connected.* We cannot say whether one concept of law encompasses all actual (and perhaps all possible) legal systems until we have developed that concept, and we cannot develop an account of that concept without using apparent legal systems as the basis for our descriptive claims.

Thus it is the case that the positivist can only prove the appropriateness of a single overarching concept of law by developing a positivist legal theory which justifies a concept of that type. At the same time, however, the historically-inclined legal theorist who is sceptical of the appropriateness of an overarching concept of law can only argue against that possibility by showing that the sixteenth-century German legal system is in some sense radically incommensurate with other apparent legal systems. The problem cuts both ways—its solution can only be found by developing full and competing accounts of law.

## 2.5 “Filtering” Pre-Theoretical Data

The ontological/epistemic question which asked whether all actual legal systems are manifestations of one basic type of social institution is unanswerable without a well-developed legal theory. We cannot determine, prior

to developing a relatively detailed account of law, whether a single overarching concept of law is appropriate. We can only attempt to describe and explain law in such a fashion and then go on to evaluate the merits of that descriptive explanation. The ontological/epistemic question can only be addressed in this manner because we have no direct, immediate knowledge of the nature of law. Moreover, the sceptical, historically-inclined legal theorist is in the same position as the legal positivist: the correctness of doubting the singularity of “the” concept of law can only be determined by showing that alternate explanations are available which elucidate multiple concepts of law in order to demonstrate that differences in the institutional structures of legal systems entail radical conceptual differences. The best, and perhaps the only available answer to the ontological/epistemic question is thus a matter of deciding which legal theory is best.

In a useful discussion of how legal theories require a starting point, and how in some respects Hart’s starting point may be seen as not altogether dissimilar from Dworkin’s,<sup>54</sup> Perry poses a methodological meta-theoretical question which should look rather familiar to us:

[T]o what extent should we assume, on the basis of superficial resemblance alone and in advance of actually formulating a theory of law, that foreign institutions really are similar, in every respect that might turn out to be theoretically relevant, to those institutions that in our own societies we call ‘law’?<sup>55</sup>

I have argued that this sort of question cannot be definitively answered until the theories of law which attempt to answer it in their different ways have been developed and, therefore, have given us conclusions which we may then evaluate.

Perry has a variety of responses available which may contradict my claim,<sup>56</sup> but at this juncture we need to consider more carefully how different theoretical approaches to the pre-theoretical data can affect our theoretical conclusions. Before doing that, however, we should note that not only legal theorists, but also participants in particular legal systems may exhibit significant variations in how they view law. Eekelaar provides a convincing argument for the conclusion that the phenomenon of law may appear differently to those participants having different roles or perspectives, even

---

<sup>54</sup> See Perry, “Hart’s Methodological Positivism”, 313–319.

<sup>55</sup> Perry, “Hart’s Methodological Positivism”, 318.

<sup>56</sup> I consider these in Chapter 4.

within the same legal system. If Eekelaar's account is correct, then citizens take their legal system to be claiming legitimate authority such that only clear sources of law may be used to determine the validity of a particular law, while judges perceive the legal system as one where non-source-based material may determine the validity of a particular law. Hence each type of participant appears to "filter" the pre-theoretical data which comprises their own legal system differently. According to Eekelaar, this filtering process or way of taking law "as it is" is immediate for citizens yet, for judges, is mediated by sophisticated criteria.

Most legal theorists are aware of and willing to defend their strategy for filtering pre-theoretical data. From the positivist perspective, for example, historical context is only important insofar as it corresponds to differences in institutional features. In the case of the sixteenth-century German legal system, it is the *institutional difference* caused by *Spruchkollegien* which is especially important, not the banal fact that all actual legal systems exist in certain places at certain periods in time. Thus we need not resort to historical relativism to ask whether an account of the concept of law improperly assumes that all actual legal systems belong to the same genus. We might wonder, for instance, whether it is appropriate to categorize the legal systems of theocratic states together with the legal systems of secular states, or whether the influence of the Roman legal system on the Canadian legal system has been sufficient, in light of their institutional differences, to allow us to place them both into the same general category.

The classification of social phenomena on the basis of their "structural" or institutional characteristics does not lack potential for controversy. No positivist insists that his account of law does an equally good job of describing and explaining in detail *all* legal systems as they have existed or might possibly exist. Hart explicitly starts his analysis by focusing on modern municipal legal systems,<sup>57</sup> and then, from this starting-point, develops a general theory of law "which is not tied to any particular legal system or legal culture" but rather

seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect. This institution, *in spite of many variations in*

---

<sup>57</sup> "The starting-point for this clarificatory task is the widespread common knowledge of the salient features of modern municipal legal system which on page 3 of this book I attribute to any educated man" (Hart, *The Concept of Law*, 290).

*different cultures and in different times*, has taken the same general form and structure. . . <sup>58</sup>

To elucidate the concept of law by means of an analysis of the form of legal systems, Hart began his inquiry with a particular legal system in mind and progressively developed a general theory of law. Elucidating “the” concept of law requires that the legal theorist filter the pre-theoretical data which serves as the explanandum of legal theory, and it is not possible to fully defend one’s filtering strategy in an *a priori* fashion. Hart’s choice of starting point undoubtedly influences his theoretical conclusions, but he provides good reasons for beginning where he does and the explanatory power of his theory serves to justify his initial choice of what counts as a paradigm case of a legal system.

It is not unreasonable to speak of “the” or “our” concept of law in this sense—law as it appears to us in the relatively well-demarcated realm of modern municipal legal systems—and yet defer from claiming that the concept is representative of every legal system that has existed or could possibly exist. And it is this sense which is used primarily by positivists who refer to “the” concept of law. Once a suitable set of pre-theoretical data is agreed-upon and the scope of the theoretical inquiry is attenuated accordingly, it becomes possible to present and evaluate different explanations of that concept and *a fortiori* to present and evaluate the filter applied to the pre-theoretical data.

## 2.6 Generality & Legal Theory

It should be clear, then, that from the positivist perspective theories of law which contradict each other in whole or in part do so because they differ in their *accounts* of the concept of law, not because they have different *concepts* of law. Nonetheless, *reference to a single concept of law is defensible only if it is identified as being based on a shared set of pre-theoretical data.*<sup>59</sup> The

<sup>58</sup> *Ibid.* 239–40, emphasis added.

<sup>59</sup> Unless, of course, we can establish that criterial semantics is the proper framework for legal theory, or that we ought to discuss legal systems in terms of functional kinds, or that there exist Platonic forms of law in some noumenal realm. Failing these proofs, we are faced with the fact that descriptive-explanatory theories of social phenomena must filter the pre-theoretical data in such a way as to make the validity of their conclusions relative to their filtering strategies.

pre-theoretical data *must* be filtered in some fashion or else there would simply be too much of it to deal with. The question of *how* to filter the pre-theoretical data is properly addressed as a meta-theoretical problem, but it is not solely or even primarily a matter of *a priori* rules of what we might call “valid filtering.” It is almost always a contestable choice which ought to be defended so far as possible on meta-theoretical grounds.

One line of meta-theoretical defence for Hart’s particular starting-point could go as follows:

Strictly speaking, “law in general” or “the set of all social phenomena which appear to be legal phenomena” is too general a starting point in that it includes all legal systems throughout history. Trying to come to terms with such a large amount of pre-theoretical data would be a nearly impossible task; it would also be an unilluminating task in so far as our conclusions would be too general to do a good job of describing and explaining any particular legal system. Since something more specific must be addressed, it makes sense to address modern municipal legal systems for several reasons:

1. They are contemporary and so we are able to avoid problems of historical interpretation.
2. They are prominent features of modern life and so an explanation of them will help us to understand ourselves better.
3. Most legal theorists have the requisite background knowledge to enter into discussions and debates about modern municipal legal systems, whereas few have the requisite knowledge to consider Roman law or sixteenth-century German law.

We can see, then, that a legal theorist may have good meta-theoretical reasons for a careful focus on some subset of the available pre-theoretical data. Insofar as Murphy and other positivists agree on the filtering conditions for the pre-theoretical data, there is nothing obviously improper with the claim that each is attempting to give a theoretical account of “the” concept of law. Hence the combination of their shared explanandum and their contradictory accounts of the role of moral and political considerations in determinations of the validity and content of law suggests that Murphy and other positivists really are faced with an equivocal concept of law.

An equivocal concept of law may be avoided by increasing its scope or by making it more or less general, as regards both the amount of pre-theoretical data it is to be drawn from as well as the generality of analysis



which is to result from its explication. Yet the problem of equivocity may also be avoided by employing more than one concept of law. For instance, if for the sake of argument we accept that *Spruchkollegien* were important institutions within the sixteenth-century German legal system, and recognize as well that this institutional form has no parallel in modern municipal legal systems, then any attempt to elucidate a concept of law which encompasses both the sixteenth-century German legal system and modern municipal legal systems will necessarily involve resolving some important questions about the scope and generality of that concept. We could ensure that our account of the concept is given at a sufficiently general level as to make the institutional differences less of an impediment and more of an explanatory challenge by treating law as an abstract system of rules whereby the particular characteristics of the institutions which create, apply, and enforce those rules are unimportant so long as they can be understood as generic means of rule-creation, rule-application, and rule-enforcement. Of course, one can be too general.<sup>60</sup> Conversely, we could choose to pursue a more fine-grained analysis by employing two concepts of law: one for the German legal system with its *Spruchkollegien* and another for modern municipal legal systems. In that case we would be sacrificing the potential scope of our concepts of law, as well as the meta-theoretical ideal of having only one concept of law, in favour of probing more deeply into the distinct institutional features of the two types of legal systems. We would still, however, require a more general concept in order to secure the claim that each type of system belongs to the same genus or at least that each type of system is comparable in form—even the rejection of a unitary concept of law is in some sense driven by the need for theoretical generality.

The two possible approaches mentioned do not entail that there are no grounds for judging which approach is better and which is worse, but they do suggest that there is nothing inherently absurd in suggesting that many different concepts of law are viable and defensible. Depending on how the pre-theoretical data are filtered, as well as other theoretical commitments, there can be a natural lawyer's concept of law such that in some cases legal validity is dependent on congruence with moral truths or strong moral

---

<sup>60</sup> In his essay on Fuller's book *The Morality of Law*, Hart expressed an implicit criticism of overgenerality: "This [Fuller's] large conception of law, admittedly and unashamedly, includes the rules of clubs, churches, schools, 'and a hundred and one other forms of human association'" (Hart, "Lon. L. Fuller: *The Morality of Law*", 343). Kramer also takes note of this quotation in *A Defense of Legal Positivism*, 48.

requirements of some other sort; there can be a critical legal theorist's concept of law such that legal systems are reducible to forms of social power; there can be a Platonic concept of law such that any actual legal system is a more or less vivid approximation of the perfect form of law; a concept for historical comparison; and so forth.

While it is possible to have different aims for the scope and generality of a concept of law, this need not lead to the conclusion that something like "the" concept of law is an impossibility. It is perhaps the case that the ideal is a single concept of law which should be the focus not only of legal theorists but of every scholar concerned with law. Achieving that ideal, however, may be impractical. In order to further our understanding of law and to present and debate the merits of different accounts thereof, it is enough that we reach a consensus as to what data we intend to investigate as well as the aims of that investigation in terms of its appropriate scope and generality.

As a final comment on the issue of a unitary concept of law, we can note that the theoretical ideal of an account of a unitary concept of law would have many benefits. First, it would allow us to compare the similarities and differences between legal systems throughout history and between different regions: a unitary concept of law would thus allow us to see and compare the form of the ancient Roman legal system, the sixteenth-century Germans, and the modern-day Canadian legal system. Secondly, a unitary concept of law elucidated by a general theory of law would provide us with what some would consider the most philosophically interesting account of law, namely one which focuses on the persistence of a particular form of human social organization, one which seems to be common to most all human societies. Finally, a unitary concept of law would have the enormous benefit of giving legal theorists a common ground upon which they could pursue more detailed debates about law itself. The fact remains, however, that any attempt to prove the superiority of one particular account of the concept of law, or even of the meta-theoretical benefits of theorizing in terms of "the" concept of law, will ultimately succeed only if the unitary concept allows for a rich and lucid understanding of actual legal systems.

## Chapter 3

# Choosing a Theory of Law

We have seen that different concepts of law may be appropriate when pre-theoretical data are filtered differently; that is, the features of different explanatory objects may lead to the development of a wide variety of stipulative or provisional definitions. For the most part, however, there exists a widespread consensus among legal theorists as to which aspects of the pre-theoretical data must be accounted for. The more intractable disagreements, such as the opposing claims that moral judgements may or may not play a role in making determinations of legal validity, are not disputes about which data legal theorists ought to consider. Rather, they are disputes about the relation of that data to a theoretical concept of law.

Hart and Fuller, for example, appeared to be at loggerheads over the issue of whether the legal system of Nazi-era Germany was properly designated as such. Yet both of them recognized the need to come to terms with that particular system. Thus the real issue was not whether the supposed Nazi-era legal system was an important test case for legal theory—the considerable attention each theorist paid to Nazi law clearly settled that question. The real point in dispute was whether the position of Nazi-era system in a proper categorization of possible legal systems was peripheral or central. Hart believed that its institutional form provided a good reason for taking it as an example of a legal system, though a grossly immoral one. Fuller believed that the system's moral turpitude confined it to the periphery of the family of possible legal systems and, more importantly, placed it on the not-a-legal system side of that boundary. Yet in each case the system shared enough of the characteristics of other legal systems so as to merit consideration.

The seemingly intractable disagreement over the proper legal-grounds theory—a disagreement which Murphy cites as evidence of epistemic uncertainty—is another example of a dispute about the data with which legal theory concerns itself. Inclusive and exclusive positivists, natural law theorists, and Dworkinian interpretivists all deal more or less with the same facts even though they differ in their accounts of what those facts reveal about the phenomenon of law in general. And so, while our inquiry to this point has revealed some of the ways in which meta-theoretical and methodological commitments relate to law as an object of theoretical investigation, we ought not to equate the conceptual possibility of multiple concepts of law with the actual state of contemporary analytical legal theory.

### 3.1 Meta-Theoretical Values

#### Explanatory Relevance

Perhaps the most important problem raised by epistemic uncertainty involves the task of evaluating the available theories of law. One way to adjudicate between better and worse theories of law is to determine which theory best enables us to answer the questions and solve the puzzles that concern us. Joseph Raz observes that an “explanation is a good one if it consists of true propositions that meet the concerns and puzzles that led to it, and that are within the grasp of the people to whom it is (implicitly or explicitly) addressed.”<sup>1</sup> A legal theory which makes such an explanation possible would therefore be better than one which prevents it.

We can refer, then, to a meta-theoretical-evaluative criterion of *explanatory relevance*: the merit of an explanation is relative to the queries it is meant to address. If taken on its own, the criterion of explanatory relevance could be seen as implying that there can be no “best” theory of law, only different explanations directed at different concerns. In other words, explanatory relevance makes *explanatory relativism* unavoidable: there is no objective way to judge the merits of legal theories apart from their success at addressing the questions and puzzles they aim to answer, hence the standards of theoretical success are necessarily relative to explanatory aims rather than being objectively set for all legal theories.

---

<sup>1</sup> Raz, “Two Views on the Nature of the Theory of Law: A Partial Comparison”, 8.

There is something to be said for holding to some form of explanatory relativism, such that our critical projects make use of a critical methodology, our descriptive projects employ descriptive methodologies, and so forth. Explanatory relativism is also an important consideration when we have more than one theoretical goal. It can be argued, for instance, that a moral critique of law is better accomplished by first giving a morally-neutral, descriptive-explanatory account of it. If this is so, then a critique of law in general which is aimed at our moral concerns regarding law requires two well thought-out theoretical methodologies: a morally-neutral descriptive one and a morally-informed critical one.

Even if legal theorists could agree on the supreme importance of one set of concerns at the expense of all others—if, for instance, we decided that only descriptive theories of law are worthwhile and that critical theories are pointless, or *vice versa*—such an agreement would not effectively entail that we could more readily determine which legal theory is best. The meta-theoretical problem of theory choice would remain even if only one methodological approach was recognized as valid or worthwhile. Consider the simple fact that some theories present different descriptions and/or explanations of the concept of law even though they aim to solve the same set of concerns and puzzles. Exclusive and inclusive positivists, for instance, aim to produce descriptive explanations of law, that is, they want to show law “as it is” rather than “as it ought to be” or “as it might be imagined.” But despite their shared goal and methodological commitments, these theories of law differ significantly, and so we are still faced with the task of determining which theory is best.

## Descriptive Accuracy

Perhaps *descriptive accuracy* is a more useful criterion for theory choice. Not so long ago the majority of Anglo-American legal theorists would have claimed that the best theory of law is the one which best describes law “as it is” as opposed to law “as it ought to be.” According to this view we ought to use the theory which allows for the most accurate description, and, so the argument goes, we ought to develop our description by means of morally and politically neutral conceptual analysis. Hart’s theory of law is an exemplar of this approach. There are, however, problems with descriptive accuracy as a meta-theoretical-evaluative criterion, and also with the methodology of morally and politically neutral conceptual analysis. For instance, Murphy

claims that a descriptive-explanation of law must *presuppose* an account of “the boundaries of law” and thus is unavoidably biased before it begins its supposedly neutral inquiry.<sup>2</sup> If Murphy’s claim is true, then descriptive accuracy is not a usable meta-theoretical-evaluative criterion.

Meta-theoretical-evaluative criteria such as explanatory relevance and descriptive accuracy are closely tied to the methodology of “morally and politically neutral conceptual analysis.” Traditional positivists must defend this methodology to secure their preferred meta-theoretical-evaluative criteria. In the following sections I shall contribute to that defensive project by considering two important ways whereby moral concerns *do* influence legal theory: (i) they help the legal theorist determine which features of law are important enough to merit theoretical attention; and (ii) they can be an aid to theory choice.

### 3.2 Morality and Significance

The morally-relevant features of legal systems cannot be ignored if we are to give a good general account of law, so it is potentially misleading to call conceptual analysis “morally and politically neutral.” Indeed, the motivation for describing law “as it is” may not be morally neutral even if the description itself is. Moreover, the elements of law which a theorist identifies as important, such as its coercive force or its supposed obligatoriness, are considered important because there are reasons—not uncommonly moral or political reasons—to be concerned with them. Thus the *motivation* for a descriptive-explanatory legal theory and the *identification* of the important features of law may be far from morally and politically neutral.

Yet these factors need not vitiate the methodology of morally and politically neutral conceptual analysis. The simple fact that a theoretical account of law is motivated by moral considerations does not entail that it will predetermine its conclusions accordingly. A moralistic motivation does not entail a moralistic methodology. By prioritizing non-moral values as a guide to theoretical aims and success, some methodological approaches to understanding law minimize the influence of our moral commitments on our theoretical conclusions.

Motivations for engaging in legal theory are many and varied, yet theoretical results can reflect theoretical values instead of the psychological

---

<sup>2</sup> Murphy, “The Political Question”, 382.

impetus for engaging in legal theory or for choosing a particular theoretical methodology. As Frederick Schauer puts it, “to provide a conceptual account of the nature of [law] is contingently to pick out those features of a contingent institution that seem particularly important, and is thus to engage in an inevitably normative enterprise.”<sup>3</sup> Yet such enterprise may or may not be guided by moral norms. Hart, for instance, may have been a raving anarchist, but his theory does not reflect this, nor does it explicitly advocate any particular moral or political ideology.<sup>4</sup> It can be argued that Hart presupposes the moral and political ideology which makes modern municipal legal systems possible, but this does not amount to advocating it. Hart suggests, for instance, that a modern municipal legal system must secure a legal form of property ownership,<sup>5</sup> but this does not entail that Hart believes that property ownership is a good thing—it entails only that he identifies it as a feature of modern municipal legal systems.

Just as moral factors may be part of the motivation for developing or employing a legal theory yet need not prejudice the results, one can identify the significant features of legal systems, including those which have moral-political significance, without at the same time justifying or condemning them. The common characteristics of law may in the first instance be identified by surveying existing legal systems, just as we can identify the common characteristics of large cities by looking at New York, Paris, Tokyo, etc. <sup>6</sup>Not all of the shared features of legal systems (or large cities) will be thought to be worthy of theoretical elucidation: the theorist will consider some of them to be significant while others will be thought insignificant. In this sense, the filtering process which began with a selection of appropriate pre-theoretical data continues as those data are further determined to be more or less important to explain. Moral considerations of a particular sort are one means for determining what is or is not significant or important. In fact, moral considerations—again, of a particular type—are *required* when a theorist makes determinations of what it is important to explain about law.

---

<sup>3</sup> Schauer, “Positivism as Pariah”, 33.

<sup>4</sup> Although he himself cannot recall saying it, I shall boldly attribute this example to Wil Waluchow as I am fairly sure that he did indeed say it.

<sup>5</sup> Hart, *The Concept of Law*, 196–97.

<sup>6</sup> Leiter elucidates this point in his imagined dialogue between “the Natural City Theorist” and “the Descriptivist” (“Beyond the Hart/Dworkin Debate”, 24–28). See also *sub* pp. 94–95.

Describing traditional positivism's methodology as "morally and politically neutral" carries with it the unfortunate implication that moral considerations are irrelevant to legal theory. We have already noted that morality may be a motivating factor for any legal theorist, but much more important is the fact that moral considerations (of a certain sort) are necessary components of any reasonable legal theory. Noting that "we are often hampered by a rather sparse vocabulary,"<sup>7</sup> Leslie Green helpfully distinguishes between the evaluative, moral, and political considerations involved in examining law. He argues that an "illuminating descriptive account of law will implicate values" by orientating itself according to meta-theoretical-evaluative criteria.<sup>8</sup> "Furthermore," Green tells us, "because law is part of human thought and practice, we also will prefer to describe it in an anthropocentric way, as it relates to those things we take to be most important about ourselves—the way law embodies power relations that can harm or help people, for instance, rather than its connection to the demand for pulp and paper."<sup>9</sup> Thus there is a sense in which moral considerations are necessary for a proper comprehensive understanding of law—not, however, in the sense of committed moral judgements guided by a moral theory. There is a difference between the role of moral considerations in identifying significant features of law and moral judgements which are the product of a commitment to a particular moral theory or, at the least, a consistent set of moral principles:

In these ways, a general legal theory must have evaluative aspects, but this stops well short of the basic features of moral evaluation on any plausible account. A moral theory will, of course, strive for some similar theoretical virtues, and any humanistic morality that it systematizes will also begin from some set of salient facts about the human condition; however, the characteristic features of moral judgements—identifying basic goods, expressing approval and disapproval, endorsing universal prescriptions, among others—all involve commitments well beyond those of description. Thus, while descriptions are not value-neutral, they need not be morally fraught either.<sup>10</sup>

Much of the confusion regarding the role of moral considerations in the traditional positivist approach to legal theory arises from a lack of termino-

---

<sup>7</sup> Green, "Review of *The Concept of Law*, 2d ed.", 12 (of the electronic version).

<sup>8</sup> Green calls them 'theoretical values.'

<sup>9</sup> *Ibid.* 13.

<sup>10</sup> *Ibid.*



logical consensus. Brian Leiter, an opponent of positivism, recognizes this even while he inadvertently adds to the confusion. Whereas Green refers to meta-theoretical-evaluative criteria as “theoretical values,” Leiter makes a similar distinction using a different label—he contrasts *epistemic* and *moral* values<sup>11</sup>—to rebut John Finnis’ claim that committed moral judgements are absolutely required if we are to identify the characteristics of legal systems which are important for legal theory to explain.<sup>12</sup> “One can,” Leiter notes, “describe the value a practice has for its participants without engaging in the practice of evaluation.”<sup>13</sup>

Leiter’s distinction between describing a value and adjudging that value to be well-grounded according to a committed moral theory echoes identical claims made by traditional legal positivists. Waluchow, for example, discusses the importance of the methodological difference between theories which recognize the “value-relevance” of moral features of law and theories, such as Dworkin’s, which hold that “our beliefs in [moral] justification shape how we see and understand a practice like law.”<sup>14</sup> Waluchow notes that

One crucial difference lies in the level of moral commitment which is involved in the two different enterprises: offering value-relevant, descriptive-explanatory theories versus value-determined interpretive conceptions. Discovering certain elements of legal practice worth highlighting because they are morally relevant in no way commits one to saying that these are elements in virtue of which the practice is actually justified (or unjustified) morally... In short, one can see moral relevance without making an explicit moral commitment.<sup>15</sup>

---

<sup>11</sup> “Epistemic values specify (what we hope are) the truth-conducive desiderata we aspire to in theory construction and theory choice: evidentiary adequacy, simplicity, minimum mutilation of well-established theoretical frameworks and methods (methodological conservatism), explanatory consilience, and so forth... Moral values are those values that bear on the questions of practical reasonableness, e.g., questions about how one ought to live, what one’s obligations are to others, what kind of political institutions one ought to support and obey, and so forth” (Leiter, “Beyond the Hart/Dworkin Debate”, 23–24).

<sup>12</sup> See *ibid.* 20–28. Julie Dickson gives similar reasons for rejecting Finnis’ claim. See *Evaluation and Legal Theory*, Ch. 3.

<sup>13</sup> Leiter, “Beyond the Hart/Dworkin Debate”, 21.

<sup>14</sup> Waluchow, *Inclusive Legal Positivism*, 18.

<sup>15</sup> *Ibid.* 22–23.

As legal theorists we need not go from saying, (1) that law's claim to obedience is significant insofar as it may conflict with individual freedom, to suggesting (2) that the theorist's identification of this significant feature of law requires moral argument in the sense of making use of a moral theory to show that law's claim to obedience is morally justified (or not). While legal systems may infringe upon or enhance human freedom by claiming obedience from their subjects, *the actual moral status of that claim may be regarded as a separate issue from its status as a common feature of legal systems*. The claim to obedience may be morally justified or politically necessary; its moral status may be contingent on features peculiar to specific societies; the claim may even be a disguised attempt to subjugate the greater part of a society's population—yet each of these possibilities can be addressed separately from the identification of law's claim to obedience as being common to all legal systems and as having moral significance.

While it is unreasonable to suggest that a legal theorist's motivation for examining law must necessarily prejudice the results of that enterprise, it is reasonable to insist that any good general theory of law must take account of and elucidate the significant, common features of legal systems. At least some of those features have moral-political significance, and no thorough explanation of law can afford to ignore morality and politics. The denizens of legal systems often employ what appear to be expressly moral or political rules or principles and equally often have determined that their system must serve some particular moral or political purpose or purposes. These moral and political characteristics of (at least some) legal systems are undoubtedly relevant to a thoroughgoing theory of law, even if their use turns out to be ill-considered, malicious, or incorrectly understood as law *per se*. Willful blindness to the apparently moral and political features of law is neither the aim nor the method of morally and politically neutral conceptual analysis.

### 3.3 Indirectly Evaluative Legal Theory

Morality is implicated in most every stage of legal theory. Describing and explaining law by taking up a theoretical approach which aims to minimize moral bias involves, arguably, a moral choice in favour of descriptive neutrality. Moreover, although the common features of legal systems can be identified without engaging in moral justification and the moral significance

of some of those features can be recognized without evaluating their actual moral merit, it may be true that what is ultimately most important about law are its effects on widely-held values such as freedom and justice.

No proponent of neutral conceptual analysis denies any of the foregoing. What really makes for moral and political neutrality in legal theory is the theorist's willingness to refrain from linking the justifiability of the significant features of legal systems with their existence. In relatively recent discussions and debates in Anglo-American legal theory, the claim that a legal theorist may describe law without *justifying* it has, time and time again, been made by one legal theorist and subsequently misinterpreted by others. Hart's approach in *The Concept of Law* is a case in point. There is nothing in Hart's legal theory which presupposes or actively attempts to secure the claim that a particular law, a particular legal system, or the very idea of law is morally justifiable. In the posthumously-published postscript to *The Concept of Law*, Hart once again insisted that his theory was not intended to justify law.<sup>16</sup> The problem of epistemic uncertainty, however, makes it unclear whether a general and descriptive legal theory can provide a powerful explanation of law. There are also standing questions as to which general and descriptive legal theory is best, as well as some lingering uncertainty regarding the appropriateness of a trans-cultural and trans-historical concept of law. Yet a project like the one Hart describes is at least possible. We need an appropriate label for theories of law which are positivist in that they aim to give an account of law in the manner I described *supra* in the final paragraph of § 2.3.

For some time Wil Waluchow's label 'descriptive-explanatory' has been widely used to refer to neutral positivist accounts of law such as Hart's. There is some debate as to whether this is the classificatory category into which we ought to place Hart's theory of law, though Hart's own insistence that his theory is general, descriptive, and without justificatory aims ought

---

<sup>16</sup> "My aim in this book was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect. This institution, in spite of many variations in different cultures and in different times, has taken the same general form and structure... My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law" (Hart, *The Concept of Law*, 239–40.)

to be considered conclusive evidence that he, at least, thought of it as a descriptive-explanatory legal theory. There is also considerable controversy as to whether the best “corrected-version” of Hart’s theory—that is, the best of the many expositions which amend and extend it—would still be a descriptive-explanatory legal theory. Opponents of legal positivism have their own ideas about what is or can be “descriptive” in a legal theory, and thus of what a descriptive-explanatory legal theory is.<sup>17</sup>

Waluchow himself, however, has expressed regret that the term ‘descriptive-explanatory’ has led to unnecessary confusion about the goals and aims of Hartian legal theorists,<sup>18</sup> and some aspects of the descriptive-explanatory approach, particularly the methodology of morally and politically neutral conceptual analysis, are easily misunderstood. On the one hand, one might mistakenly think that the descriptive-explanatory theorist who aims to analyze law in a morally and politically neutral way does so because he believes that law cannot contain moral norms, have moral significance, or be used for political purposes. On the other hand, one might mistakenly think that using a morally and politically neutral theoretical approach to law amounts to denying the possibility or worth of moral critiques of law. Yet none of these characteristics need be part of a descriptive-explanatory legal theory.

Moreover, “descriptive-explanatory” legal theories do not always share the same methodological approach even if they have the same general aim. Leiter’s naturalized legal theory, to give just one example, is arguably a descriptive-explanatory account of law, though a very different one than those given by Hart, Waluchow, and Raz. The positivist methodology of neutral conceptual analysis, which is common to traditional positivists, is a more narrow means for theory classification.

Dickson suggests that an analytical theory of law which allows for the identification of the important features of law without judging their moral acceptability is best referred to as an *indirectly evaluative legal theory*. Indirectly evaluative legal theories neither ignore the fact of moral-legal debate—the fact that legal practitioners and legal subjects often use moral

---

<sup>17</sup> See e.g. Perry, “Hart’s Methodological Positivism”, 313–14. It seems to me that Perry’s account is either naïve or highly misleading, but it does reflect a conception of that type of legal theory. Some legal positivists also seem to have very different and possibly confused views regarding the nature of descriptive-explanatory legal theories. See e.g. Coleman, *The Practice of Principle*, 109–11; see also Waluchow’s remarks on Coleman’s view (Waluchow, “In Pursuit of Pragmatic Legal Theory”, n. 6 at 130).

<sup>18</sup> Personal communication.

argument when debating what is or is not legal, and what ought or ought not to be legal—nor deny that law is a morally and politically significant phenomenon.<sup>19</sup> Indirectly evaluative legal theories maintain a deliberate neutrality with regard to the actual justificatory status of the moral norms within legal systems while recognizing their moral significance, and *that* is what is usually meant by ‘politically neutral conceptual analysis’. Accordingly, we shall hereafter use ‘indirectly evaluative’ as equivalent to ‘descriptive-explanatory.’

We have surveyed some of the ways in which moral and political factors can arise even in a purportedly neutral approach to law and reached three conclusions:

1. Moral considerations may motivate an indirectly evaluative legal theory without necessarily influencing the account of law it produces.
2. A good theory of law will recognize that many of the common characteristics of legal systems are important and relevant because they are susceptible to moral evaluation; they are, in other words, important to explain because they are morally significant features of law.
3. Recognizing the moral significance of a feature of law neither requires nor entails a direct evaluation of that feature’s moral merits.

### 3.4 Morality and Theory Choice

#### Murphy & the Second-Best Approach

Although Liam Murphy does not suggest that indirectly evaluative legal theory is impossible, he does claim that epistemic uncertainty render meta-theoretical-evaluative criteria inadequate for the task of evaluating legal theories. In this section we shall examine Murphy’s second-best approach and see why the problem of epistemic uncertainty appears to make that approach necessary.

---

<sup>19</sup> Dickson, too, recognizes that a proper theory of law must take account of morality: “Jurisprudential theories must not merely tell us truths, but must tell us truths which illuminate that which is most important about and characteristic of the phenomena under investigation. Moreover, in so doing, those theories must be sufficiently sensitive to the way in which those living under the law regard it” (*Evaluation and Legal Theory*, 25). See also Chapter 2 of this work.

As Murphy sees things, neither assessing the relevance of a theoretical explanation of law to its explanatory goals nor invoking the meta-theoretical-evaluative criterion of descriptive accuracy provides a *prima facie* reason to prefer inclusive over exclusive positivism (as conceptual theses), nor do explanatory relevance and descriptive accuracy give us grounds to reject positivist legal theory in favour of some other approach. Moreover, while we have seen that moral considerations are relevant to legal theory—both as possible motivations for engaging in it and as a necessary aspect of identifying the significant features of its explanatory object—there is no *a priori* necessity for a legal theorist to directly evaluate law in general from the perspective of a thoroughgoing and justificatory theory of morality. Since there is no reason to suspect that the best legal theory *must* be chosen on the basis of its congruence with sound moral principles, Murphy's account of epistemic uncertainty will need to do a lot of work if it is to convince us that we ought to do so anyway.

Yet Murphy believes epistemic uncertainty leaves us with no alternative but to choose our legal theory according to the moral palatability of its conclusions and the moral consequences of its application. However, while a theory of law may have moral-political consequences (so long as it is not simply forgotten or ignored), it is by no means clear that it ought to be rejected simply because morally unpleasant consequences are part of the causal consequences of the theory's application. It is also a matter of debate as to whether the conclusions of a general account of law ought to be evaluated from a moral perspective, and the theory accepted or rejected because of that moral evaluation. In fact, traditional positivists have usually held that the *causal consequences* of a theory's adoption and the *moral status of its theoretical conclusions* are not suitable grounds for accepting or rejecting the theory as an explanation of law and legal systems.<sup>20</sup>

To see why the moral-political and causal consequences of a theory of law are irrelevant to its status *as* a theory of law, consider the following:

- Suppose that we have determined which theory provides the most thorough and enlightening account of law as it is.
- Suppose, also, that this theory leads directly to the unavoidable conclusion that legal systems are by their very nature systems of social control for which no possible moral justification is available. . .

---

<sup>20</sup> See e.g. Waluchow, *Inclusive Legal Positivism*, 88–94. See also *supra* p. 35.

- . . . and that, in fact, they are by their very nature morally reprehensible from the perspective of every available theory of morality, properly understood.
- Suppose, further, that the theory of law in question—the hypothetically best one—inevitably leads to widespread anarchy and an increase in human suffering.

Are *any* of these “facts” relevant to the evaluation of the theory’s accuracy? Do they prevent it from helping us understand law and legal systems better?

Surely it would be absurd to suggest that the suppositions listed above would, were they to be true, give us any grounds to deny the accuracy or explanatory power of such an extremely dangerous and, thankfully, purely hypothetical theory of law. To be sure, in rare and extreme cases such as the one just described we may decide that truth is less important than social stability, human suffering, freedom, and justice. We might reject the goal of an improved understanding of ourselves and instead advocate a kind of wilful blindness—but this decision would not amount to an argument about the ability of a particular theory of law to reveal the truth or further our understanding of law and legal systems.

Murphy’s method for theory choice leads, then, to an uncomfortable and quite startling question: “Ought we ever take the theoretical approach of developing a concept of law on the basis of the concept’s potential for engendering morally improved legal practices?” Note that the phrase “theoretical approach” may refer either to a theory of law, such as Murphy’s version of exclusive positivism, or to what might be more fully expressed as a meta-theoretical approach to evaluating and choosing between legal theories. Thus we really have two questions:

1. Ought we ever to develop a concept of law so as to improve the moral status of our legal practices, including the form of legal systems?
2. Ought we ever to accept that the moral acceptability of a theory’s logical conclusions or the causal consequences of employing a theory provide valid evaluative criteria for theory choice?

Both of these questions are implicated in Murphy’s approach to theory choice. Consider this passage from “The Political Question of the Concept of Law”:

The political dimension of the dispute over the place of moral and political considerations in the grounds of law matters more than any

purely intellectual concerns we might have; and I cannot think of a third reason why the dispute might matter. We must therefore approach our question about the concept of law as a practical aspect of political theory. The dispute about the concept of law is a political argument for control over a concept that has great ideological significance, where different sides in the dispute propose different ways of regimenting the existing equivocal concept. The dispute comprises the practical questions of the social consequences of accepting one rather than another regimentation as well as the political question of which consequences we should be aiming at.<sup>21</sup>

Here Murphy seems to be making several claims. First, he suggests that “the political dimension” of the debate over the correct legal-grounds theory, hence the debate over the correct account of the existing equivocal concept of law, is more important than what we might call “the truth dimension.” In other words, Murphy gives priority to “the ideological significance” of the concept of law insofar as this is (somehow) causally connected to “the social consequences” of prioritizing particular accounts of that concept. As Murphy observes, it is entirely possible “to deny that the pursuit of truth is always our most important goal,”<sup>22</sup> but with regards to legal theory the more pertinent issue is whether a philosophical approach to understanding law can consistently claim that the pursuit of truth is anything less than *the* goal of philosophical understanding. Yet Murphy seems to suggest that our answer to “the political question of which consequence we should be aiming at” is relevant to which theory of law we ought, from a philosophical perspective, to accept as the best one.

It seems, then, that Murphy would answer our first question—“Ought we ever to develop a concept of law so as to morally improve legal practices, including the form of legal systems?”—in the affirmative.<sup>23</sup> There are, however, some implicit constraints on Murphy’s argument. His answer to the first question is tenable only if at least one of two meta-theoretical claims, one strong and one weak, can be supported. The weaker claim is that the pursuit of truth, or at least the pursuit of an increased understanding of law

<sup>21</sup> Murphy, “The Political Question”, 384.

<sup>22</sup> *Ibid.* 383.

<sup>23</sup> To be fair to Murphy, however, we ought to recall that this is his second-best approach to choosing a legal theory: if the pursuit of truth is forced into a dead-end by epistemic uncertainty, then we ought to pursue the alternate goal of moral improvement instead, or so the argument goes. See *supra* §1.3.



and legal systems, is no longer a viable goal for legal theory because of the problem of epistemic uncertainty.<sup>24</sup> It is important to recognize that a solution to the problem of epistemic uncertainty would make the second-best approach unnecessary.

Murphy's stronger meta-theoretical claim is closely connected to the weaker claim. Whereas the weaker claim suggests that epistemic uncertainty forces us to choose the theoretical goal of moral improvement by default, the stronger claim is that the proper goal of legal theory is moral improvement rather than the pursuit of truth. This stronger claim could be attributed to Murphy on account of his view that the debate about the correct account of the concept of law is a debate within the realm of political theory, where political theory is taken as a theoretical approach which requires: (1) the direct (moral) evaluation of law; (2) the direct (moral) evaluation of the causal consequences of a theory's adoption; and (3) the direct (moral) evaluation of a theory's logical conclusions.

### Evaluating Causal Consequences

While it may seem odd to distinguish between the causal consequences of a theory's adoption and promulgation and the causal consequences of its conclusions, there is a good reason for doing so: the influence of a particular theory (of law, of morality, of science, etc.) may be entirely at odds with that theory's conclusions. Consider an example from a field with which Murphy is apparently familiar: Nietzsche studies. Some very influential pseudo-Nietzschean theories of society gained a great deal of social credit during the first four decades of the previous century, such that Nietzsche's concept of the *Übermensch* was used to justify the superiority of the Aryan (read 'German') race. No careful interpretation of Nietzsche's work can show these justifications to be consistent with Nietzsche's own account—Nietzsche himself did not equate Aryan with German—yet it can reasonably be argued that these pseudo-Nietzschean views had a significant and morally reprehensible influence which led to startlingly immoral social consequences. Even if we distinguish between "authentic" and "inauthentic" interpretations of Nietzsche's philosophy, and thus argue that the pseudo-Nietzschean theories were something entirely different from Nietzsche's own account of the world, the fact remains that the inauthentic accounts are out-

---

<sup>24</sup> This is a meta-theoretical claim insofar as it applies to all possible legal theories.

growths of the authentic account and thus the authentic account is causally (though not necessarily morally nor even logically) implicated in the existence of the inauthentic ones. Similar arguments have been made regarding legal positivism, though for the most part they have been rejected.<sup>25</sup> In any case, it is both possible and important to distinguish between (1) the moral consequences of a theory's adoption and promulgation, and (2) the moral consequences of its conclusions.

### Evaluating Moral Consequences

Our second question regarding the moral implications or consequences of a theory of law asked, "Ought we ever to accept that the moral consequences of a theory's conclusions or the moral consequences of a theory's use provide valid evaluative criteria for theory choice?" To this question, too, Murphy's answer must be affirmative. Since in his view the correct account of the concept of law is a matter of political theory, and political theory includes "the question of which consequences we should be aiming at," it follows that choosing a legal theory must be at least partly made on the basis of its ability to bring about the "right" political consequences. This entails that the ability to account for the "right" moral-political consequences is a *necessary condition* for a superior theory of law. But surely such a presupposition is entirely unjustified. It necessarily holds that law ought, does, and most importantly *is able* to achieve the "right" consequences. If it is the case that law does not do so, or is unable to do so, or that legal practices by their very nature are unable to uphold the moral imperative of achieving the correct moral-political consequences, then it would be impossible to develop an adequate explanation of law as it is. In other words,

<sup>25</sup> Radbruch and Fuller, for instance, both claim that positivism (or something like it) enabled the Nazi regime, its legal officials, and even its legal subjects to adopt a formalist view of law whereby the morality of particular laws was thought to be irrelevant to their actual adoption and application. For a critical refutation of Radbruch which argues that German positivists were largely opposed to the Nazi regime's legal machinations, see Paulson, "Lon L. Fuller; Gustav Radbruch, and the 'Positivist' Theses", 313–59. Oladosu refutes similar criticisms raised by African legal theorists who, in their contemporary cultural and historical situation, portray legal positivism as a morally pernicious influence, though it should be noted that these anti-positivists seem to have something like a legal-practice-oriented version of exclusive positivism in mind rather than a practice-oriented version of inclusive positivism.

if law is somehow inherently and irretrievably morally bad, then Murphy's necessity condition precludes any explanation of law at all.

Murphy's notion of political theory, moreover, seems to be something very like a stipulative definition. It is not at all clear why there could not be a political theory which aims to describe and explain political systems without engaging in the direct moral evaluation of those systems. In other words, there is no reason to exclude the possibility of indirectly evaluative political theory. Even if Murphy's position on the relational meta-theoretical issue of the connection of legal theory to political theory is correct—that is, even if Murphy is right to claim legal theory is inextricably linked to and in some sense dependent on the conclusions of political theory, or is perhaps merely a subset of political theory—Murphy has not provided an argument for the notion that this dependence or subservience entails that the practice of political theorizing relies upon the direct moral evaluation of political systems (including legal systems). *If* legal theory is but a subsidiary activity within political theory, and *if* political theory requires direct moral evaluation, then it *may* be the case that indirectly evaluative legal theory is woefully misguided. But lacking convincing arguments which show those hypotheticals to be real, there is no reason to assume that they are.

## Methodological Consequences

We must conclude, then, that Murphy does not provide an independent argument for developing a concept of law so as to generate the best moral-political consequences—independent, that is, from the theoretical deadlock caused by epistemic uncertainty. Some such argument may exist, of course, but it would still have to deal with the claim that a clear and (relatively) morally-unbiased understanding of law is the appropriate prolegomena to prescriptive claims regarding the morally best form of legal practices. We must also conclude that Murphy fails to provide a convincing meta-theoretical argument in favour of using the moral consequences of a theory's application or the moral palatableness of its conclusions as primary evaluative criteria for theory choice. These features of legal theories might, at most, be secondary evaluative criteria, used as a last resort when meta-theoretical-evaluative criteria are insufficient for the task. And so Murphy's positing of such criteria relies, once again, upon the theoretical deadlock caused by epistemic uncertainty. Only the weaker of the two meta-theoretical claims has any chance of obtaining.

Our next task, then, is to determine whether epistemic uncertainty forces us to choose a legal theory for its moral benefits. Before we engage in that inquiry, however, it is worthwhile to consider what we would stand to lose if we were to follow Murphy's lead and choose a theory of law on moral-political grounds.

The most direct implication of what I have called Murphy's second-best approach would be its effect on traditional analytical legal theory. Traditional legal positivists, for instance, would be forced to surrender one of their few points of theoretical agreement, namely the idea that theories of law can be judged better or worse on meta-theoretical grounds alone. By prioritizing the pursuit of truth—in the sense of aiming for the most accurate and explanatorily powerful understanding of human beings as participants in the social phenomena of legal systems—traditional positivists hold to the view that the best theory of law will not necessarily have the best moral consequences: it would offer instead the best description, conception, explanation, and elucidation of law and its associated concepts, institutions, and practices.<sup>26</sup> A superior explanation of law, they argue, exhibits superior *theoretical* values—the moral consequences of the theory's application (or misapplication) and of its conclusions are irrelevant to the merits of its description and explanation of its object, however important such consequences might be to quotidian life.

It is true that a theory of law—any theory of law—may affect legal practices, social opinions, and perceived moral imperatives. Thus the consequences of the theory may be and often are morally significant, even in the case of an indirectly evaluative legal theory which strives for moral neutrality in the application of the theory's methodology. But moral consequences are not the be-all-and-end-all of philosophical inquiry. What we stand to lose by taking the second-best approach to theory choice is nothing less than a mode of analysis which prioritizes the pursuit of truth and aims to provide the most illuminating explanation of social phenomena. Moreover, it is possible, and I will argue that it is in fact the case, and that an indirectly evaluative legal theory is a necessary and immensely helpful prolegomena to any project which aims to subject law and legal systems to moral evaluation and criticism.

---

<sup>26</sup> Waluchow, for example, claims that "descriptive-explanatory theories are ultimately governed by meta-theoretical-evaluative considerations like simplicity, comprehensiveness, coherence, and the like" (*Inclusive Legal Positivism*, 21).

## Chapter 4

# “Methodological” Positivism

So far we have seen (1) that meta-theory is the ubiquitous background of legal theory, (2) that legal positivists can defend their presupposition of a single explanatory object, namely the concept of law, and (3) that one need not engage in direct moral evaluation in order to provide a valuable description and explanation of juridical law.<sup>1</sup> It may also be the case that a positivist legal theory offers the best prolegomena to a direct moral evaluation of law.<sup>2</sup> In short, we have seen that it is possible to develop a minimalist legal theory whose methodological and other meta-theoretical commitments are explicit, and that this might be a good thing to do. In this and the following chapters we shall secure those commitments. In this chapter we shall consider Stephen Perry’s methodological critique of Hart in particular and of descriptive-explanatory legal theorists in general.

### 4.1 “Hybrid” Positivism

Perry argues that “from a methodological perspective” Hart’s legal theory “is an unsatisfactory hybrid.”<sup>3</sup> Perry’s critique rests upon a distinction between two types of positivism:

**Substantive legal positivism** is the view that there is no necessary connection between morality and the content of law.

---

<sup>1</sup> These are the main conclusions of Chapters 1–3, respectively.

<sup>2</sup> See *supra* p. 34.

<sup>3</sup> Perry, “Hart’s Methodological Positivism”, 354.

**Methodological legal positivism** is the view that legal theory can and should offer a normatively neutral description of a particular social phenomenon, namely law.<sup>4</sup>

Perry argues that Hart employs a “scientific” methodology which is incapable of grounding his substantive claims about law, claims which can only be secured by jettisoning “inappropriate elements from the [scientific] descriptive-explanatory approach” in favour of what Perry calls “internal conceptual analysis,” a methodological approach which recognizes that “particular theories of law must be offered from the internal point of view and must be defended, in part, by resort to *moral argument*.”<sup>5</sup>

If Perry is correct, then even a minimalist descriptive-explanatory theory is flawed in three ways: (1) like Hart’s theory, it aims to realize unrealizable theoretical values rather than proper moral values; (2) it aims to describe and explain law in general without relying upon a stipulative definition, yet must begin from a familiar particular starting-point which always already presupposes a moral outlook; and (3) it proceeds by analyzing actual social practices without engaging with the practitioners’ competing accounts of those practices. In the next three sections I shall address all of these supposed flaws. I argue in § 4.2 that Perry’s conflation of descriptive-explanations with scientific explanations is incorrect and, furthermore, that his account of the meta-theoretical-evaluative criterion of explanatory power is inadequate and misleading. In § 4.3 I reconsider, in light of Perry’s critique, the possibility of developing a general theory of law from a particular starting point. Finally, in § 4.4, I show that conceptual analysis need not take the form of fully-committed moral argument, as Perry claims it must.

To understand why he believes that Hart’s legal theory in particular and descriptive-explanatory legal theory in general is an inappropriate jurisprudential approach, let us first consider the structure of Perry’s argument:

- (1) Hart’s legal theory purports to be a descriptive-explanatory legal theory instantiating the thesis of substantive legal positivism.
- (2) To secure that thesis, positivists like Hart employ two distinct theoretical methodologies: (i) the descriptive-explanatory methodology and (ii) conceptual analysis.

---

<sup>4</sup> *Ibid.* 311.

<sup>5</sup> *Ibid.* 313, emphasis added.

- (3a) The descriptive-explanatory methodology is consistent with methodological positivism.
- (3b) Conceptual analysis is inconsistent with methodological positivism.
- (4a) The two methodologies are in tension with each other.
- (4b) This tension must be resolved.
- (5) Of the two methodologies, only conceptual analysis is appropriate for a philosophical jurisprudence.
- (6) Given 4(a), 4(b) and 5, the descriptive-explanatory method must be abandoned in order to rescue Hart's theory of law from jurisprudential banality. Thus methodological positivism must be abandoned in order to secure substantive legal positivism.

We can concur with (1) insofar as we aim to develop a legal theory which allows for the conceptual possibility of the separability of law and morality. Since some of Hart's theoretical claims are descriptive claims about actual legal systems while others are about the general character of juridical law in abstraction from particular legal systems, (2) enjoys some degree of initial plausibility and raises the important meta-theoretical issue of whether and to what degree we can separate our particular descriptive claims from our general explanatory concepts. If (2) is true in virtue of a necessary separation between the methodology of descriptive-explanatory legal theory and the methodology of conceptual analysis, then we will be forced to concur with (4a). If (2) is false because Hart and other descriptive-explanatory legal theorists really do not employ two discrete and incompatible methodologies, then we need not concur with (4a). Hence (4b), (5), and ultimately (6) all depend on the truth of (2). The distinction it makes is essential to Perry's argument, which is unsound if (2) is false.

## 4.2 Descriptive Explanations

### Perry & Explanatory Power

Let us first disambiguate the label 'methodological positivism.' It might be taken as equivalent to the Neutral Description Thesis,<sup>6</sup> but Perry means

---

<sup>6</sup> "It is both possible, desirable, and philosophically enlightening to describe (and explain) a legal system as it is without at the same time engaging in its moral evaluation"

to identify a position which goes far beyond the Neutral Description Thesis. According to Perry, methodological legal positivists believe that “there is no connection, necessary *or otherwise*, between morality and legal theory.”<sup>7</sup> Is this a tenable characterization of Hart’s approach, or of descriptive-explanatory legal theory in general?

We have already seen that a good descriptive-explanatory legal theory requires reference to moral concepts.<sup>8</sup> Many legal phenomena are morally significant, yet a descriptive-explanatory legal theorist may take account of the moral significance of law’s features without advocating a particular moral viewpoint; she may make *indirect* moral evaluations regarding the moral significance of law’s features.<sup>9</sup> Perry, however, argues that descriptive-explanatory jurisprudence is “a form of scientific enterprise” which “supposes that what does and does not count as law is determined by applying the scientific method” without recourse to judgements regarding moral significance.<sup>10</sup> By equating descriptive-explanatory legal theory with the “scientific enterprise,” Perry obscures an important difference between the *actual* descriptive-explanatory project espoused by Hart (among others) and Perry’s caricature of it (which I shall refer to using his phrase ‘the descriptive-explanatory method’). This caricature relies upon a superficially plausible but ultimately mistaken definition of the meta-theoretical-evaluative criterion of ‘explanatory power.’

“A particular theory,” Perry opines, “adopts the characterization of empirical phenomena that it does because the theory’s proponents believe that characterization has explanatory power.”<sup>11</sup> When he notes that “explanatory power is most plausibly understood as referring to metatheoretical criteria for assessing scientific theories,”<sup>12</sup> one might take Perry to be using the term in the usual sense, namely as a general catch-phrase for the many possible ways an explanation, scientific or sociological or jurisprudential, can commend itself.<sup>13</sup> In fact, however, Perry argues that *prediction is the primary aim* of a descriptive-explanatory theory of law.<sup>14</sup>

(Waluchow, “Many Faces”, 398). See also *supra* p. 13.

<sup>7</sup> Perry, “Hart’s Methodological Positivism”, 311, emphasis added.

<sup>8</sup> See *supra* § 2.3 and §§ 3.2—3.4.

<sup>9</sup> See *supra* § 3.3.

<sup>10</sup> Perry, “Hart’s Methodological Positivism”, 313.

<sup>11</sup> *Ibid.* 320.

<sup>12</sup> *Ibid.*

<sup>13</sup> See *supra* n. 6 on p. 4.

<sup>14</sup> Perry, “Hart’s Methodological Positivism”, 320. Avner Levin wonders whether



## Scientific Theories & Explanatory Power

There is no necessary connection between explanatory power and predictive power in descriptive-explanatory legal theory. Moreover, although scientific explanations aim to enhance our understanding by maximizing explanatory power, the successful prediction of empirical phenomena is neither a *necessary* nor even a primary aim of all scientific theories.<sup>15</sup> What *is* a prevalent or even necessary feature of scientific theories is the alignment of “scientific” claims with “empirical” facts—scientists dealing with observable phenomena aim to strike an appropriate balance between empirical generalizations and descriptive observations. Scientists, like descriptive-explanatory legal theorists, aspire to explain actual phenomena, and they often do so by developing general concepts (such as empirical generalizations) to explain observable phenomena. Hence they aim to develop and apply general concepts which explain descriptive observations—they adopt what we might call *the methodological principle of descriptive/conceptual reciprocity*.<sup>16</sup>

A scientific explanation whose conclusions are overwhelmingly at odds with the data gathered by means of scientific experiment is a bad one not because it lacks explanatory power (in Perry’s narrow sense of predictive power); it is bad insofar as it lacks *explanatory relevance*. If a scientific explanation’s conclusions, including its empirical generalizations, are rebutted or falsified by observation, then the explanation appears to be irrelevant, that is, it doesn’t seem to apply to the phenomenon in question. Consider a very simple example: Suppose that a scientist offers an account of the interaction of billiard balls. The account includes the claim that “Given conditions *W* (one solid striking another) *X* (the angle of the vectors involved), and *Y* (the momentum transferred), the result will be *Z*.” The scientist goes into the laboratory and, in a carefully controlled testing environment, seemingly creates conditions *W*, *X*, and *Y*. Suppose that *Z* follows. The scientist’s account appears to have predictive power. The explanatory concepts involved in the scientist’s account—solids, vectors and angles of attack, momentum, etc.—are not disproved by experiment.

---

“Perry is stacking the deck against descriptive-explanatory methodology in his focus on prediction.” (“The Participant Perspective”, 582).

<sup>15</sup> Physicists, for instance, sometimes offer explanations which are unfalsifiable and thus “true” only so long as there is sufficient consensus that the (unfalsifiable) generalizations upon which the explanation is premised are the best available.

<sup>16</sup> This principle is one means for dealing with the meta-theoretical problem of descriptive/conceptual reciprocity. See *supra* § 2.3.

But consider another account, where *W*, *X*, and *Y* are given as “the touching of one colour by another,” “divine approach and retreat no. 36,” and “transference of subliminal energies,” respectively. This rather offbeat account may nonetheless successfully predict *Z*, though it uses very different concepts to explain that result. Does its predictive power make it a valuable explanation of billiard-ball interaction?

Predictive power is not itself a sufficient condition for being a valuable *explanation*. A pool-shark who wants to bring about *Z* need not know *why* or *how* *X* and *Y* lead to the desired result, the pool-shark need only know that doing *X* and *Y* will normally result in *Z*. Thus, for the pool-shark, both accounts are valuable because they are useful *practical* models of what billiard-balls tend to do under certain conditions, conditions which are of interest to the pool-shark. The pool-shark may successfully employ either theory; he may see *Z* as “the transfer of momentum according to the inherent laws of interaction between physical solids” or “the way the billiard-ball gods re-arrange the table under certain circumstances.”

The difference between the first and the second theory of billiard-ball interaction lies in their different sets of explanatory concepts. While a good argument can be made for preferring explanatory concepts which are falsifiable, predictive power does not itself speak to the actual *relevance* of the explanatory concepts used in the theory which offers them. This is especially so for explanations of social phenomena, but explanatory relevance is an important consideration in the so-called hard sciences as well. For instance, the theoretical account of light as a wave provides an answer to puzzles and questions which are less satisfactorily answered by the model of light as a particle, yet the reverse is the case with regard to other questions and puzzles. In at least some instances, either model provides a good explanation, sometimes even a better explanation than the other model, and yet the two models contradict each other with regard to the “real” character of the phenomenon of light. If predictive power is truly important to the scientific method, it is not because such power is valuable in and of itself—it is because that method relies on falsifiable generalizations in order to mediate between sound descriptive claims and valuable explanatory concepts.

Thus we have good reason to reject Perry’s imposition of a dichotomy between “predictive” scientific explanations and jurisprudential explanations which employ general concepts that do not maximize or even realize predictive power. Predictive power is a theoretical value only insofar as it helps to establish the relevance of the explanatory concepts to the phe-

nomenon under investigation. Conversely, a concept's predictive capacity may be of *practical* value regardless of its utility in providing a sound explanation of that phenomenon. Perry's account of the relationship between the theoretical values appropriate to (scientific or legal-theoretical) descriptive explanations and the theoretical value of predictive power is incorrect.

We ought in any case to reject predictive power as an appropriate meta-theoretical-evaluative criteria for descriptive-explanatory theories of law. This is so because *law may change*. I do not mean merely that particular laws or particular legal systems may change, but rather that the phenomenon of juridical law is not static. Juridical law is the result of human social institutions and practices. If it were to aim to maximize predictive power, a theory which also aims to describe law "as it is" would be unable to account for law as it may be at some future point. In other words, a theory of law which attempts to commend itself in light of two particular meta-theoretical-evaluative criteria—descriptive accuracy and predictive power—would almost certainly be forced to sacrifice the former in order to fulfill the latter.<sup>17</sup> One of the virtues of descriptive-explanatory legal theory is that it is flexible or open-ended: should the institutions and practices of law change, the theory will aspire to modify its account of those institutions and practices accordingly.<sup>18</sup> Maximizing explanatory power by predicting future behaviour is antithetical to that approach. Adhering to the methodological principle of descriptive/conceptual reciprocity is not.

## Pure and Impure Meta-Theoretical-Evaluative Criteria

Hart's theory of law does not aim to predict anything at all, at least in the usual sense of scientific prediction. He actually observes that "there is much that is questionable, indeed blinding, in the attempt to force the analysis of legal concepts or of any rules into the framework adapted for the empirical sciences."<sup>19</sup> Given that Hart is so clear on this matter, it is puzzling that

<sup>17</sup> To clarify: my claim is not that a descriptive jurisprudential theory committed to *only* these two meta-theoretical-evaluative criteria is incoherent; rather, my claim is that a descriptive jurisprudential theory whose set of meta-theoretical-evaluative criteria included these two, perhaps even among others, is incoherent.

<sup>18</sup> Levin emphasizes this virtue of inclusive positivism. See Levin, "The Participant Perspective", 612–15.

<sup>19</sup> Hart, "Scandinavian Realism", 162.

Perry tries so hard to force Hart into the position of being either a “real” scientist or a “real” legal theorist. It is all the more puzzling given that the meta-theoretical-evaluative criterion of explanatory power does not support Perry’s diremption of Hart’s actual methodology into a descriptive and a conceptual one; indeed, it suggests quite the opposite, namely that descriptive claims and explanatory concepts are reciprocal components of most any good theoretical explanation, as opposed to a useful practical technique.

Perry presupposes that, with regard to descriptive explanations, there is only one set of meta-theoretical-evaluative criteria, and that the content of that set is fixed. He argues that a scientific theory has explanatory power only if it has predictive power, that predictive power is not an appropriate evaluative criterion for (at least some forms of) jurisprudential theory, and thus that jurisprudential explanations must make use of moral argument.<sup>20</sup> Hence Perry jettisons the idea that meta-theoretical-evaluative criteria are applicable to legal theories.

Perhaps Perry’s real target is not Hart at all. After disparaging the descriptive-explanatory method, Perry goes on to suggest in the subsequent portions of his essay that Hart’s primary methodology is conceptual analysis.<sup>21</sup> A potentially more appropriate target of Perry’s critique is Wil Waluchow’s inclusive positivism.<sup>22</sup> It is possible to read Waluchow as claiming that meta-theoretical-evaluative criteria are static and absolute. In his elucidation of a descriptive-explanatory account of law, he notes that simplicity is “a meta-theoretical criterion governing the assessment or evaluation of theories.”<sup>23</sup> Waluchow also commends the relative impartiality of explanations of the type traditionally offered by scientific theories,<sup>24</sup> and soon after he distinguishes between “normative as opposed to analytic jurisprudence,”<sup>25</sup> a distinction which might be taken as suggesting that

<sup>20</sup> Here I concur with Levin. “A theory of law, as Perry is well aware, differs from a scientific theory seeking to predict experimental results. Yet this does not turn descriptive-explanatory methodology into a methodology inadequate for legal theory. At most it is an argument against the meta-theoretical criterion of prediction when evaluating the success of theories of law” (Levin, “The Participant Perspective”, 582).

<sup>21</sup> See “Hart’s Methodological Positivism.” Nonetheless, Perry’s account of the relationship between description and jurisprudential explanations is incorrect.

<sup>22</sup> See *ibid.* n. 6 at 313.

<sup>23</sup> Waluchow, *Inclusive Legal Positivism*, 20.

<sup>24</sup> “Why should our aim not be, as it is in science, to illuminate the object, enhance our understanding of it and other things to which it is related?” (*Ibid.* 26)

<sup>25</sup> *Ibid.* 27.

analytical descriptive-explanatory jurists reject the significance of moral norms and other morally significant features of actual legal systems. From comments such as these, Perry may have drawn the conclusion that descriptive-explanatory legal theorists commend their explanations according to the criteria usually applied to scientific theories—but this conclusion is only partly true.

Meta-theoretical-evaluative criteria are general standards. It is for this reason that Julie Dickson calls simplicity a “purely meta-theoretical” value: it relates “only to the nature of theories in general, rather than to the nature of the particular data or explananda with which a given theory or type of theory deals.”<sup>26</sup> Waluchow’s commendation of inclusive positivism on the basis of such criteria is sound insofar as purely meta-theoretical criteria reflect the valuable subsidiary aims of theoretical inquiry in general. Their general applicability arises from the fact that they relate to the manner of presentation rather than the content of the presentation. Dixon observes that such criteria are “applicable to theories concerning any subject matter whatsoever, as they do not bear upon the truth of the particular substantive claims which a given theory makes, but are rather concerned with optimal ways of getting the message of the theory across, and are hence considerations which apply irrespective of what the content of that message might be.”<sup>27</sup> Purely meta-theoretical-evaluative criteria speak to the proper or superior rhetorical forms for presenting explanations.

Formal standards are defeasible, however. A simple and clear explanation commends itself on that basis, but if its substantive claims are wrong the simplicity of the explanation is moot.<sup>28</sup> Moreover, some meta-theoretical-evaluative criteria are appropriate standards for evaluating the content of a theory rather than the form of its presentation. By extending Dixon’s terminology, we can call these “impure meta-theoretical criteria.” Predictive power is an impure meta-theoretical criterion insofar its value is relative to what the theory is attempting to explain. An explanation of the *moral* significance of murder will gain little by being able to predict the statistical frequency of murder-rates, yet an explanation of the *economic* significance of murder may be judged better precisely because it does offer such insights. Likewise, an explanation of the physics of billiard-ball inter-

---

<sup>26</sup> Dickson, *Evaluation and Legal Theory*, 35.

<sup>27</sup> *Ibid.* 34.

<sup>28</sup> E.g., “Billiard balls move opposite to the direction whence they are struck because the gods like symmetry.”

actions commends itself by predicting such interactions, but an explanation of why games involving spheres are universal social phenomena gains little from such predictions.

Although the distinction between pure and impure theoretical values is unambiguous—pure meta-theoretical-evaluative criteria apply to the form of an explanation while impure criteria apply to its content—this distinction is not always easy to make. On the one hand, explanatory power can be considered a pure criterion insofar as *every* non-practice-oriented theory aims to explain its explanatory object; on the other hand, the explanatory power of a particular theory is relative to the puzzle or question being addressed. The latter sense of explanatory power is conditioned by explanatory relevance, which has to do with a theory's substantive claims rather than its presentation of those claims. Thus explanatory power is ultimately an impure (relative) meta-theoretical-evaluative criterion. That is why some theories are commended for their predictive ability while other theories do not even attempt to predict future outcomes.

The same ambiguity applies to the meta-theoretical-evaluative criterion of descriptive accuracy. Theories of law which aim to describe law as it is are better insofar as they are descriptively accurate, that is, insofar as they present their explanatory object in an undistorted and suitably detailed fashion. But law is a complex phenomenon. Legal theories may constitute different explanatory objects from that phenomenon, such that the accuracy of a particular theory's description of the relevant features of its explanatory object is relative to that object. Thus there is a sense in which *every* descriptive account aims for descriptive accuracy (hence that theoretical value is absolute), yet it is also the case that descriptions of different explanatory objects may be, to the best of our knowledge, accurate yet contradictory (hence that theoretical value is relative to its explanatory object). For example, an account where light is understood as a wave is (arguably) dealing with a different explanatory object than one where light is understood as a particle, though both objects are constituted from the same explanandum. A more general theory of light which encompasses both explanatory objects, or essentially constitutes a new one dealing with all the significant features of the prior ones, will then be able to commend itself on the basis of being a more comprehensive explanation—it dispenses with the two different explanatory objects (wave-light and particle-light) by substituting another explanatory object and offering a more comprehensive account in the process. And so arguments regarding descriptive accuracy

often involve subsidiary arguments as to what it is that is being described: descriptive accuracy, like explanatory power, is a pure meta-theoretical-evaluative criterion applicable to all descriptive explanations, yet also an impure or relative criterion with regards to particular explanatory objects.

Two points bear mentioning. First, there *is* a viable sense of a pure form of explanatory power. We could say that every (non-practice-oriented) theory aims to give a thoroughgoing and insightful explanation of its explanatory object. Thus we could say that ‘explanatory power’ is simply *the* meta-theoretical evaluative criterion: something just is a theoretical explanation if and only if it has explanatory power, and it is better insofar as it more effectively realizes that potential. Hence rhetorical values such as simplicity and elegance are part of the values used to assess theoretical explanations—these are some of the meta-theoretical-evaluative criteria which are universally applicable, and in this sense they help define the more general criterion of explanatory power. Predictive power is part of explanatory power for some theories but not others, hence it may *or may not* be part of the content of explanatory power. On this reading, explanatory power is itself a merely formal criterion—an arch-criterion, if you will—whose content includes other meta-theoretical criteria. Thus, while all theoretical explanations aspire to maximize explanatory power, each may differ in respect to which impure criteria are considered to be part of the content of explanatory power for *that* theory. We would say, then, that explanatory power is a pure criterion with respect to its form, but is impure with respect to its content. The same can be said of descriptive accuracy.<sup>29</sup>

Secondly, we must be wary of using the distinction between “pure” and “impure” theoretical values to reify the invidious distinction between morally neutral and morally active theoretical inquiries. A “pure” meta-theoretical evaluative criterion is pure only in the sense that it does not relate to the content of a theory’s claims. It is not “pure” in the sense that it denies that in some circumstance it may be morally reprehensible to con-

---

<sup>29</sup> Note that my use of the term ‘meta-theoretical-evaluative criteria’ is perhaps no longer consistent with Waluchow’s use of the term. (See *supra* §1.1.) I believe that Waluchow’s discussion in *Inclusive Legal Positivism* shows at least an implicit awareness of this difference, and it seems to me that much of the confusion others have exhibited when discussing inclusive positivism as a descriptive-explanatory theory can be remedied by making an explicit distinction between pure and impure meta-theoretical-evaluative criteria. This distinction also reinforces the importance of the particular criterion of descriptive accuracy.

struct theories on this basis. So-called objective scientific approaches, the paradigmatic case being scientific positivism, sometimes claim to be amoral activities because they use only or primarily “pure” theoretical values. That claim is highly contestable, but in any case it is not what I mean when I refer to pure and impure theoretical values.

### Perry’s Misunderstanding

If my distinction between pure and impure meta-theoretical-evaluative criteria is sound, then Perry’s caricature of descriptive-explanatory legal theory can be seen in a somewhat more charitable light. He is concerned to prove that Hart is not a descriptive-explanatory legal theorist because, on Perry’s view, the explanatory aims of that sort of theory “is most plausibly understood as referring to metatheoretical criteria for assessing scientific theories: predictive power, theoretical simplicity, and so on.”<sup>30</sup> Moreover, we can agree with Perry that predictive power is usually not a commendable feature of a jurisprudential theory.<sup>31</sup> And so Hart appears to oscillate between two distinct theoretical enterprises: a scientific one where explanations are better insofar as they maximize predictive power, and a properly jurisprudential enterprise where explanations are better on account of “the power of a theory to elucidate concepts.”<sup>32</sup> This seeming oscillation, however, is due to Perry’s conflation of predictive with explanatory power and his misunderstanding of the difference between descriptive-explanatory legal theory and what Hart calls a “radically external” approach. Perry notes, for instance, that Hart “characterizes the phenomenon of ‘law’ in terms of the notion of a rule of recognition” and yet “does not give us any reason to believe that his theory of law is superior, in terms of explanatory power thus understood [i.e., predictive power], to what he calls radically external theories.”<sup>33</sup> Yet a reading of Hart which refrains from burdening him with “the scientific method” and its supposed predictive aims will not find it difficult to explain why Hart makes reference to “the notion of explanatory power, but not in the ordinary scientific sense.”<sup>34</sup>

<sup>30</sup> Perry, “Hart’s Methodological Positivism”, 320.

<sup>31</sup> Yet some theorists would make it so. See *sub* Chapter 5.

<sup>32</sup> Perry, “Hart’s Methodological Positivism”, 321.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*



Perry is confused because he thinks that descriptive-explanatory legal theorists like Hart and Waluchow espouse inappropriate jurisprudential values. At best, Perry has misread Hart and misunderstood Waluchow's emphasis on meta-theoretical-evaluative criteria. This misunderstanding may have arisen from Perry's failure to recognize the difference between pure and impure meta-theoretical-evaluative criteria—the same difference which, I have suggested, leads Perry to argue for his second premise by means of a false dichotomy.<sup>35</sup> I have argued against this false dichotomy by showing that a descriptive theory's explanatory power need not entail predictive power, hence the explanatory component of a descriptive-explanatory theory may commend itself for other reasons. I further strengthened that argument by pointing out that even in the case of scientific inquiry, predictive power is not always a paramount concern; and that even when it is, its primary role is to enable the falsification of (incorrect) empirical generalizations. I suggested, as well, that given the possibility that juridical law may change or develop over time (including the future), maximizing predictive power is antithetical to the aim of describing law as it is. If my arguments are sound, then Perry is wrong to suggest that the "descriptive-explanatory approach is appropriate if one intends to do science" yet is inappropriate as a jurisprudential methodology.<sup>36</sup> Only what Hart calls "radically external" approaches would be an inappropriate jurisprudential inquiry, simply because they ignore the internal aspect of rules. Once his false dichotomy is unmasked, Perry's critique of descriptive-explanatory legal theory shows itself to be unsound. Hence premise (3b), which holds that the tension between the descriptive-explanatory method and conceptual analysis must be resolved by choosing one methodology over the other, dissolves along with Perry's caricature of descriptive-explanatory legal theory and its meta-theoretical commitments.

### 4.3 Starting Points

Perry raises an important methodological concern despite his caricature of the descriptive-explanatory methodology: If an account of juridical law aims

---

<sup>35</sup> I explicated that premise as: "To secure the substantive legal positivist position, Hart employs two distinct theoretical methodologies: (a) the descriptive-explanatory methodology and (b) conceptual analysis."

<sup>36</sup> Perry, "Hart's Methodological Positivism", 313.

to be general and descriptive, how does it begin? And how does this starting point relate to the theory's substantive claims? Hart, for example, claimed that his theory of law aims to describe the phenomenon of juridical law where that phenomenon "in spite of many variations in different cultures and in different times, has taken the same general form and structure."<sup>37</sup> He develops his descriptive explanation by taking modern municipal legal systems as his starting point, then extrapolates the relevant features to develop a general theory of law. Perry notes, correctly, that Hart's aim "immediately raises the question of how we know or could come to know that these manifold social practices are in fact manifestations of the *same* institution, namely law."<sup>38</sup>

Recall our discussion of the Historical and Cross-Cultural Doubts.<sup>39</sup> I argued then that the historical and cross-cultural schemes for doubting are challenging but not irresolvable, and I suggested that the provisional character of the positivist's filtering criteria allows her to begin the project of developing a descriptive-explanation. Accordingly, I offered a tentative argument for accepting Hart's starting point.<sup>40</sup> Perry offers an argument to the contrary, one which suggests that the problem is more deeply-rooted than we initially suspected. He notes that "[t]aking a certain kind of familiar social practice—for example, those practices Hart refers to as 'modern municipal legal systems'—as a tentative starting-point, a theory of this kind [i.e., a descriptive-explanatory legal theory] would develop its own internal descriptive categories."<sup>41</sup> In Hart's theory these descriptive categories are primary rules, secondary rules, and the rule of recognition. "These categories," Perry observes, "would not necessarily correspond to what 'we'—participants, in some appropriately loose sense, in modern municipal legal systems—have in mind, either explicitly or implicitly, in speaking of law."<sup>42</sup> Thus not all legal practitioners—judges or lawyers—will conceptualize their practice in the same way as the descriptive-explanatory legal theorist.

How might discrepancies between theoretical and practical conceptions

---

<sup>37</sup> Hart, *The Concept of Law*, 240. Perry cites this quotation on p. 313 of "Hart's Methodological Positivism."

<sup>38</sup> Perry, "Hart's Methodological Postivism", 313.

<sup>39</sup> See *supra* § 2.4.

<sup>40</sup> See *supra* § 2.6.

<sup>41</sup> Perry, "Hart's Methodological Positivism", 314.

<sup>42</sup> *Ibid.*

complicate the task of developing a good explanation of law? According to Perry, one possible result is that

the initial examples of law on which we tend to focus at a pre-theoretical stage—modern municipal legal systems, let's say—are, from the perspective of the best descriptive-explanatory theory, just a minor variant within a wider class of social practices.<sup>43</sup>

It may be that the phenomenon we take to be juridical law is properly described as several discrete phenomena. If this were so, we would have to reject Hart's presupposition that his unitary concept of law can account for an institutional system which "in spite of many variations in different cultures and in different times, has taken the same general form and structure."

When we first took up the schemes for doubting, our concern was that our theoretical starting point was arbitrary insofar as it presupposed a unitary concept of law, hence a sole category in terms of which all actual legal systems could be described and explained. Let us reconsider the problem of arbitrariness for a moment. Hart's starting point, like any starting point, presupposes that a certain set of data merits explanation. This set of data is our explanatory object. Does this presupposition entail that our starting point is arbitrary? Yes and no. It is arbitrary in the sense that our choice of any given starting point is arbitrary, since other equally viable starting points are available. In fact, other starting points must be available if we are to consistently uphold our descriptive-explanatory methodological commitments. A legal theorist in a different historical period or different culture will have a starting point which is familiar to him but not to us. Hence his and our descriptions, beginning from different starting points, may "differ from one another with respect to what and how much they leave out, or to put the point more positively, they differ insofar as they focus on or highlight different aspects of what is being observed."<sup>44</sup>

If the basis for our starting point is our familiarity with a particular set of social practices and institutions, then our descriptive ambitions will partly be grounded by what we, from that starting point, consider to be significant or insignificant. This is one reason why we favoured the indirectly evaluative methodology for identifying the significant features requiring explanation: it helps to reduce "investigator bias." We resolved that problem

---

<sup>43</sup> Perry, "Hart's Methodological Positivism", 314.

<sup>44</sup> *Ibid.* 327. Perry could be our cross-cultural sceptic.

by noting that careful attention to our filtering criteria would allow us to defend our presupposition of a unitary trans-historical and trans-cultural social phenomenon, namely juridical law. So long as we recognized those criteria as limiting factors on our explanatory object and were prepared to revise them when necessary, our conclusions need not beg the question. Thus our starting point is not arbitrary in at least one important respect: it is not a stipulative definition. It is, rather, a provisional definition which makes it possible for us to begin a process of theoretical inquiry which may in fact lead us to conclude that we chose poorly when we began our inquiry by filtering the pre-theoretical data in the way we did.

We should recall that our minimalist methodology allows one presupposition: that the pre-theoretical data exhibit what appear to be common features among a variety of social phenomena. This is so whether we begin from a very general or very specific starting point. From the broad historical perspective, for instance, the presence of adjudicatory institutions in most every society suggests that these societies share something in common, even though the particular adjudicatory institutions take different forms. The relevant institution may be a king or noble's court where subjects can appeal to the king or noble for an enforceable decision. Or it may be a religious assembly, a law court, etc. Hence a common and readily observable set of institutional features serving an identifiable function, e.g. the making of enforceable decisions about matters in dispute, leads us to suspect that we have identified a trans-historical institution of a certain type. From a cross-cultural perspective, we might note that disparate societies still appear to develop similar adjudicatory institutions. This, too, might lead us to postulate the existence of a trans-cultural social practice which manifests itself in the form of adjudicatory institutions. Once we suppose that we may be dealing with a common type of institution, we have gone beyond the immediate explanandum of a wide variety of social phenomena and constituted an explanatory object, in light of which we can attempt to develop a descriptive explanation of that institutional form. The methodological principle of descriptive/conceptual reciprocity guides us in developing correlated descriptive and conceptual claims so as to arrive at a general conceptual schema which appears to be applicable to all the seemingly relevant features of the phenomena which first drew our attention. In this way, our initial presupposition—that the phenomena exhibit a number of identifiable features which are worthy of explanation—leads by means of a provisional definition (in the form of our explanatory object) to a thorough-

going descriptive-explanatory account. While our starting point is arbitrary, its result is not. Our provisional definition may, for instance, change if and when we encounter new data. In principle, this is how an open-ended and flexible descriptive-explanatory account of juridical law would proceed.

Can the descriptive-explanatory legal theorist avoid the potential bias and constraints which may arise from the context whence her account is developed? I argued earlier that it is possible to identify the significant features common to all legal systems by extrapolating from those with which we are most familiar.<sup>45</sup> Perry is aware of this methodological approach,<sup>46</sup> but rejects it. He suggests that our “external” theoretical perspective—the view of the theorist who describes but does not participate—leads to epistemic uncertainty insofar as “any given social phenomenon can be *accurately described* in an indefinitely large number of ways.”<sup>47</sup> In this respect, his concerns coincide with those raised by our hypothetical historical and cross-cultural sceptics: descriptive explanations of a unitary concept of law give rise to the problem of determining how general or abstract that explanation can be<sup>48</sup> and may obscure or omit the very features which give us reason to abandon a unitary concept of law.<sup>49</sup>

It is true that most any inquiry into a social phenomenon will encounter difficult choices, including and especially the choice of how general or abstract an explanation is appropriate. We have already discussed that issue, and I have offered an argument claiming that it is possible to determine, relative to the aims of a particular inquiry, when an explanation is too general or too particular. The problem of generality, however, is separable from the problem of identifying similar phenomena by means of their common features.

---

<sup>45</sup> See *supra* § 2.4.

<sup>46</sup> See Perry, “Hart’s Methodological Positivism”, 327.

<sup>47</sup> *Ibid.*, emphasis added.

<sup>48</sup> “Descriptions,” Perry notes, “will differ from one another, for example, in the level of generality at which the practice is described” (*Ibid.*).

<sup>49</sup> “Different descriptions will individuate practices and sub-practices in different ways. There will also be differences in degree of selectivity, as every description inevitably fails to include some attributes of the object being described” (*Ibid.*).

## Natural City Theory

Perry's scepticism regarding the ability of descriptive jurists to identify actual instances of legal systems without recourse to direct moral evaluation is aptly addressed by an example given by Brian Leiter. Leiter presents a short dialogue between a "Natural City Theorist" and a "Descriptivist" in which the two theorists disagree on whether it is possible to identify actual instances of cities without making determinations of what is morally or practically required for something to be a city.<sup>50</sup> The Natural City Theorist argues that the Descriptivist's analytical starting point is arbitrary and possibly irrelevant: "How do you know that it is the features of *these* places—New York, Paris, London, etc.—that have to figure in analysis of the concept of city?"<sup>51</sup>

In the ensuing debate, the Natural City Theorist suggests, first, that the Descriptivist's attribution of the descriptive label 'city' to those entities commonly considered to be such implies that the Descriptivist aims to regulate usage of the label (and its corresponding concept), and that this regulative project is far-removed from—if not entirely antithetical to—standard Descriptivist ambitions. To this claim the Descriptivist responds by noting that he is "not interested in regulating linguistic or conceptual practice, just in understanding what we call 'cities' are actually like."<sup>52</sup> If it turns out that most people use a different term or concept with reference to New York, Paris, London, etc., then the Descriptivist will happily admit that his use of 'city' is what Perry calls an "internal descriptive category." Yet this admission does not undermine the Descriptivist's ambitions: theoretical inquiries may legitimately employ technical terms in order to be more precise, or to mark the difference between explanatory concepts and practical conceptions, and so forth. Doing so does not weaken a descriptive-explanatory explanation since such explanations are neither intended nor required to regulate the practical—i.e., quotidian—use of words or concepts. As the Descriptivist says, "The main point is that there are real places in the world—what I've been calling 'cities'—that have certain important, common features that make it interesting and fruitful to group

---

<sup>50</sup> See Leiter, "Beyond the Hart/Dworkin Debate", 24–28. In most respects, Leiter's argument parallels the one I presented in §2.4, though he refers to 'epistemic norms' rather than 'meta-theoretical-evaluative criteria.'

<sup>51</sup> *Ibid.* 24.

<sup>52</sup> *Ibid.* 25.

them together and ask what it is they share.”<sup>53</sup>

Setting aside the “quibble about terminology,” however, does not preclude another objection from the Natural City Theorist, namely that the Descriptivist has “made a value judgment about what is ‘important’ and ‘fruitful’.”<sup>54</sup> When the Descriptivist replies that such “value judgments” involve epistemic values—that is, meta-theoretical-evaluative criteria—the Natural City Theorist retorts that moral and political norms are needed to determine what a city is. “How, after all, can you say what a ‘city’ is . . . without attending to the essentially *practical* conception of how one ought to live?”<sup>55</sup> Leiter’s Descriptivist responds by saying that the practical question of how one ought to live—e.g., Should one live in a city or on a farm?—is itself “parasitic on a demarcation made based on purely *epistemic* criteria.”<sup>56</sup> People are already faced with the possibility of living or not living in a city, on a farm, and so forth—their practical or moral concerns about which living environment is best make reference to the actual entities known as cities, farms, etc.. Yet these practical-moral concerns need not be solved in order to describe cities and demarcate them from farms and suburbs. Nor is it the case that a description of the similarities and differences between New York and London requires a direct evaluation of which particular city, or which sort of city, is best according some ideal of practical reason.

What grounds might remain, then, to give weight to Perry’s scepticism regarding a viable starting point for a descriptive jurisprudence? In short, Perry believes that a descriptive jurisprudence is compelled to elucidate the conceptualization of the legal system which the *participants* within that system hold. We ought not to employ “external” conceptual analysis of the type Hart proposes, nor, presumably, engage in the naturalistic inquiry championed by Leiter, since neither of these approaches can ensure that our explanatory concept correlates to the participants’ conception of law. Perry claims, instead, that we must engage in “internal” conceptual analysis and make direct moral evaluations of particular legal systems before we can arrive at anything like a general concept of law suitable for a descriptive-explanatory or naturalistic legal theory.

---

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* 26.

<sup>56</sup> *Ibid.*

## 4.4 Conceptual Analysis

In order to understand Perry's concerns, we must explicate three important ideas: "thick" vs. "thin" concepts of law, "external conceptual analysis," and "internal conceptual analysis." Perry concludes that a viable theory of law is only possible insofar as we explicate, by means of internal conceptual analysis, an actual practical conception of law with which we are already familiar and which is actually in use by participants in a particular legal system. Having done so, we can then separate our thick concept of law—the one whose content replicates the participants' conception—from a thin concept of law which describes the general structure of legal systems. The thin concept of law will specify the existence conditions of legal systems (e.g., that a system purports to have legitimate authority or that it provides exclusionary reasons for action) from the justifications offered for their existence (e.g., that legal reasons are authoritative because one is better-off by following those directions than by reasoning for oneself or that law justifies coercion by means of a substantive moral argument based on shared principles of political morality). What is essential to Perry's account is that we must first develop a thick concept of law based on a particular legal system *and the participants' conception of it*, and then abstract away from that concept to develop a theoretical concept thin enough to be applied to other legal systems.

It is instructive to see how Perry examines Hart's theory with an eye towards the two different types of explanatory concepts of law and the two different forms of conceptual analysis. Central to Hart's general theory of law is the claim that legal systems have two types of rules—primary and secondary—which are joined together by means of a special type of secondary rule: a rule of recognition. The idea of a rule of recognition is an indispensable component of Hart's theory in two equally important ways: (1) it accounts for the participants' practice of treating legal rules as standards of behaviour whose violation may be condemned simply on that basis,<sup>57</sup> and (2) it makes possible a complex legal system, rather than a simpler regime of primary rules, by solving some practical problems related to the instantiation and continued existence of a complex system of social rules. In short, the rule of recognition accounts for both the force of purported legal

---

<sup>57</sup> The rule is a standard which provides its own grounds for criticism in a case of non-compliance.



rules—a force which they may have irrespective of their content—as well as the usual resolution of certain practical problems involved in maintaining legal systems.

Hart's general theory of law is very thin indeed. It claims only that a legal system exists where a given society has institutions and practices which make rules that guide conduct, where there are rules about other rules, and where the officials of the relevant institutions perceive the violation of certain rules to be grounds for criticism (regardless of the content of the particular rule). None of these claims make reference to the practices of particular legal systems or individuated conceptions of those practices.

Perry's concern is this: How does Hart derive or discern the existence of a rule of recognition from or in the "salient features" of modern municipal legal systems?<sup>58</sup> According to Perry, Hart does so by means of "external" conceptual analysis. This methodology "can appropriately be described as descriptive, but which is nonetheless distinct from the standard methodology of science."<sup>59</sup> Its aim, Perry claims, is to "offer an external analysis of the participants' conceptualization of their practice, which means looking at that conceptualization from the outside."<sup>60</sup> Thus Hart supposedly takes note of the fact that modern municipal legal systems have particular features which are salient to a general theory of law, and then, by examining how those features work from the participants' point of view, he makes observations about the form and structure of their practices.

Perry allows that some of Hart's observations are novel. "A rule of recognition is not, after all, one of those 'salient features' of a modern municipal legal system."<sup>61</sup> Rather, the rule of recognition is a theoretical or explanatory concept. In fact, it need not be an explicitly posited legal rule in *any* actual legal system. Hart holds only that we need the concept of a rule of recognition in order to make sense of actual legal systems. It is a valuable

---

<sup>58</sup> For the salient features, see Hart, *The Concept of Law*, 3.

<sup>59</sup> Perry, "Hart's Methodological Positivism", 325. Recall that in the initial stages of his critique Perry claims that Hart employs two distinct methodologies: the descriptive-explanatory method and conceptual analysis. I argued *supra* that this distinction, if it can be made at all, requires Perry's caricature of the descriptive-explanatory methodology. Perry seems to set up a straw-person argument in order to "rescue" Hart from a methodological approach which Hart did not actually employ. At this later point in his argument, however, Perry has begun to consider the second of Hart's supposedly distinct methodologies.

<sup>60</sup> *Ibid.* 327–328.

<sup>61</sup> *Ibid.* 329.

explanatory concept, but need not be a practical concept employed in any particular legal system, even though there must, according to Hart, be a social practice which we can label as the use of rules of recognition. This is an external claim of (to use Perry's terminology) *conceptual necessity*. As an explanatory concept, the rule of recognition is employed by someone such as a legal theorist or sociologist who takes up the external perspective towards particular legal systems. This external theoretical perspective is a necessary condition for attributing the existence of a rule of recognition to those legal systems which do not explicitly posit one.<sup>62</sup> One can only say 'System Y has a rule of recognition' or 'System Y's rule of recognition is X' if one can observe the social fact of convergent behaviour on the part of the officials of that system. The actual social practice is, of course, an internal feature of every actual legal system, though it need not be recognized as such—or even recognized at all—by its participants. So long as the practice exists, the system coheres. Thus it is the case *both* that every actual legal system has a social practice which serves the function of the rule of recognition (though that practice may not be explicitly understood as "having a rule of recognition" by those who participate in it), *and* that the very idea of a legal system requires the theoretical concept of a rule of recognition. It is the latter aspect which gives rise to conceptual necessity, while the former aspect is a practical constraint on the existence of every particular legal system.

Against Hart, however, Perry argues that claims of conceptual necessity require reference to the *content* of participants' conceptions of their practices. It is not enough, according to Perry, to make descriptive claims about a familiar type of legal system, then to generalize those claims by presenting a conceptual schema corresponding to those claims, and from that (external or observational) vantage point to claim that particular concepts such as the concept of the rule of recognition are necessary components of a good descriptive legal theory. "Hart specifies that social rules [e.g., the rule of recognition] must be understood as conventional practices" in spite of the fact that "the thesis that law is underpinned by a conventional rule is nonetheless a controversial one."<sup>63</sup> Accordingly, Perry highlights Dworkin's argument that there is no conceptual necessity to the concept of a rule of

---

<sup>62</sup> Hamish Ross, who aims to develop a sociological theory of law from Hart's philosophical legal theory, criticizes Hart for failing to sufficiently consider the character of this external theoretical perspective. See Ross, *Law as a Social Institution*, 67.

<sup>63</sup> Perry, "Hart's Methodological Positivism", 335, citation omitted.

recognition because law is just not a conventional practice: it is an interpretive one whose participants aim to show, by means of substantive moral and political argument, that system in its best moral light. “This particular debate between Hart and Dworkin is philosophical in nature, not empirical,” Perry remarks, and so “normative argument, probably of a moral and political nature, will be required to settle it.”<sup>64</sup>

Hence the controversy over the conventionality of law results in epistemic uncertainty, and in Perry’s view the resolution of this uncertainty is only possible by means of normative argument. This leads Perry to make two meta-theoretical claims about legal theory itself:

First, the thought that such a debate might be required to settle an important question in legal theory suggests that more is at issue here than the neutral description of a social practice. Second and relatedly, such a debate seems best construed as taking place not between two outside observers but rather between two insiders, participants in the practice who disagree, on philosophical rather than on empirical grounds, about the practice’s fundamental nature.<sup>65</sup>

It is important to note that these two claims are meta-theoretical claims about *legal theory* rather than (or perhaps in addition to) *particular legal systems*. The “two insiders, participants in the practice who disagree” need not be lawyers or judges; they may be legal theorists engaged in the shared task of trying to further our understanding of law.

The weight Perry places on his presentation of these meta-theoretical issues is at odds with the fact that no reasonable legal theorist would disagree with either of his claims. No positivist methodological minimalist will deny that the theoretical issue of the conventionality or non-conventionality of law is important in part because law is an important feature of our quotidian lives. It is equally obvious that this issue is one with particular significance for legal theorists, who are after all the sort of individuals inclined discuss and debate the issue. In short, Perry’s observation is banal. Legal theory is important in part because it is an inquiry into an important feature of most every society. We can even say, quite confidently, that legal theory is important because law has a great deal of moral significance. Moreover, it is no contribution to our understanding of law or of legal theory to note that legal theory involves, indeed requires, the participation of legal theorists.

---

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

Why would Perry even bother to give space to these two observations when they are so clearly true and already agreed upon?

The short answer is that Perry fails to distinguish between the various conceptual levels involved in legal theory. Consider the following criticism of so-called external conceptual analysis:

As in the case of Hart's account of obligation, it is not clear that his account of the concepts of authority, validity, and so on is in any significant sense properly designation an *analysis*. This is so, at least, so long as he insists on sticking with an external, purely descriptive theoretical perspective. . . *But there is no reason why participants in a social practice should have to hold a particular external view of their practice, or indeed any external view of it at all.*<sup>66</sup>

Here Perry berates the use of "an external theoretical notion" because it is seemingly irrelevant to the perspectival concerns of actual legal subjects. But why should it be relevant in that way? The descriptive-explanatory legal theorist is not aiming to improve legal practices, but to give a philosophical account of law.

Perry's criticism holds only if we accept a number of questionable claims regarding legal theory: (1) that the aim of conceptual analysis must be to elucidate and clarify already-existing participant-level concepts, (2) that conceptual clarification of this sort is "unavoidably . . . an internal enterprise,"<sup>67</sup> and (3) therefore conceptual clarification requires a particular form of normative argument, namely substantive moral and political argument. Let us take up these three claims, for then we shall be able to see the extent of Perry's confusion between legal theory and legal practice, and between indirect and direct moral evaluation.

We can ask, first of all, whether our conceptual claims must aim to elucidate and clarify already-existing conceptions. As we might expect, there is a sense in which this both is and is not a necessary aim of a (descriptively) good legal theory. Conceptual claims about juridical law ought to describe and explain juridical law. Insofar as juridical law is not a thing like a rock-formation, but is an institutionalized social practice, conceptual (and descriptive) claims regarding that *type* of practice must elucidate and clarify it. And the practice involves participant-level conceptions.

---

<sup>66</sup> *Ibid.* 336, emphasis added.

<sup>67</sup> *Ibid.* 339.

We might think, then, that a good description and explanation of law is bound to provide a detailed account of how participants in legal practices actually think. But this need not be the case. A good description and explanation of, for instance, the social practice of creating, performing, and listening to music need not account for the wide variety of conceptions regarding music which composers, performers, and listeners have. It is still possible and perhaps even desirable to make general claims about those conceptions without trying to tease out their content. We can say, for instance, that any good explanation of music as a social phenomenon must recognize that composers intend for their compositions to be performed in a certain way, and that this is why there are highly-developed notational systems for transmitting the composer's creative idea to the performers who render it audible. If there are composers who are not also performers, then it is practically necessary for there to be a means for the former to communicate their creative works to the latter. This practical necessity gives rise to a conceptual necessity: in order to understand the social phenomenon of music, we must make employ a concept of composer performer communication. But we can make this claim (as descriptive-explanatory music theorists) without becoming mired in debates regarding the "best" system of musical notation, or whether musical performance is necessarily interpretive, or other controversial issues. Such issues may be significant and relevant to the social phenomenon of music, of course, but they need not be settled in order to observe that, given the division of labour between (non-performing) composers and (non-composing) performers, it is necessary for there to be a means for "positing" the work such that the composers can communicate their idea to those who will actualize it. We can leave open the question of whether such means are conventional or essentialist or divinely inspired, even (perhaps especially) if composers and performers do not themselves agree on the nature of the communicative means. As observant theorists of musical sociability, we can clearly claim that the means must exist, though it may be a matter of controversy at both the theoretical level of descriptive-explanatory music theory and the practical level of composing and performing music. We can, to some considerable extent, describe and explain the role of those participant-level conceptions without providing a detailed analysis of their content. This is as true for the social phenomenon of law as it is for that of music.

Yet our theoretical claims about juridical law *do* aim to "elucidate" or "clarify" already-existing conceptions in at least one sense: they describe

and explain our explanatory object, namely our “filtered” explanandum (the social phenomena we assign to the category of juridical law). In this case, however, the already-existing conception is one disputed by legal theorists and not necessarily by participants in a particular legal system. Thus, from the meta-theoretical perspective, we can say that legal theorists who share the same explanatory object aim to elucidate and clarify a theoretical concept which corresponds to it. Yet this concept is once-removed from the participants’ conceptions of their own practices. Thus when Perry claims that legal theory involves debates among “insiders,” his claim does not touch the fact that legal theorists can debate the nature of their object of explanation without accepting or endorsing the object-level conceptions held by legal practitioners in or subjects of particular legal systems. The arguments of the theoretical “insiders” may be resolved by appeal to meta-theoretical-evaluative criteria. While the set of valid evaluative criteria need not be restricted to “pure” theoretical values, it is equally the case that it need not extend to criteria like “a good theory must provide the best moral justification of law.”

We can agree, then, that “the aim of conceptual analysis must be to elucidate and clarify already-existing participant-level concepts,” but we can tender that agreement on the understanding that the participants are legal theorists, not legal practitioners. Hence Perry’s second claim—that the necessary type of conceptual clarification is “unavoidably . . . an internal enterprise”—is trivial. Legal theory is, of course, the product of legal theorists. But legal theorists are not necessarily legal practitioners. There is no need for Hart to prove that legal *practitioners* employ the *theoretical* concept of the rule of recognition. As a matter of fact, they sometimes do, but Hart’s claim of conceptual necessity only requires that they instantiate a practice of the type described by his explanatory concept.

All that remains, then, is Perry’s third claim: conceptual clarification requires a particular form of normative argument. Here Perry simply confuses normative argument with substantive moral-political argument. On his view, there is a division between “empirical” argument which makes simple descriptive claims and “normative” or philosophical argument to which different evaluative criteria are applied. I have already shown that this division is false. It is false because (i) empirical or scientific theories do not necessarily take the form Perry supposes them to take, (ii) there are norms used in theoretical argumentation which are neither purely meta-theoretical nor derived from substantive moral argument (hence there is

a level of normative argument available to legal theory which Perry does not recognize), and (iii) there is a methodological *via media* between non-evaluative and directly-evaluative accounts of law.<sup>68</sup> Not all norms of theory construction are substantive moral or political norms, and morally significant features can be identified indirectly without engaging in substantive moral argument. Perry needs more than the mere fact of epistemic uncertainty regarding the nature of juridical law is present if he is to prove that legal theory must be directly evaluative. He must show that we cannot understand the purpose of juridical law unless we offer a moral-political theory which “thickens” that purpose by showing how it is morally and/or politically justifiable.

The arguments Perry offers to establish the need to offer an analysis of law which is “moral in nature”<sup>69</sup> all rely upon a very controversial assertion: that the central goal of legal theory is to provide a *thick* account of law’s normativity. Hart’s “external theoretical entity” known as the rule of recognition is, according to Perry, too “thin” to explain how the *normativity* of law could be justified. Dworkin, conversely, does offer a “thick” account which shows how a legal system and/or particular laws are justified. I think that here Perry is on very thin ice, for two reasons. First, it is not clear that a philosophical account of juridical law must account for the substantive claims of particular legal systems or the substantive contents of particular laws by showing how those claims or contents may be submitted for direct moral evaluation. To suggest that all legal theories must be thick in this way is to rely upon the assumption that juridical law *can* be justified, and we should be cautious of assuming that this is so. A descriptive-explanatory or external theory of law need only account for the fact that certain legal *practices* appear to make that assumption, though it may be a mistake to believe it. If it is a mistake, then internal conceptual analysis is fundamentally incoherent insofar as it attempts to explain law by assuming that law is justifiable, when in fact it is not. Perhaps, however, the assumption is sound. We simply do not know for certain, and a feature of the “insider’s practice” of legal theory is that the issue of actual as opposed to seeming

<sup>68</sup> (i) and (ii) were established in the first section of this chapter, and we took note of (iii) in § 3.3. Like myself, Julie Dickson takes Perry to task for succumbing to “the real ills of the descriptive/normative classificatory schema” (Dickson, *Evaluation and Legal Theory*, 34, 37). Leiter also offers a nearly identical criticism and observes that Finnis prefigured Perry’s error. See Leiter, “Beyond the Hart/Dworkin Debate”, 23.

<sup>69</sup> Perry, “Hart’s Methodological Positivism”, 352.

justifiability is a matter of continuing controversy, i.e. we are in a state of epistemic uncertainty with regard to its truth. The prudent theoretical approach is to recognize that uncertainty in such a manner as to leave open the possibility that law may *or may not* admit of moral justification. But only a methodologically minimalist approach can leave that question open.<sup>70</sup>

Even if Perry and Dworkin are right to assume that law can be justified, and that a legal theory may aspire to establish the conditions for justification, we are still left in a state of epistemic uncertainty. We would have several different accounts of law's normativity, none of which is clearly superior on meta-theoretical grounds. If Perry rejects the philosophical nature of external descriptions of juridical law because more than one description is possible, then, if he aims to be consistent in his views, he ought to reject the philosophical nature of internal descriptions on the same grounds. That he does not do so suggests that Perry, quite sensibly, accepts the fact that many aspects of juridical law—including, perhaps most of all, the nature of its normativity—are controversial at both the theoretical and practical levels. He chooses to direct the debate towards the substantive moral-political arguments which might establish the real character of law's normativity. But to do so is to describe law as it ought to be—it “engineers” our concept of law according to our moral-political ambitions rather than to describe and explain law as it is.

Another route, the more cautious route insofar as it presupposes as little as possible, is to describe of law's normativity without relying upon controversial moral-political arguments while making that normativity. Such

---

<sup>70</sup> Again, however, I want to stress that one way to attempt to answer the question of whether law can be morally justified is to develop a theory which aims to give an account identifying those features which require justification. On my reading of Raz, that is what his legal theory does: it considers law in light of “practical reason” in order to identify (among other things) the implications of law's claim to legitimate authority, and it presents a philosophical account of how those implications pertain to other aspects of practical reason, including justification conditions. In this way, Raz offers a thorough, fascinating, and powerful theory of law. But a legal theorist need not take as her primary aim the presentation of an account of law's normativity in terms of the dictates of practical reason, and one possible reason for rejecting that aim is simply that disputes about the nature of practical reason are as prevalent as disputes regarding the status of objective morality. Thus I respectfully disagree with Soper's claim that “the nature of law debate, as currently conducted, is meaningless” though I do not deny that it “can be made meaningful by connecting it to issues in moral and political philosophy” (*A Theory of Law*, vii).



arguments attempt to do away with both our legal-theoretical and moral epistemic uncertainty by persuading all legal theorists to accept and endorse a particular function and a particular set of conceptual conditions which justify that function. Yet, as Jules Coleman observes, “it is important to note that not every jurisprudential theory must or does impute a proper function to law.”<sup>71</sup> We ought instead to leave open the more cautious path—the descriptive-explanatory approach—not just because it avoids unnecessary assumptions, but also and especially because of the moral-political significance of law. It is worthwhile to highlight the importance of law to our moral and political concerns. It is not necessary, however, to attempt to establish the conceptual conditions whereby law can be seen to actually be justified. One reason for prudently avoiding that assumption is the fact that law may not be justifiable at all.

Even if we set aside the issue of whether juridical law is capable of justification, there remain strong grounds for retaining our methodological minimalism, for using indirect evaluation when examining law, and for developing a thoroughgoing descriptive-explanatory account of law. It is important to note that here we can find some common ground with Perry. Law can be seen as a system of rules or norms which may or may not be justified, but regardless of the actual moral status of juridical law (taken either as a general phenomenon or in the case of particular legal systems or particular laws), it seems clear that juridical law aims to guide human conduct. Hence the normativity of law—which is a central feature, if not *the* central feature of law—has a subjective side. Participants in legal systems relate to law from the perspective of those who are subject to it. Some also relate to law from the perspective of those who are expected to enforce it, or those who are recognized as having the capacity to create it. Avner Levin correctly observes that “[e]xactly how law is normative is determined by the manner in which law shapes the perception of law held by the participants in the legal system.”<sup>72</sup> This must be true regardless of whether juridical law, in general or in particular instances, admits of moral justification. Hart’s great contribution to legal theory was his observation that any philosophically worthwhile account of law must account for the fact that law has

---

<sup>71</sup> Coleman, *The Practice of Principle*, 205. Coleman goes on to say: “Not only does my theory of the concept of law not rely in any way on ascribing a proper function to law, it does not even rely on the claim that law has a function. In fact, I deny that law has a function in the traditional sense.”

<sup>72</sup> Levin, “The Participant Perspective”, 568.

normative force for at least some of its subjects. Yet we can distinguish between “the existence of the attitude of acceptance and the content of this attitude.”<sup>73</sup> The fact that this attitude exists and must exist in order for law to be normative (whatever the nature of law’s normativity might turn out to be) is a significant feature of law which must be given a place of prominence in any reasonable legal theory. But we need not go *beyond* that fact to describe and explain the institutional features and social practices which constitute law.

As Levin points out, Hart believed that this “attitude of acceptance was the essence of law’s normativity.”<sup>74</sup> Here everyone—Hart, Dworkin, Waluchow, and Perry—can agree. But, unlike Perry, Hart prudently recognized our epistemic uncertainty regarding the moral worthiness of the attitude of acceptance just as he recognized our uncertainty regarding the relation of law and morality. His theory of law sets many points of connection between legal and moral phenomena, both empirically and conceptually, and it does not rely on controversial moral or political arguments, hence it avoids epistemic uncertainty so far as possible. Levin observes that “[l]aw’s normativity was [for Hart] both sufficiently and necessarily explained by the existence of an attitude of acceptance, not by its particular contents, which varied from participant to participant and could therefore not be generalized upon according to the dictates of Hart’s methodology.”<sup>75</sup> I am not claiming, however, that Hart’s “minimalism” was motivated primarily by the problem of epistemic uncertainty. It may be that he was motivated more by the fact that participants within a particular legal system often do not agree among themselves with the possibility of law’s justification, or with the various justifications offered, and yet that legal system may persist nonetheless. In other words, it may be that Hart was more concerned to allow for disagreement at the object-level than to deal with epistemic uncertainty at the meta-level. But the fact remains that his theoretical approach is one which does both.

Minimalist descriptive-explanatory legal theorists aim to elucidate law’s normativity, including its subjective component, without getting mired in the seemingly endless controversy regarding law’s justifiability. Interpretivists like Perry and Dworkin take a different methodological path: they

---

<sup>73</sup> *Ibid.* 572.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

aim to provide a “thick” concept of law which both specifies the conditions required for law’s justification and, in Dworkin’s case at least, the objective moral conditions which can fulfill the justification conditions. The two methodological approaches—indirect and direct—are not in conflict with each other. The first accepts epistemic uncertainty in certain areas and limits its theoretical aims accordingly. The second aims to dispense with our epistemic uncertainty. The descriptive and conceptual claims of the former type of theory may be of assistance to the latter type, and should the latter kind of theory succeed in establishing when and how law is morally justified, that conclusion will no doubt be taken into consideration by future descriptive jurists. If descriptive-explanatory legal theorists limit the explanatory power of their theory of law by refusing to consider the content of particular participant’s attitudes of acceptance, they at least gain the security of knowing that their theory does not rely upon a highly contestable assumption. Likewise, if interpretivists allow themselves more methodological scope and possible explanatory power by making that assumption, they do so knowing that the risk is worthwhile so long as their theoretical approach continues to be a fruitful one. The two tasks are complementary insofar as they further our understanding of law, although the second approach is more daring and impatient in light of the fact of epistemic uncertainty. It is a mistake to judge each either approach according to the aims of the other.

## Chapter 5

# Positivist Uncertainty

Unlike Stephen Perry and Ronald Dworkin, Brian Leiter acknowledges that a minimalist positivist account of law “needs only epistemic values to proceed.”<sup>1</sup> In Leiter’s opinion, descriptive jurisprudence is possible, but its usual methodology—conceptual analysis—is weak. While assessing the explanatory merits of positivist legal theory, Leiter considers and contributes to two important positivist debates, and offers an argument for an alternative legal-theoretical methodology. Both debates involve epistemic uncertainty, methodological disputes, and different accounts of meta-theoretical-evaluative criteria. In this chapter we shall consider Leiter’s remarkably impartial account of these debates to examine the extent of positivist uncertainty regarding the best conceptions of two important positivist concepts: the rule of recognition, and the nature of legal authority. This discussion will occupy §§ 5.1—5.3, and allows us to move beyond noting the existence and nature of epistemic uncertainty in order to consider its effects on the substantive conclusions of positivist legal theories. In the next chapter, we shall examine Leiter’s critique of conceptual analysis and consider his suggested alternative in light of a careful examination of the many levels of analysis which correspond to the various conceptions at work within legal systems as well as analytical legal theory itself.

---

<sup>1</sup> *Ibid.* 30. What Leiter calls ‘epistemic values’ are what we have called meta-theoretical-evaluative criteria. See *supra* n. 6 on p. 4.

## 5.1 Hard and Soft Positivism

Let us first take up the debate between exclusive and inclusive positivists; or, as Leiter puts it, Hard and Soft Positivists. Leiter's account of the division between Hard and Soft Positivists focuses on the central positivist theses regarding law, commonly known as the Separation Thesis and the Social Thesis. Two different ways of defining these core positivist tenets serve to demarcate a general division within legal positivism: Soft and Hard Positivism.<sup>2</sup>

Soft Positivists hold that there could exist a legal system in which moral criteria do not form part of that system's set of criteria for legal validity; thus the laws of some actual legal systems *may* be legally valid regardless of their moral status. The Soft Positivist version of the Separation Thesis—the *Separability Thesis*—holds that legal rules and moral principles are separable though not necessarily incompatible.

Hard Positivists, conversely, argue that it is not possible for there to be an actual legal system where the existence or validity of a law depends on a moral criterion.<sup>3</sup> For simplicity's sake, we shall refer to this as the *Separation Thesis* proper. On this account, moral criteria cannot be used to determine whether a legal rule is a valid, already-existing law. Moral criteria may nonetheless be relevant factors in legislation, adjudication, and the behaviour of those subject to the law. Soft Positivists, then, allow for a connection between moral criteria and legal *validity*, while Hard positivists deny any direct connection insofar as determinations of legal validity and the making of moral judgments are necessarily separate activities.

Positivists of both varieties do agree that a legal system's rule of recognition<sup>4</sup> relies on actual social practices. As Leiter puts it, the Soft Positivist *Social Fact Thesis* holds "that a society's Rule of Recognition is consti-

---

<sup>2</sup> This general division is, however, merely that. Important differences arise not only between but also within the two camps. See *supra* n. 44 on p. 16.

<sup>3</sup> According to some Hard Positivists, such as Joseph Raz, the existence and validity of a law are necessarily concurrent characteristics. See *sub* § 7.5.

<sup>4</sup> When speaking of law in general or abstractly of a particular legal system, positivists often refer to singular rules of recognition, i.e. each legal system has one such rule. But in the case of any particular legal system, there may actually be a number of (implicit or explicit) rules used to recognize valid legal norms; that is, a particular legal system may have several rules of recognition. Note, also, that the Hard Positivist Joseph Raz generally avoids the term 'rule of recognition,' though his arguments regarding legal validity clearly pertain to that concept.

tuted by the social facts about how officials actually decide disputes.”<sup>5</sup> The Social Fact Thesis, then, is a claim about the *existence conditions* of a rule of recognition: the rule is ontologically parasitic on certain social facts, namely the convergent practices of legal officials based on a shared acceptance of a particular social standard. As Leiter notes, Hard Positivists take a stricter view in that they impose “a constraint on the *content* of the Rule of Recognition, not simply on its existence conditions” by claiming that “the criteria of validity set out by any society’s Rule of Recognition must *consist* in social facts (e.g., facts about pedigree or sources).” Soft and Hard Positivists agree on the importance of social facts in the form of convergent social practices, but they disagree about the limitations inherent in those practices. Whereas the Soft Positivist can envision a legal system where the practice of adjudicating legal validity employs moral criteria, the Hard Positivist believes that, for instance, the nature of practical reason precludes the possibility of a determination of legal validity which involves reference to morality.<sup>6</sup>

These differences of opinion among positivists result in very different accounts of certain aspects of law. What, for instance, do we make of constitutional provisions for equality? And how do we characterize constitutional adjudication when judges strike-down laws based on such provisions? If a legal theory aims to explain law in light of social facts, then disagreement over the facts themselves becomes problematic. For positivists, the answer is clear: When a descriptive claim is contestable, reference to conceptual necessity is appropriate and desirable. “All important arguments for Hard Positivism to date,” Leiter observes, “have been *conceptual* arguments: i.e. they defend Hard Positivism on the grounds that it provides a better explanation for various features of the concept of law.”<sup>7</sup>

What does Leiter take the concept of law to be? He notes, first of all, that concepts are not words yet they are closely connected with words: “words

---

<sup>5</sup> Leiter, “Legal Realism and Hard Positivism”, 357.

<sup>6</sup> Things are really somewhat more complicated insofar as, for the Hard Positivist, moral criteria such as equality or fairness can become part of a legal system’s pedigree or sources. Long-standing practice may give a clear meaning to equality by making it clear that equality before the law means to treat like cases alike, and a legislature may enact a statute which defines fairness in some way, perhaps by stating that a fair wage is \$5.00/hr. But these actions allow reference to be made to the conventional practice of treating like cases alike or to the statutory determination of a fair wage—legal validity no longer depends on contestable moral notions of equality or fairness.

<sup>7</sup> *Ibid.*

and concepts stand in a close (partly evidentiary, partly constitutive) relationship.”<sup>8</sup> Thus an inquiry into the use of concept-words may be helpful to legal theory, but cannot be dispositive because words alone do not define concepts. Leiter notes that “one very important difference between words and concepts is that it is concepts, and not words, that are the objects of propositional attitudes.”<sup>9</sup> Propositions directly relate to concepts,<sup>10</sup> and on Leiter’s account it is this relation which makes conceptual analysis possible:

So when jurists appeal to the concept of law they are appealing to the object of a diverse set of propositional attitudes held by those who engage in ‘law-talk’: the law-talk has as its object the concept of law, and the various types of law-talk in which different people (lawyers, judges, legal scholars, ordinary citizens) engage has both evidentiary and sometimes constitutive value as to the contours of that concept.<sup>11</sup>

If all law-talk has the same object, one might expect widespread agreement about that object’s features and general character. But this is not the case at either the theoretical or the practical level: legal theorists and judges/lawyers/claimants disagree about the object of their propositions insofar as they disagree about which propositions are true in virtue of that object. “The objects of propositional attitudes ... are abstract objects, and this invariably presents epistemic difficulties: the objects are not there to be picked up, weighed, measured, and scrutinized.”<sup>12</sup> Controversy and seemingly intractable debates abound because the *referent* of propositions regarding law (in general or in particular) is often unclear, and it is almost never static. Since law is a dynamic social phenomenon, and therefore unlike a relatively static object like a rock formation, we may even “sometimes wonder whether the object of all propositional attitudes concerning ‘law’ is really the same ‘thing’.”<sup>13</sup>

---

<sup>8</sup> *Ibid.* 358.

<sup>9</sup> Leiter, “Legal Realism and Hard Positivism”, 358.

<sup>10</sup> “‘You can’t do that, it’s against the law’ and ‘You can’t do that, the legislature has prohibited it’ both express the same concept—that of illegality—though one speaks of ‘the law’ and the other of the actions of a legislature” (Leiter, “Legal Realism and Hard Positivism”, 358).

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

Allow me to point out that my presentation of the concept of law as an explanatory object fits well with Leiter's observation in the quotation just cited. Notice, also, that Leiter's phrasing implicitly presupposes a unitary concept of law such that *any* proposition relating to law (or a subsidiary legal concept, such as the concept of illegality) relates to a single propositional object. On the account I have given, propositions asserted by legal scholars do not necessarily have the same object as propositions asserted by lawyers, judges, or ordinary citizens. In fact, on my account even those propositions asserted *only* by legal theorists do not necessarily refer to the same object: a theoretical object of explanation is established by filtering an explanandum such that different filtering criteria may result in different explanatory objects. Just as a Canadian judge's stated claim regarding Canadian law may refer to a different legal system than a sixteenth-century German jurist's claim about his legal system—or, perhaps, their claims may refer to two very different types of social systems entirely—it is also possible for a natural lawyer's claim regarding 'law' to refer to something other than that to which the Critical Legal Theorist refers.

This is not to say, however, that legal scholars shouldn't try to converge on the same explanatory object. Although there is nothing in the nature of scholarly law-talk which *guarantees* that scholarly propositions relate to the same object, a single legal theory whose explanatory object encompasses more data is able to describe and explain more of law, and that is a point in its favour—even moreso if that theory is able to unify what once were disparate explanatory objects into a single one. A *presumption in favour of generality* is, therefore, a valuable meta-theoretical-evaluative criterion for theory construction and theory choice. Of course, the presumption is defeasible. For example, a unified theory of light which cannot account for its seemingly wave-like behaviour has less explanatory power, and it may be necessary to retain two explanatory objects and two theoretical accounts of light in order to explain both its wave-like and particle-like character(s). And it may be that modern Canadian law and sixteenth-century German law are not the same sort of creature at all. But so far as we can, we ought to maximize the scope and power of our explanations about law by making them as general as their subject matter permits. The difficulties involved in doing so are many and varied, but foremost among them is ensuring that legal theorists at least talking about the same "thing" in virtue of debating the features of a single explanatory object.



## 5.2 Public Guidance & The Extreme Scenario

How can we ensure that our legal-theoretical propositions have the same referent? According to Leiter, positivists focus on a shared referential object in virtue of the fact that they analyze law-talk, and thus illuminate “specific features of the *concept* of law—the concept manifest in all kinds of law-talk, the concept that is the *real* object of all the many propositional attitudes people have when they engage in law-talk.”<sup>14</sup> Moreover, Hard Positivism supposedly gives the best (conceptual-analytical) account of the referential object of law-talk because it presents the strongest arguments regarding the *function* of law, or, as Leiter more carefully puts it later, “arguments that appeal to some aspect of our concept of the function of law.”<sup>15</sup>

If for the sake of argument we accept that it is methodologically sound to attribute a function to juridical law, then we enter into the realm of substantive theoretical debate involving the proper conception of that function. There are two particularly important debates within Anglo-American legal theory regarding law’s function. One centres on law’s supposed function of providing public guidance, while the other centres on law’s supposed authoritative function. In both cases, the Hard Positivist champion is Joseph Raz, who argues that Soft Positivism is descriptively and conceptually unsound because the Separability Thesis fails to exclude moral criteria from from the rule of recognition.

Leiter approaches Raz’s argument by first considering its originator: Ronald Dworkin. The so-called Public Guidance Argument was initially presented by Dworkin as an anti-positivist attack, but Raz’s practical-reason-based account of law allows the argument to be applied to Soft Positivism while (supposedly) rendering Hard Positivism immune to its force.<sup>16</sup> Leiter

<sup>14</sup> *Ibid.* 359. Leiter notes, however, that “[t]here is no particular reason . . . to think that [the analysis of law-talk] is the only or even the best instrument” for understanding law. (*Ibid.*) We shall consider his proposed alternative *sub* in Chapter 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> Leiter directs us to Raz, “Authority, Law and Morality’. Leiter feels that Dworkin’s presentation of the argument is weak: its point can be blunted by first accepting that the vagueness of moral criteria of validity may impair the public guidance function of law, and then simply asserting that a legal system with (unaided) moral criteria of validity can still fulfill its public guidance function, albeit not quite so effectively as one which eschews such criteria.

refashions the argument into what he calls an “epistemic impossibility argument.” The rule of recognition must “fulfill an *epistemic* function” by “empowering (at least) officials to recognize what the law is, if not with absolute certainty all the time, then at least with some reasonably high degree of certainty most of the time,” and Soft Positivism is supposedly incompatible “in principle” with that important function.<sup>17</sup>

Suppose we are faced with the Extreme Scenario: a legal system wherein “it is the practice or convention of officials to decide all disputes by reference to natural law.”<sup>18</sup> Soft Positivism, which is open to the possibility of such a legal system, seems to allow for a rule of recognition which, Leiter argues, “could not discharge its epistemic function, unless (a) there are moral truths and (b) we can have reliable knowledge of these truths most of the time.”<sup>19</sup> Although he allows that the Public Guidance Argument is not dispositive,<sup>20</sup> Leiter’s aim is to show that Hard Positivism is immune to the force of the argument because it places content-based restrictions on the rule of recognition.<sup>21</sup> The Extreme Scenario, combined with the Public Guidance Argument, is meant to show that Soft Positivism is inferior because its explanatory concept of the rule of recognition lacks content-based restrictions. This supposedly entails that Soft Positivism must “carry the metaphysical and epistemological burdens for both social facts *and* moral facts”<sup>22</sup> and so must commit itself to the meta-ethical view that morality is objective in order to rescue itself from from “ontological promiscuity and

<sup>17</sup> Leiter, “Legal Realism and Hard Positivism”, 360, citations omitted.

<sup>18</sup> *Ibid.* 361.

<sup>19</sup> *Ibid.*

<sup>20</sup> The rule of recognition’s epistemic role admits of *degrees* of success, and so “it remains possible that even though Soft Positivism necessarily increases uncertainty, it does not (in principle) increase it beyond the threshold that renders the fulfilment of the rule of recognition’s epistemic function impossible” (*Ibid.*).

<sup>21</sup> Oddly, Leiter dismisses Waluchow’s observation, that “even a rule of recognition that satisfies Raz’s Sources Thesis can still involve uncertainty” (Waluchow, *Inclusive Legal Positivism*, 122), as futile. Though it shows that the Public Guidance Argument has some force against Hard Positivism, according to Leiter Waluchow’s response provides no grounds for commending Soft Positivism. On this point, however, Leiter is mistaken. At the very least, Waluchow’s counter-argument is relevant to the *meta-theoretical problem* of theory choice, since if it is the case that both Hard and Soft Positivism succumb to the Public Guidance Argument, then it follows that we have no reason (on the basis of that argument) to prefer one to the other.

<sup>22</sup> Leiter, “Legal Realism and Hard Positivism”, 361.

the resulting epistemological complexity such promiscuity entails.”<sup>23</sup>

Leiter errs, however, by importing an objectivity to the “natural law” of the hypothetical legal system of the Extreme Scenario, an objectivity which may not actually exist. The Soft Positivist can describe the fact that there exists a legal system with a rule of recognition whereby officials make determinations of law according to what *they* understand to be the dictates of natural law. That descriptive claim does not require any evaluation of whether the officials of that system are *correct* in believing that natural law really exists, i.e. is an objective moral truth, or an evaluation of whether, given that natural law does exist, the officials’ account of it is correct. So long as those participants in that particular legal system have a sufficiently convergent understanding of what “natural law” is—that is, so long there *exists* on the part of officials a convergence on *an understanding*, whether that understanding is called ‘natural law’ or ‘the principles of the Constitution’—the rule of recognition can serve its epistemic function.

Note, too, that as Soft Positivists see things it is possible that in the Extreme Scenario a judge can strike down a law because it violates “natural law” even though, in that instance, the law corresponds to the conventional morality of the community. Thus the judge can invalidate an “immoral” law even though most of the population believes it to be moral, and so the inclusive rule of recognition of that system may result in a clash between judicial practice and a widely-accepted social morality. Leiter has placed the ontological and epistemic burdens of natural law onto the wrong group: Soft Positivists rather than the judges in the Extreme Scenario. According to the Social Fact Thesis, the rule of recognition exists in a particular legal system so long as that system effectively maintains conventional dispute-resolution criteria which act as a social standard for the legal officials in that system. Those criteria need not be true according to *our* best theoretical understanding of morality; they need only be sufficient for the officials of the system to identify what, for good or ill, is valid law in *that* system. The officials of that system are the ones who carry the ontological and epistemological burdens of natural law, and if they are successful in doing so then there exists an inclusive rule of recognition.

Leiter believes that an inclusive rule of recognition may fail to fulfill its epistemic function because of his *own* doubts regarding natural law and objective morality. The fact that Leiter, Raz, and Waluchow might be doubtful

---

<sup>23</sup> *Ibid.*

about the truth of natural law entails only that a legal system which required decisions to be made according to natural law would not last long were Leiter, Raz, and Waluchow to constitute that system's ultimate court of appeal. Legal or moral theorists may suspect that it is a gross mistake to depend on anything so unlikely and vague as "natural law," but that is a problem of which the denizens of the Extreme Scenario may be blissfully unaware, and so long as they remain in that state their natural-law-based rule of recognition is unproblematic (for them). If, for example, the judicial officials of a theocratic state made determinations of legal validity according to holy scripture, and it were the case that the dictates of holy scripture were, in that state, fully agreed-upon amongst judges, then *our* meta-ethical scepticism of the objectivity of that rule of recognition is irrelevant. Their rule of recognition could not function for us, but what does that matter to them?

Rather than showing the weakness of Soft Positivism as a theory of law, the Extreme Scenario shows its strength instead: Soft Positivists allow that rules of recognition may take many forms, some of which may seem quite bizarre to us, given our own cultural, historical, and philosophical beliefs.

Hart's "rather casual posture" with regard to the meta-ethical issue of moral objectivity is not, as Leiter suggests, indicative of "Hart's particular, and perhaps idiosyncratic, meta-jurisprudential scruples."<sup>24</sup> The casual posture Hart adopts rests upon his acceptance of the Social Fact Thesis and its implication that a rule of recognition exists in virtue of being practised, regardless of the moral soundness of the criteria of validity the rule recognizes. "Law," Leiter worries, "... fails to provide public guidance if moral criteria of legality are tantamount to a licence for judicial discretion, which is what they will be in the absence of an objectivist meta-ethic."<sup>25</sup> From a meta-ethical perspective, Leiter may be right, but from the perspective of the judges in the Extreme Scenario, conventional judicial agreement on the dictates of what they call natural law is *functionally* equivalent to a true objective morality. In the Extreme Scenario, the participants' social practice may manifest a rule of recognition which, from our more perspicacious perspective, gives license to rampant judicial discretion. Yet the question of whether judges in that system are making or finding law is (i) practically irrelevant (to them) insofar as they think they are finding law even if (from

---

<sup>24</sup> *Ibid.* 363–64.

<sup>25</sup> *Ibid.* 363.

our perspective) they are making it up as they go along, and (ii) only a possible problem (for us) at the meta-level perspective where we might want to know whether the judges in the Extreme Scenario are *actually* finding law as opposed to simply *believing* that they are finding law. But this meta-level concern need not be the concern of a legal theorist who aims to describe and explain law as it is. Hart observes that

if it is an open question whether moral principles and values have objective standing, it must also be an open question whether ‘soft positivist’ provisions purporting to include conformity with them among the tests for existing law can have that effect or instead, can only constitute directions to courts to *make* law in accordance with morality.<sup>26</sup>

Note that Hart places the phrase ‘soft positivist provisions’ in scarequotes. He is referring to legal *practice*, not legal theory. In other words, if an actual legal system manifests an inclusive rule of recognition, it is an open question (from the meta-ethical perspective) as to whether those provisions *really do* allow officials to identify pre-existing law or, conversely, whether those provisions *really do* guarantee that within that system judicial discretion is rampant (though the participants, of course, would be unaware of this). But that question is one which concerns meta-ethicists, not methodologically minimalist legal theorists. An answer would require (i) a sustained argument about the best way to constrain or prevent judicial discretion, and (ii) an argument resolving the question of whether the uncertain status of objective morality amounts to a good reason to prefer legal practices which avoid reference to uncertain moral standards. In other words, an answer lies squarely within the realm of how best to structure legal practice, not with the nature of law.<sup>27</sup>

Descriptive-explanatory jurists need not involve themselves in debates about the morally best or morally most certain legal practices.<sup>28</sup> Soft

<sup>26</sup> Hart, *The Concept of Law*, 254.

<sup>27</sup> See e.g. Tom Campbell, *The Legal Theory of Ethical Positivism*, who admits that inclusive positivism is the best descriptive theory of law, but believes that it is morally wiser to avoid things like the “soft positivist provision” which Hart refers to.

<sup>28</sup> Jules Coleman succinctly explains why: “It is an *empirical* question what a given society happens to find confounding, confusing or controversial. It is simply a mistake to base a conceptual claim about possible criteria of legality on an empirical generalization (no matter how well founded) about how controversial morality usually is” (*The Practice of Principle*, 114).

Positivists need not aim to fulfill the theoretical ambitions appropriate to a prescriptive meta-ethical theory. The meta-theoretical claim that legal theorists need an objective moral theory to discern the content of inclusive rules of recognition is not tenable, and the objective moral or meta-ethical standing of the content of a rule of recognition is of no direct concern to methodologically minimalist legal theorists. For the methodologically minimalist jurist, inclusive rules of recognition cause no “intractable theoretical dilemma” regarding “a sound theoretical understanding of the social phenomenon of law”<sup>29</sup> even though the meta-ethical status of inclusive rules of recognition have, as Leiter points out, practical consequences.<sup>30</sup> Those consequences are relevant to the best meta-ethical theory and the best practical theory of adjudication, but they are not directly relevant to a descriptive explanation of law.

### 5.3 Law’s Function & Law’s Authority

I have argued rather stridently against Leiter’s concerns regarding the Extreme Scenario, but perhaps more important is his claim that Raz’s Argument from Authority demonstrates the superiority of Hard Positivism. Leiter observes that

[a]ccording to this argument, it is essential to law’s function that it be able to issue in *authoritative* directives—even if it fails to do so in actuality . . . According to Raz, a legal system can only claim authority if it is possible to identify its directives without reference to the underlying (‘dependent’) reasons for that directive . . . But Soft Positivism makes the identification of law depend on the very reasons that authoritative directives are supposed to preempt, and thus makes it impossible for law to fulfil its function of providing authoritative guidance.<sup>31</sup>

We should note that here, as in many other places, Leiter shifts the context of discussion from law in general to the nature of legal adjudication. In this case the contextual shift is not illegitimate. Sometimes it is a mistake to shift into the context of adjudication. The Extreme Scenario depended for its

<sup>29</sup> Leiter, “Legal Realism and Hard Positivism”, 362.

<sup>30</sup> See *ibid.* 362–63.

<sup>31</sup> *Ibid.* 363.

plausibility on the fact that *we* could not envision an effective adjudicatory practice allowing reference to natural law because we ourselves could not instantiate the social convention needed to ground that practice. But once we recognized that the judges in the Extreme Scenario could conventionally agree on an inclusive rule of recognition, it became clear that we mistakenly took our own context of adjudication to be *the* context of adjudication.

Soft positivists have presented three main counter-arguments to the Argument from Authority:

1. The moral reasons for the identification of law need not be equivalent to the dependent reasons which authoritative directives must supposedly preclude.
2. Ordinary legal subjects, e.g. people who are not judges or lawyers or legal scholars, do not rely upon the rule of recognition to identify law.
3. Legal authority does not require exclusionary reasons.

Let us accept, for the sake of argument, that legal systems do in fact claim legitimate authority, and that their effectiveness really does depend upon their being the sort of creature which can possibly instantiate that authority.

Leiter dismisses the first Soft Positivist counter-argument by initially accepting it. Even if it were the case that the determination of the validity of a particular legal rule made use of moral reasons which the directive does *not* intend to exclude, Leiter notes that it would still be possible (according to the Social Fact Thesis) for a rule of recognition to require in some instance that the validity of a legal directive did depend on the moral reasons it aims to exclude. He then argues that

it suffices to defeat Soft Positivism as a theory compatible with the law's authority if there exists *any* case in which the dependent reasons are the same as the moral reasons which are required to identify what the law is; that there remain some cases where these reasons 'may' be different is irrelevant.<sup>32</sup>

Waluchow responded to Leiter's claim by arguing that the authority of a legal system does not depend on the fact that all its putatively authoritative directives are in fact authoritative. Leiter retorts that Waluchow misses the point of the authority argument:

---

<sup>32</sup> *Ibid.* 364.

while it is surely true that *in actuality* some legal directives may prove to be authoritative and some not, what matters for the possibility argument is that it is even *possible* that some might fail to be authoritative, which is precisely the upshot of the Soft Positivist view of legality.<sup>33</sup>

Here it seems that it is Leiter, not Waluchow, who has missed the point. Although Leiter makes reference to Waluchow's argument,<sup>34</sup> he seems not to have understood its full force. Leiter's claim is that the possible existence of even one unauthoritative directive in a particular legal system will undermine that *system's* claim to authority. That argument is untenable, for it is clearly too much to expect that *every* legal directive of a legal system actually be authoritative in order to instantiate the system's claim to authority.<sup>35</sup> There is no reasonable basis for thinking that a legal system with only one unauthoritative directive is incapable of fulfilling its authoritative function, unless we take that function to be absolute.

### Leiter's *Reductio*?

Perhaps Leiter means to present a *reductio ad absurdum* argument which goes something like this: "Were it the case that an inclusive rule of recognition allowed for one legal directive to fail to fulfill its authoritative function, then there is nothing to prevent all legal directives in that system from also lacking authority for the same reason, namely that they appeal to the dependent reasons they are meant to exclude." An inclusive rule of recognition, in other words, allows a legal system to issue *nothing but* unauthoritative directives.

There are three possible yet very different responses to this *reductio*. First, "necessity" versions of an inclusive rule of recognition (e.g., Waluchow's inclusive account of the rule) can be distinguished from "sufficiency" versions (e.g., Coleman's incorporationist account of the rule). To say that it is possible for a legal system's rule of recognition to specify that laws

---

<sup>33</sup> *Ibid.*

<sup>34</sup> See *ibid.* n. 22 at 364.

<sup>35</sup> Waluchow notes that Leiter's rejoinder relies upon the assumption that "the preconditions for the authority' of law are met only when *all* legal directives are authoritative" (Waluchow, "Authority and the Practical Difference Thesis", 71). Jules Coleman is sceptical of the claim all legal systems to issue nothing but authoritative directives. See Coleman, *The Practice of Principle*, 133.



which violate posted moral criteria are invalid is a weaker and more readily defended claim than saying that there could exist a legal system whose rule of recognition is such that the moral correctness of a rule or principle is a sufficient condition for that rule or principle being a law. Only the latter (sufficiency) version of the rule of recognition entails the idea that a legal system could exist where *every* law appeals to dependent (moral) reasons; the former (necessity) version allows such a system only if the legislative authorities issued legal directives which they always knew in advance to be incompatible with clearly posited moral criteria of validity. Insofar as the Practical Guidance Argument depends on some plausible idea of the nature of practical reason, it also precludes the actual existence of such a *deliberately* impotent legislative authority. Thus the necessity version of the rule of recognition, conjoined with a plausible account of practical reason, rejects the possibility of the absurd “legal system” Leiter must have in mind.

The second response to Leiter’s reductio is to note that a necessity version of the rule of recognition does not require that moral criteria for validity actually be posited or employed in *any* actual legal system. While an exclusive account of the rule of recognition disallows actual inclusive rules of recognition, an inclusive account permits actual exclusive rules of recognition. Soft Positivism could be offered as a descriptively weak but conceptually sound account of law which argues only that an inclusive rule of recognition is conceptually possible, rather than arguing that such rules are ever actualized. The lack of actual inclusive rules of recognition might be based on a prevailing, contemporary but circumstantial, fear that inclusive rules of recognition can’t prevent wholly impractical or unreasonable legislators from consistently failing to issue authoritative directives. A descriptively weak but conceptually sound Soft Positivist, then, might suggest further that human beings may one day be less fearful of what are by our present standards overly general inclusive rules of recognition, at which time legal systems with inclusive rules of recognition may come into existence. That Soft Positivism allows for such a possibility appears to vitiate its descriptive power, but it does not render inclusive positivism *conceptually* incoherent. Again, however, this response is no better than Leiter’s rejoinder<sup>36</sup> insofar as most all Soft Positivists argue for inclusive rules of recognition partly because such rules appear to be extant. Still, the reductio fails to show that Soft Positivism is conceptually incoherent.

---

<sup>36</sup> Coleman might disagree. See *The Practice of Principle*, 114.

Finally, we might refute the *reductio* argument by raising doubts as to whether the authority of a legal system depends on issuing exclusionary directives. There are other possible sources of institutional authority, e.g. the personal authority of the legislators or a completely passive acceptance of legal directives by legal subjects who are not prone to use practical reason to question authority of any type. However, Leiter has a second response to the claim that the authority of a legal system is compatible with the issuance of a legal directive which may be invalidated on grounds of dependent reasons other than the reasons excluded by the directive:

if moral reasons are always overriding in practical reasoning—a view accepted, in fact, by most moral theorists—then moral reasons will always be among the dependent reasons for any authoritative directive. Therefore, if identifying that directive requires recourse to moral reasons, the preconditions for authority will fail to obtain.<sup>37</sup>

I am not sure how to respond to this claim, which seems to me to rely upon a view of practical reason according to which moral reasons have an implausibly large degree of weight. If practical reason really were to function in this manner, it seems doubtful that law could gain any foothold at all. In any case, Leiter's *reductio* argument fails to establish that the presence of one unauthoritative legal directive will or could undermine the authority of an entire legal system.

## Uncertainty About Authority

Leiter attributes Soft Positivism's second response to the authority problem to Jules Coleman. "Coleman has argued that Soft Positivism is compatible with the law's claim to authority because the Rule of Recognition is not the rule by which ordinary people (those subject to the law's authority) *identify* what the law is."<sup>38</sup> Coleman thus "calls attention to an important point: the in-principle authority of law is only impugned if the rule used to identify the law requires recourse to dependent reasons," but Leiter goes on to note that even if this were not so for ordinary legal subjects, "the rule of recognition must still perform an epistemic function for officials."<sup>39</sup> He then sets aside Coleman's argument because Coleman "has abandoned the claim about

---

<sup>37</sup> Leiter, *Legal Realism and Hard Positivism*, 364, citation omitted.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.* 365.

ordinary people in more recent work.”<sup>40</sup> In his most recent book, however, Coleman offers an intriguing account of how a rule of recognition might serve different functions for different participants within a legal system. Coleman observes that “to say that officials adopt the internal point of view toward the rule of recognition is (at least) to say that they are motivationally guided by it” and yet “[b]y contrast ordinary folk need not necessarily take the internal point of view toward the laws valid under the rule of recognition.”<sup>41</sup> I will not discuss Coleman’s “infamous Swede” here. The best summary of his argument is presented by Waluchow, who also extends the argument in an important way such that there appears to be no conceptual impossibility in an inclusive rule of recognition providing both epistemic and motivational guidance to legal officials.<sup>42</sup>

Like the second response to Leiter’s *reductio* I suggested earlier, the final Soft Positivist response to the more substantial Argument from Authority rests on the counter-claim that legal authority does not require exclusionary reasons. While some Soft Positivists aim to show that Soft Positivism is compatible with Razian authority, they may also attempt to “defend the proposition that the authority which law necessarily claims is not Razian Authority.”<sup>43</sup> Raz’s service conception of authority is not the only defensible account, and the necessary form or forms of legal authority is a subject of controversy amongst positivists themselves, not to mention other legal theorists. In light of some criticisms offered by Ronald Dworkin, for instance, Hart clarified his own theoretical approach by noting that his theory of law “makes no claim to identify the point or purpose of law and legal practices as such.”<sup>44</sup> Hart went on to say that he thought it “quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct.”<sup>45</sup> With respect to the function of a legal system, at least, Hart insisted upon a presumption

---

<sup>40</sup> *Ibid.*

<sup>41</sup> Coleman, *The Practice of Principle*, 135. For a sustained argument toward this end, Coleman directs us to Himma, “H.L.A. Hart and the Practical Difference Thesis”.

<sup>42</sup> See Waluchow, “In Pursuit of Pragmatic Legal Theory”, 146–149. Waluchow also discusses Coleman’s distinction between the epistemic and validation functions of the rule of recognition in Waluchow, “The Many Faces of Legal Positivism”, 425–30.

<sup>43</sup> Waluchow, “The Many Faces of Legal Positivism”, 435. Waluchow defends that proposition in *Inclusive Legal Positivism*, 123–140; “Authority and the Practical Difference Thesis”, 47–71; and “The Many Faces of Legal Positivism.”

<sup>44</sup> Hart, *The Concept of Law*, 248.

<sup>45</sup> *Ibid.* 249.

in favour of a very general conception indeed. Perhaps, if the nature of legal authority is too obscure or varied to admit of philosophical analysis at all, we ought to avoid over-specifying that supposed function of law, regardless of its nature. In this sense, it seems, the complexity of the nature of legal authority places a limit on the degree of specificity to which a descriptive-explanatory legal theory can aspire.

Clearly there is uncertainty about the best conception or conceptions of legal authority. It is this very uncertainty which provides Leiter with the opportunity to offer his own novel argument against positivism. Leiter argues that the positivist methodology of conceptual analysis is quite possibly *incapable* of ever settling the question of legal authority or the existence of inclusive rules of recognition. Positivism, Leiter suggests, is truly trapped by epistemic uncertainty.

In this respect, Leiter's concerns are similar to those of the positivist Liam Murphy and the interpretivist Stephen Perry. Recall Murphy's insistence that substantive moral-political argument is the only possible means to deal with our equivocal concept of law.<sup>46</sup> Murphy believes that we are forced into a second-best approach to theory choice just because of the lack of a decisive argument in favour of a positivist, interpretivist, or natural law account of the concept of law. And so it seems to him that the best way to proceed is to "approach our question about the concept of law as a practical aspect of political theory."<sup>47</sup> In Chapter 3 of this work I argued that meta-theoretical-evaluative criteria are robust enough to allow for epistemic uncertainty while still guiding theory construction and choice. But Murphy, like Leiter, believes that regardless of the utility of meta-theoretical-evaluative criteria, we need more than conceptual analysis if legal theory is to make a philosophical contribution.

Recall, also, that Stephen Perry invokes the need for substantive moral and political argument on the grounds that there is no middle way between descriptive-explanatory and interpretivist accounts of law. This is so, according to Perry, because: (i) we need to specify the function of law in order to understand it, and (ii) understanding the function of law requires substantive moral and political argument. I argued, contra Perry, that neither (i) nor (ii) are relevant so long as our aim is merely to describe and explain law. My arguments were methodological in nature; they demonstrated

---

<sup>46</sup> See *supra* § 1.2.

<sup>47</sup> Murphy, "The Political Question", 384.

only that the ambitions of descriptive-explanatory legal theorists are neither incoherent nor unachievable. A proper understanding of meta-theoretical-evaluative criteria allows us to adjudicate between our descriptive and conceptual claims well enough to continue the descriptive-explanatory project without appealing to substantive moral-political argument.

While Leiter recognizes that the sort of project I have suggested is not incoherent,<sup>48</sup> he is sceptical of its explanatory potential. He notes that Perry insists upon “internal” conceptual analysis because “there are too many incompatible understandings of the concept for the jurist simply to fall back upon appeal to ‘our’ concept.”<sup>49</sup> Even so, positivists persist in analyzing the concept of law. “We have seen,” Leiter observes, “that the leading arguments for Hard Positivism all depend upon claims about the concept of law, in particular about our concept of the function of law.”<sup>50</sup> The persistence of positivist debates about such important and central issues, Leiter suggests, brings us to the limits of conceptual analysis, and to Leiter’s methodological critique of descriptive-explanatory legal theory.

---

<sup>48</sup> See Leiter, “Legal Realism and Hard Positivism”, 367.

<sup>49</sup> *Ibid.* 367.

<sup>50</sup> *Ibid.* 366.

# Chapter 6

## Limits on Conceptual Analysis

### 6.1 The Linguistic & Naturalistic Turns

Does a proper understanding of the role of philosophical inquiry and its relation to scientific inquiry entail that we should *replace* conceptual analysis with another methodology? Brian Leiter believes so. Positivist disagreement about the nature of authority, on Leiter's account, shows that standard norms of theory development are insufficient. The problem is not merely that there are disparate or competing conceptions (of law, of legal authority, of the rule of recognition), but rather that "the differing conceptual claims are in tension such that no one theory can account for the viable concepts,"<sup>1</sup> and so the presumption in favour of generality is unhelpful because the various conceptions of legal authority are seemingly irreconcilable. Moreover, the positivist dilemma is worse than a simple dispute about the nature of legal authority, for explanatory concepts of authority appear to speak for or against explanatory concepts of other features of law. One cannot choose between the best explanatory concepts of authority and the rule of recognition as if they have no relation to each other.

#### Ordinary Language Philosophy and Intuitions

Leiter aims to avoid these difficulties by employing a naturalistic methodology. According to Leiter, positivists suffer from having made "the linguistic turn":

---

<sup>1</sup> Leiter, "Legal Realism and Hard Positivism", 368.

In its contemporary form, linguistic-turn philosophers typically examine some concept (“justice” or “law” or “mind”), looking at how we use language to express the concept as a way of clarifying our intuitions about its content. How we talk and how we intuit dominate the methodological armory of the linguistic-turn philosophers.<sup>2</sup>

The force of Leiter’s critique of “linguistic-turn philosophers” does not rely on whether speech can express concepts, nor whether the analysis of speech is the best way to explain concepts or things conceptual, nor even whether all descriptive jurists are concerned with law-talk at the object-level. Leiter himself does not dispute the first point, and with regard to the second, he is sceptical yet not entirely dismissive. Furthermore, at least one analytical legal philosopher, namely Joseph Raz, has little to say about how we use words and much to say about the nature of practical reason. What Leiter must establish is the claim that positivist legal theorists rely on *intuitions* about explanatory concepts as evidence of their veracity.

What role do intuitions play in a sound descriptive-explanatory legal theory? Consider Hart’s legal theory. It is true that Hart was influenced by ordinary language philosophy.<sup>3</sup> Moreover, Hart “famously endorsed J.L. Austin’s view”<sup>4</sup> which holds that by examining ordinary language we are “using a sharpened awareness of words to sharpen our perception of phenomena.”<sup>5</sup> But does this concern with language entail the claim that an explanatory concept is proved or disproved by our intuitions regarding it?

There are many places in *The Concept of Law* where Hart’s discussions of statements made in a particular context are revealing and insightful, but they do not appear to rely on our intuitions. For example, on p. 103 Hart discusses legal validity as a concept whose usual use, i.e. “This law is invalid,” presupposes the context of a particular legal system and its rules; he then draws an analogy with the game of cricket as the context whereby the statement “He is out” presupposes the rules of cricket. One need not have

<sup>2</sup> Leiter, “The Naturalistic Turn in Legal Philosophy.”

<sup>3</sup> Whether ordinary language philosophy is something upon which Hart’s theory of law depends is contestable. Yasitomo Morigiwa, for instance, argues Hart’s legal theory tacitly relies on an incorrect theory of language, but he does not argue that Hart is an ordinary language philosopher. See Morigiwa, “The Semantic Sting in Jurisprudence: Hart’s Theories of Language and Law.”

<sup>4</sup> Leiter, “The Naturalistic Turn.”

<sup>5</sup> *Ibid.* Leiter cites Hart (*The Concept of Law*, 14) who is himself citing Austin, “A Plea for Excuses”, 8.

any intuitions regarding cricket to see that Hart's example elucidates the contextual character of statements of legal validity, hence the contextual character of concepts of legal validity. Even where Hart employs counterfactual situations and purely hypothetical statements regarding those situations, he certainly does not appeal to our intuitions in order to define the *content* of a concept. For instance:

Let us recall the gunman situation. A orders B to hand over his money and threatens to shoot him if he does not comply. According to the theory of coercive orders this situation illustrates the notion of obligation or duty in general. . . . The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that B, if he obeyed, was 'obliged' to hand over his money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that B 'had an obligation' or a 'duty' to hand over the money. So from the start it is clear that we need something else for an understanding of the idea of obligation.<sup>6</sup>

In what sense is Hart "intuition-pumping" here? His hypothetical example suggests that the concept of obligation referred to by obligation-talk admits of fine distinctions, and that one of these distinctions—being subject to pure coercive force—is dissimilar from the others. But nothing in this suggests that the question of what a legal obligation is, and of what coercive force can oblige us to do, ought to be settled by appealing to our intuitions. We do in fact think it odd to conflate the meaning of a statement about the exertion of coercive force ("Since he had a loaded pistol pointed at his head, he was obliged to give the gunman the money") with the meaning of a statement about, say, proper behaviour towards one's mother ("Since she is his mother and is ill in hospital, he has an obligation to visit her").

Leiter may be misled by the fact that it is not uncommon for a philosopher concerned with social phenomena, especially social phenomena with which he is personally familiar, to take a counter-intuitive claim or feature of something as a sign that further investigation is in order. Imagine someone remarking, "Canadians have *no effective legal recourse* should their properly made and registered vote, or even the votes of *all* voting Canadians as a whole, be ignored by Parliament." This statement is remarkably anti-intuitive, for how can we reconcile such a claim with our knowledge that

---

<sup>6</sup> Hart, *The Concept of Law*, 82.



Canada is considered to be a parliamentary democracy under the rule of law? Yet the claim is also almost certainly a true proposition regarding the actual state of Canadian law—or so thinks the Supreme Court of Canada.<sup>7</sup> Thus the counter-intuitiveness of the statement suggests a possible divergence between the Supreme Court's concept of a right to vote and that of the ordinary Canadian. Since voting is a social practice with some significance, and since the Supreme Court's statements carry considerable force, here we have the basis for a fruitful investigation into the complexity of concepts related to Canadian social-political practices. But that investigation, should we undertake it, does not require us to refer to anyone's intuitions; it certainly doesn't require that we define the concept of a right to vote according to *our* intuitions as legal theorists; and we may even arrive at theoretical conclusions which are intuitively unsound despite being, in our considered opinion, true.

Leiter does effectively highlight the problem of epistemic uncertainty. Positivist legal theorists dispute the available explanatory concepts for several key features of juridical law, and standard meta-theoretical-evaluative criteria and methodological principles do not appear to have resolved these disputes. As a critique of the descriptive-explanatory methodology, however, Leiter's polemic against "linguistic-turn philosophers" is misguided. Accusations of "intuition-pumping" falsely suggest that descriptive-explanatory legal theorists aim to develop the content of explanatory concepts according to their own intuitions, or to offer theoretical conclusions which are "intuitively true." This polemic is primarily intended to secure Leiter's own legal-theoretical methodology, to which we now turn.

## Replacement Naturalism

Leiter advocates a form of *replacement naturalism* where "philosophical questions about the relationship between evidence and theory ... [are] replaced by purely empirical, scientific questions about the causal relations between the two relata."<sup>8</sup> Philosophers of law, he argues, have abdicated their responsibility to keep up with current methodological practice.

---

<sup>7</sup> See *sub* § 6.4.

<sup>8</sup> Leiter, "The Naturalistic Turn in Legal Philosophy." See also Leiter, "Naturalism in Legal Philosophy" in *Stanford Internet Encyclopedia of Philosophy (Spring 2004 Edition)*.

Almost all of philosophy has succumbed—or at least felt the need to respond—to this naturalistic turn. One of the striking holdouts from the naturalistic turn, however, has been none other than legal philosophy, which proceeds via conceptual analysis and intuition-pumping as though nothing had transpired in philosophy in the last forty years.<sup>9</sup>

Why *replace* philosophical questions regarding evidence and theory with some other mode of inquiry? Leiter's replacement strategy must be based on more "the methodological *Weltanschauung* of philosophy in our time."<sup>10</sup> It must be that philosophical inquiry into theory and knowledge, which is to say the project of epistemology itself, has arrived at some new insight into appropriate norms of theory construction, and that conceptual analysis is incompatible with those norms. Leiter's argument to this end goes as follows:

1. Non-naturalistic legal philosophers have been unable to conclusively explain or even describe several important features of law, e.g. the nature of legal authority.
2. The best descriptive-explanatory accounts of these features of law rely on explanatory concepts whose veracity, in turn, relies on the strength of conceptual arguments.
3. The conclusions of conceptual analysis are always insecure because:
  - a) They rely on our intuitions, which are notoriously fickle.
  - b) They are revisable in light of empirical evidence, and so are ever mutable in light of future knowledge.
4. Therefore, conceptual analysis is an inadequate methodology for describing and explaining law.

Leiter's argument is intended to support the rejection of conceptual analysis and also to introduce a new meta-theoretical evaluative criterion: "facilitating successful a posteriori theories."<sup>11</sup>

Let us recount four of the weaknesses in Leiter's overall position regarding proper legal-theoretical inquiry. First, I have already pointed out that

---

<sup>9</sup> Leiter, "The Naturalistic Turn in Legal Philosophy."

<sup>10</sup> *Ibid.*

<sup>11</sup> Leiter, "Legal Realism", 369.

legal theorists like Coleman, Raz and Waluchow do not suggest that intuitive appeal is either (i) a good reason in itself for accepting or rejecting an explanatory concept, or (ii) the goal of a good descriptive-explanatory account of law.

Second, in the case of positivist legal theory, Leiter's account of the so-called "linguistic turn" in philosophical inquiry is more polemical than substantive. Descriptive-explanatory legal theorists do not attempt to determine the content of their explanatory concepts by means of ordinary language philosophy. Indeed, Joseph Raz argues that "so long as in one's deliberation about the nature of law and its central institutions one uses language without mistake, there is little that philosophy of language can do to advance one's understanding."<sup>12</sup>

Third, minimalist positivists actually support 3(b). Not only do they agree with Leiter on what we have called "the methodological principle of descriptive/conceptual reciprocity," they also take that principle as a reason to *avoid* a priori restrictions on the explanatory concepts used in her legal theory. The fact that a minimalist positivist account of law is revisable in light of future inquiry is a *good feature* of that type of legal theory, and no positivist says otherwise.

Finally, and most importantly, the methodological implications of Leiter's own norm for theory choice and construction create *a priori* restrictions on the possible content of the concept of law. He aims to increase the explanatory power of empirical inquiries into law by filtering juridical law so as to render it into an explanatory object which is more readily studied by that type of inquiry. This may solve the problem of epistemic uncertainty, and a naturalistic theory of law may further empirical legal-theoretical inquiries, but it also hinders other equally sound and important ways of understanding what law is.

---

<sup>12</sup> Raz, "Two Views", 6.

## 6.2 Elaborating the Constitution

Although Leiter defines conceptual analysis in very general terms,<sup>13</sup> let us focus solely on the minimalist methodology of legal positivism in order to secure three points: (i) that descriptive-explanatory legal theorists are not ordinary language philosophers, (ii) that descriptive-explanatory legal theory does not rely on *a priori* analyses in the manner Leiter suggests, and (iii) that Leiter's advocacy of a naturalistic legal theory is vulnerable to his own critique.

We shall briefly consider the initial stages of giving a theoretical description and explanation of a particular phenomenon—the constitution of Canada—from the perspective of a minimalist investigator who aims to get a rough idea of the essential features of that phenomenon. This tentative perspective is not that of a legal theorist or moral activist. It is, in a very approximate way, the perspective of Hart's external observer, but in this case the external observer is particularly ignorant of the phenomenon being investigated. The investigator has no classificatory schema to demarcate legal rules from moral rules, nor legal institutions from political institutions, and so forth. We shall not develop a thoroughgoing analysis of Canadian constitutional practices, legal or moral or political. Our goal is to identify some of the virtues of methodological minimalism and to see *why* those features are laudable.

### Conceptualizing 'The Constitution'

Nation-states are political entities comprising a number of institutions and social practices. Canada is a nation-state with a typical assortment of modern institutions and enduring political practices. Most all Canadians consider the Charter of Rights and Freedoms to be an important and influential feature of Canadian society. They also consider the Charter to be part of Canada's constitution. What, we might ask, is this "constitution"?

---

<sup>13</sup> Kant's transcendental account of the necessary categories of human experience is supposedly an example of conceptual analysis. Since physics has shown that non-Euclidian geometries are consistent with the nature of space and time, Kant's *a priori* account of how the world must be for us is therefore disproved. Leiter takes note of a number of other examples, including the law of excluded middle, as examples of failed *a priori* analyses intended to secure absolute truths. See Leiter, "The Naturalistic Turn in Legal Philosophy."

If we want to understand the Charter and its role (or, if most Canadians are mistaken, its not having a role) in Canada's constitution, then we need a concept of 'constitution' in order to begin our analysis. Since we do not know whether Canadians have a correct account of what a constitution is, we might reasonably turn towards experts in political science who have developed empirically-tested concepts of things like constitutions. There are political-theoretical accounts according to which constitutions are simply the form or institutional arrangement of political institutions, where 'political institution' is broadly construed so as to include such things as legislatures and courts. This notion of a constitution is well-suited to what Leiter calls a *posteriori* studies insofar as it specifies constitution-types according to observable characteristics, e.g. democratic parliaments, *juntas*, monarchs, and so forth. Let us call this conception  $C_{pol}$ .

A political theory which uses  $C_{pol}$  and the type of legal theory which we have been calling descriptive-explanatory both share a particular methodology: they attempt to identify institutional structures and practices in order to develop general explanations of them. The descriptive-explanatory political theorist, for example, notes that according to  $C_{pol}$  there are  $X$  number of constitutional-types, such as democracies, oligarchies, etc. The descriptive-explanatory legal theorist analogously notes that according to the best available conception of law—we shall call it  $C_{law}$ —there are  $Y$  number of rule-types, such as primary and secondary rules.

Could we make use of the political theorist's conception of the Canadian constitution—that is, the particular constitution-type Canada has in light of  $C_{pol}$ —as a starting point for understanding the relationship between the Charter and Canada's constitution? Unfortunately, we cannot.  $C_{pol}$  *excludes* the possibility that the Charter is part of Canada's constitution. According to that conception, the Charter could *affect* Canada's constitution by influencing the formal arrangement of political structures, but it could not be properly said to be a *part* of the constitution because a constitution is merely an abstract theoretical entity.  $C_{pol}$  exists only because political theorists posit its existence, regardless of the fact that  $C_{pol}$  is intended to be a descriptive claim about the actual nature of real nation-states.<sup>14</sup>

If we want to describe and explain the Charter's role in Canada's consti-

---

<sup>14</sup> In other words, the political theorist is using her conception of what a constitution is to explain the object-level instance of the Canadian legal system. She is not, however, suggesting that Canadians are aware of or believe in the political-theoretical concept the political theorist is using — **it is an explanatory concept.**

tution, or at least describe and explain why and how Canadians mistakenly believe that it does play a role, then it is pointless to begin with an account of ‘constitution’ which determines *a priori* that the Charter and Canada’s constitution are necessarily distinct. We aim to describe and explain things as they are, and it is clear that Canadians often speak of the Charter *as if* it were a part of Canada’s constitution. Even the judges on Canada’s highest court do so.  $C_{pol}$  is unhelpful insofar as it implies that we ought to reject *ab initio* the claims and self-reports of even Canada’s Supreme Court. What ought we, as descriptive-explanatory Charter theorists, to do?

We could simply reject that implication of  $C_{pol}$  by distinguishing between the political-theoretical sense of the term ‘constitution’ and the various senses of the term used by contemporary Canadians. We would, in that case, note that the political-theoretical term is what Stephen Perry calls “a term of art” and accept it as appropriate in one context but not another. This is not an acceptable solution, however. In fact, it points to a much deeper problem than careful use of theoretical terminology. The real issue is not whether it would be more convenient for theorists to use the same words as the participants in the practices being studied. The real problem for us is that the political theorist’s term refers to a different referential object than that referred to (in most instances) by contemporary Canadian constitution-talk.

## Levels of Analysis

It might be objected that all this talk of  $C_{pol}$  amounts to terminological quibbling or, even worse, a category error. Why not say that  $C_{pol}$ , being an abstract theoretical entity, need not correlate with Canadian social and political practices at all? We know that such practices *prima facie* exist; if  $C_{pol}$  denies that fact, so much the worse for  $C_{pol}$ . A category-error account might suggest that what its Supreme Court says of Canada’s constitution may be true even though it contradicts  $C_{pol}$  since we are really talking about two different types of creature: Canada’s constitution is (somehow) a concrete existing thing while  $C_{pol}$  is merely an abstract theoretical entity. On this account, the claim that  $C_{pol}$  involves Canadians in conceptual incoherence is just the result of confusing the meta-level of political theory with the

object-level of Canadian legal and political practices.<sup>15</sup>

In fact, however, the meta-level/object-level distinction does *not* map onto the distinction between “abstract” theoretical inquiry and concrete social practices. A Canadian judge who refers to the Charter as part of Canada’s constitution is *already* working with an abstract conception. While that judge’s conception—let us call it  $C_{judge}$ —is not so general as to render irrelevant everything but the formal arrangement of political institutions, it is nonetheless just as much a “mere theoretical entity” as  $C_{pol}$ . Judge X’s determinations of Canadian law are propositions regarding an actual referential object shared by other Canadian judges. If we have made a category error, it is not one which confuses “real” things with “merely theoretical” things.

More importantly, if  $C_{judge}$  exists at the object-level of Canadian legal *practices* by virtue of its application or elaboration by Judge X and his compatriots, then it appears that the object-level with which legal theorists are concerned *already* contains conceptions like  $C_{judge}$ . This raises the issue of whether  $C_{pol}$  in some sense needs to account for  $C_{judge}$ . A theory which determines *a priori* that Canadian Supreme Court Justice Binnie’s conception of Canada’s constitution is utterly mistaken is *prima facie* a poor account of Canada’s constitution.<sup>16</sup> There is little point in giving a descriptive-explanatory account of the Charter if we decide, *a priori* and according to  $C_{pol}$ , that Canada’s Supreme Court is conceptually confused.<sup>17</sup>

It might seem that, to remedy the contradiction between  $C_{pol}$  and  $C_{judge}$ , we must take  $C_{pol}$  as an abstract theoretical entity while accepting  $C_{judge}$  as some other type of object. We would then be faced with having to relate the former to the latter—that is, we would need to develop a theory of how  $C_{pol}$  can “truly” reflect something else entirely, namely  $C_{judge}$ . But this seems to be an actual instance of the kind of “ontological promiscuity” which Leiter wants to avoid, and which we also ought to avoid so long as we advocate a minimalist descriptive-explanatory methodology. Fortu-

<sup>15</sup> To paraphrase Gilbert Ryle’s example, we might say that Canadian constitution-talk refers to something like a college building, while the political theorist’s term of art refers to something like the idea of the university.

<sup>16</sup> As Raz observes, “we know well that if some theory of law yields the result that American law is not law, it is a misguided theory of law” (Raz, “Two Views”, 35).

<sup>17</sup> This is not to say that after due reflection and inquiry we might not decide that, in fact, Canada’s Supreme Court is conceptually confused. That is an open question. What we need to avoid is *predetermining* an answer to that question on unreasonable grounds.

nately, we can sidestep the entire ontological debate with a methodological postulate:

*M1* There are different conceptions of social practices and institutions such that, so long as the conceptions are elaborated at the object-level by actual social practices, those conceptions can be the referent of a meta-level descriptive claim.

Three important clarifications are in order. First, it is possible to reduce the notion of a social institution to that of a social practice. We need not do so, but knowing that we can comfort someone who is unsettled by the notion that a institution can be said to actually do something. (While we may also reduce social practices to observable patterns of behaviour, a reduction of this sort is largely unhelpful as to the meaning and role of conceptions like  $C_{judge}$ .) Secondly, it is important to keep in mind that *M1* is a methodological postulate rather than an ontological claim. It does not entail, for instance, that ideas exist if and only if they are spoken of. Rather, a conception such as  $C_{judge}$  can be said to exist insofar as we observe that Judge X says something to the effect of  $C_{judge}$ . Note that we can also make the same claim with regard to  $C_{pol}$ : it exists insofar as we observe that some political theorist says something to the effect of  $C_{pol}$ .  $C_{pol}$  and  $C_{judge}$  may have other modalities of existence, of course. It is enough for our purposes to make the minimum necessary ontological commitment. Thirdly, *M1* is deliberately vague. We have not yet specified what it is for a social practice to “elaborate” an idea. For now, it is enough to note that if Judge X says something to the effect of  $C_{judge}$  in the courtroom, then  $C_{judge}$  can be said to exist in at least that context. It is important to note that the meta-level descriptive claims allowed by *M1* may take other meta-level descriptive claims as referents. In other words, the descriptive claim ‘Aristotle states  $C_{pol}$ ’ is a meta-level descriptive claim about what is itself a meta-level descriptive claim; we can consider  $C_{pol}$  as an object-level feature of the practice of political theory even though, from Aristotle’s perspective,  $C_{pol}$  is a meta-level claim about regular political practices.<sup>18</sup>

<sup>18</sup> And this is why it is always possible to point out that a supposedly neutral theoretical claim or theoretical methodology implicates a non-neutral context. For example, the methodological claim “One can describe law without praising or condemning it” can be the subject of another claim such as “To hold that ‘One can describe law without praising or condemning it’ implies that law admits of moral predicates.” The latter claim



When considering a particular meta-level descriptive claim there is much potential for confusion about the object-level and the meta-level. This is so because it is *the perspective of the theorist* which constitutes the meta-level, regardless of the claim under consideration. Hence our second methodological postulate:

*M2* The object-level is both relative to and dependent on a theoretical perspective.

This is a subtle but very important point. Positivists, for instance, are very concerned to describe law as it is and to correlate their conceptual claims with descriptive claims whenever possible. Accordingly, when positivists talk about law, the discussion often refers to only two levels of analysis: the object-level of actual legal systems and the meta-level where those systems are discussed generally and in abstraction from any particular legal system—there are legal systems and there is the concept of law. Even the most empirically-minded positivist, however, recognizes that *actual legal practices involve participants who use concepts* like  $C_{judge}$ . These are also meta-level concepts, though they tend to be more practical than theoretical. For the sake of having a useful label with which to distinguish them from *our* legal-theoretical conceptions, let us call these ‘practical’ or ‘participant-level’ concepts.

Consider again the familiar legal theory of H.L.A. Hart. Hart aimed to elaborate a general concept of law in light of these practical legal concepts, and to see how they were used in similar or different ways from moral concepts. Hart would, therefore, accept *M1* as a useful constraint on positivist legal theory. His own work clearly deals with concepts as they are used in actual legal systems, e.g. the concept of a legal duty, but he aims to describe them rather than to discipline or engineer their use. Hart’s meta-level claims about the nature of a legal duty are based upon the practical conceptions of legal duty already at work within actual social practices.

Insofar as Hart describes and explains the conceptions already at work within legal systems, he (and any other descriptive-explanatory legal theorist) must also accept *M2*. The Hartian account of law describes conceptions like  $C_{judge}$ , yet  $C_{judge}$  is itself a meta-level descriptive claim, i.e. the type of

---

may, for instance, appear as part of an argument suggesting that it is more important to attribute the correct moral predicates to law than merely to describe it, and so anyone who engages in only the latter suffers from a kind of wilful moral blindness, and so forth.

claim Judge X might make regarding the law of Canada. Hart's concern was not to prove whether  $C_{judge}$  was epistemically correct or not, either as a matter of morality or as a matter of true practical legal propositions regarding Canadian law. Rather, Hart's aimed to describe and explain participant-level conceptions like  $C_{judge}$  in modern municipal legal systems, and then to show that a general account of law could be given such that juridical law could be explained in light of its central features.

## The Aim of Analysis

Whatever an actual legal system might be in practice, the description and explanation of it is theoretical, as is the thing being described and explained—the explanatory object. When our theoretical conceptions of our shared explanatory object cannot be reconciled with the concept of it—in other words, when our descriptions and explanations would, taken as a whole, suggest an actual contradiction in our explanatory object itself—we find ourselves in a state of meta-theoretical epistemic uncertainty. We can also be uncertain about the veracity of participant-level conceptions: we may be unsure, for instance, as to whether Judge X's conception  $C_{judge}$  is correct in relation to Canadian law. Thus epistemic uncertainty may be more than a simple conflict between conceptions at the same level of analysis. Accounting for our legal-theoretical epistemic uncertainty is difficult in large part because uncertainty about a claim at one level can arise in light of further uncertainty about a claim at another level. For example, the participant-level conception  $C_{judge}$  (“Canada's constitution includes the Charter”) and the meta-level conception  $C_{pol}$  (“Bills of rights cannot be ‘part’ of a constitution, properly understood”) are not obviously reconcilable in a unitary concept of the constitution. Thus we are uncertain whether the meta-level conception  $C_{pol}$  is appropriate given the participant-level conception  $C_{judge}$ ; likewise, we do not know whether the participant-level conception  $C_{judge}$  is necessarily mistaken, since it is possible that the meta-level conception  $C_{pol}$  is true. Unless we resort to *a priori* suppositions, any attempt to describe and explain a complex social phenomena will involve epistemic uncertainty at many levels—the pursuit of truth is a difficult task.

What, then, makes a particular conception of Canada's constitution good or bad? Can it be the truth of the conception? Since *our* aim is to develop a descriptive-explanatory account of the relation between Canada's Charter and its constitution, the worth of a conception of the constitution is

relative to that aim. Yet we should not assume that our commitment to the pursuit of truth entails that for us the epistemic certainty of a conception is of paramount importance. This is immediately obvious once we consider an important difference between the participant-level conception  $C_{judge}$  and the meta-level conception  $C_{pol}$ . From the meta-theoretical perspective, it is possible for a conception to take on three different roles: it may be a product, an instrument, or a feature. That is, a conception may be:

- (i) the result of a theoretical inquiry, e.g.  $C_{law}$
- (ii) used to filter the pre-theoretical data, e.g.  $C_{pol}$
- (iii) a feature of our explanatory object, e.g.  $C_{judge}$

Different theoretical approaches to law may purposely limit the roles played by a conception within a theoretical account. Ronald Dworkin's legal theory, for instance, suggests that  $C_{judge}$  is a conception with which legal theorists must compete. We might say that for Dworkin there is no distinction between participant-level conceptions of law and meta-level conceptions of law. On this view, all lawyers, judges, and other participants in legal argument are legal theorists.<sup>19</sup>

Positivists like Hart see themselves as external to the explanatory object. They are observers who can take note of its features yet can see how, given different circumstances, those features might be different. Interpretivists like Dworkin deny that one can take up an external point of view. Dworkin believes that the manner of conceptualization which occurs at the participant's level is the *only* appropriate way to conceptualize law. To treat law as if it were something one could understand from an external perspective is to misconceive law's nature. For Dworkin,  $C_{judge}$  could never just be something to be described or explained—it is always already a conceptual competitor. But treating  $C_{judge}$  as being on the same level as  $C_{law}$  is a contestable methodological choice, not only because it relies upon the mistaken claim that any worthwhile or proper account of law necessarily

---

<sup>19</sup> "Jurisprudence," Dworkin claims, "is the general part of adjudication, silent prologue to any decision at law" (Dworkin, *Taking Rights Seriously*, 66). In the Postscript to *The Concept of Law*, Hart welcomes Dworkin's subsequent limitation of this "claim that the only proper form of legal theory is interpretive and evaluative," though it is unclear whether Dworkin really does abandon the idea that a legal theorist must directly evaluate the law. See Hart, *The Concept of Law*, 243-44; cf. Dworkin, "Legal Theory and the Problem of Sense"; see also Waluchow, *Inclusive Legal Positivism*, 22-25.

involves substantive moral-political argument, but also because it places *a priori* limits on the nature of juridical law itself: law must be justifiable (else it is not law). Hence positivists tend not to think of participant-level conceptions like  $C_{judge}$  in terms of (i). For a positivist,  $C_{judge}$  is part of the data we need to describe and explain—it is (iii). Judge X may say Y about Canadian law, and we will try to describe and explain Y even if we are quite certain that Y is incorrect. Separating meta-level from participant-level conceptions allows us to include even mistaken participant conceptions in our theoretical account—it leaves (iii) as one way to include a conception in our descriptive-explanatory account without our having to evaluate the worth of its content.

## Restrictive Methodologies

Having owned-up to our commitment to describe things as they are and to do so from an external perspective (M1), and having recognized that this entails developing a theoretical explanation which distinguishes between participant-level features and our legal-theoretical claims (M2), we are now able to give a good reason for rejecting  $C_{pol}$ .

Our problem with  $C_{pol}$  is neither ontological nor epistemic. We can take the defensible minimalist ontological view that ideas like  $C_{pol}$  and  $C_{judge}$  can be said to exist insofar as they admit of being the product of a descriptive claim. Since our epistemological schema includes a distinction between the participant- and meta-level, the fact that  $C_{judge}$  and  $C_{pol}$  are mutually contradictory is not yet cause for alarm. This is so because we can allow that  $C_{judge}$  is possibly mistaken, or that  $C_{pol}$  applies to a different explanatory object. Even if  $C_{pol}$  were a conception of the same object we intend to explain,  $C_{pol}$  is pitched at a level of generality and abstraction which has little connection with the questions and puzzles that concern us.

The real problem with  $C_{pol}$  is that it is *methodologically restrictive*. If we use  $C_{pol}$ , then we would effectively be applying it as a filter for the pre-theoretical data which forms the basis of our object of explanation.<sup>20</sup> Our theoretical perspective would hold *a priori* that Canada's constitution is merely an abstract theoretical entity whose nature is such that it cannot be reasonably claimed that the Charter is a part of it. Before even considering *why* and *how* Judge X offers  $C_{judge}$ , we would be assuming that

---

<sup>20</sup> See *supra* §2.5.

Judge X's conception is conceptually incoherent. If we accept  $C_{pol}$ , then, our explanatory object and hence our meta-level conception of it will be largely predetermined.

In the present case, it seems that we need to know what a constitution is before knowing whether the Charter can be a part of it. From our descriptive-explanatory theoretical perspective, the meaning of the term 'constitution'—perhaps it is better to say “the best legal-theoretical provisional definition of ‘constitution’”—is either (a) not equivalent to  $C_{pol}$ , or (b) is equivalent to  $C_{pol}$ . If (b) is the case, then we are necessarily led to the conclusion that (c) Canadians do not know what a constitution is. Yet (c) seems highly unlikely. The challenge here is analogous to the challenge of knowing whether a stipulative or provisional definition of law is methodologically appropriate. Recall that Cicero's stipulative definition of law avoids many problems in legal theory, including the problem of descriptive/conceptual reciprocity. Yet Cicero's theory is completely undermined if his stipulative definition is incorrect. Moreover, his theoretical methodology does not allow him to revise that definition insofar as his conclusions directly depend upon on it. Cicero's theory of law is not amenable to *a posteriori* observations which signal a need to modify its explanatory concepts.

The best methodological path to follow is to allow that  $C_{pol}$  *may* be true, but that for our present purposes it is methodologically inappropriate. We will not try to determine whether (a) or (b) is really the case by engaging directly with deep questions in political theory since that would leave little time for developing a descriptive-explanatory account of the Charter and its relation to Canada's constitution. For the same reason, we want to take note of  $C_{judge}$  as a feature of Canadian constitution-talk without passing judgement on its epistemic (or moral) correctness in relation to the Canadian constitution.

One presupposition allowed to us as methodologically minimalist legal theorists is the presupposition that there are actual legal systems, and that widely-accepted paradigmatic cases of such systems, such as Canada's legal system, provide us with enough empirical data to begin a legal-theoretical inquiry. It is clear that Canadians commonly make reference to the Charter as being part of Canadian law as well as being part of “the constitution.” Thus it is the case that, whatever it may be from the perspective of absolute theoretical certainty, the Charter has a significant place in the practices commonly thought by Canadians to be related to Canadian law. Instead of trying to choose *a priori* the best stipulative definition, we can instead

develop an account of what Canadians mean when they use that term. Of course, a sound theoretical grasp of what they take the term to mean may result in our recognizing that the term is equivocal. Judges, for instance, may mean one thing by it while citizens mean another.

It may also be that whatever conceptual claims we arrive at regarding the nature of law in general may entail that the ordinary use or uses of the term are conceptually incoherent. Before we can make those judgements, however, we need to know what role or roles the constitution plays at the participant-level. Here, as elsewhere, we are assuming that there is a significant relation between the use of a term and a particular concept. In short, we assume that one way to grasp the meaning or partial meaning of a concept is by considering the meaning of the concept-word. This is a useful philosophical methodology of long-standing. It does not commit us to any particular controversial linguistic or semantic position—it does not make us ordinary language philosophers. Ultimately, our best theoretical understanding of a concept may render it inconsistent with most every participant-level meaning given to it. Thus we ought not to assume that our concepts should be dictated or circumscribed by ordinary meaning. To claim that we can *begin* to develop a theoretical account of a concept by examining its purported use at the object-level does not entail that our theoretical account will not diverge from the participant-level meanings or uses of the concept-word.

## An Interim Reply to Leiter

It is clear that a minimalist descriptive-explanatory approach to the question of how the Charter is related to Canada's constitution is not an instance of ordinary language philosophizing. There may be contradictions between ordinary Canadian's conceptions of their constitution, Canadian judges' conceptions of the constitution, and our own theoretical conception of it. Our methodological postulates actually enable us to consider the different participant-level conceptions and the roles they play in the social practices which we assume are the basis for Canada's constitution. At the same time, however, we have not decided that the political theorist's conception of the constitution is necessarily false, even though it contradicts our theoretical conception as well as participant conceptions. We decided, instead, that  $C_{pol}$  is not an appropriate explanatory concept in light of the question we aim to answer, namely the relation of the Charter to Canada's constitu-

tion. That may also be the case for  $C_{judge}$ , which is itself a participant-level conception. We have taken note of a number of different, oftentimes contradictory participant-level conceptions, but none of these has been appropriated so as to engineer the content of our explanatory concept. On that basis alone, then, we can defend the descriptive-explanatory approach from Leiter's claim that it is merely a version of ordinary language philosophy.

Secondly, nothing in our approach makes use of *a priori* analysis. Leiter's main objection to positivism is that it reverts to appealing to our intuitions in order to secure "analytic truths" arrived at by means of non-empirically-revisable claims. It is clear that the theoretical approach we have considered does none of these things. It does not appeal to our intuitions; in fact, it recognizes that many of our theoretical claims may in the long run be quite anti-intuitive. Nor does methodological minimalism postulate *a priori* analytic truths. Indeed, it has shown itself to be rather resistant to any such tactic. Recall that we rejected  $C_{pol}$  just because it predetermined our theoretical conclusions, and that we chose instead to *develop* an explanatory concept by considering the actual social practices which instantiate that which we aim to describe and explain. There is nothing in this which commends "analytic truths" of the sort Leiter condemns.

If methodological minimalism does not appeal to intuitions in any inappropriate way, nor rely on participant-level concepts to determine the content of theoretical explanatory concepts, nor prescribe "analytic truths" by means of *a priori* reasoning, then what remains of Leiter's criticisms? The only remaining contested ground is Leiter's proposed meta-theoretical-evaluative criterion and his demand that we choose our legal-theoretical concepts according to their utility for *a posteriori* inquiries.

There is an obvious objection to Leiter's proposal. It should at this point be clear that his distinction between *a priori* and *a posteriori* inquiry does not do the job Leiter wants it to do. We have seen that positivist minimalist legal theorists employ a theoretical methodology and use epistemic norms which further the latter type of inquiry, not the former. Stephen Perry's caricature of the descriptive-explanatory methodology was unsuccessful at portraying it as *too* scientific—Leiter's caricature of that methodology is equally unsuccessful at portraying it as *not scientific enough*. One could set aside Leiter's critique for this reason alone.

It is not enough, however, to show that Leiter's polemic against so-called linguistic-turn philosophers undermines his critique of legal positivism. Insofar as positivist theories of law are amenable to revision, and insofar as

they aim to produce an accurate description and powerful explanation of their subject matter, then they must actually compete in the arena of what Leiter calls *a posteriori* inquiries. The question is not “Should we accept Leiter’s proposed meta-theoretical-evaluative criterion of ‘aiding *a posteriori* inquiry’?” but rather “Is positivism a better means to describe and explain law than the competing *a posteriori* methods of inquiry?”

Leiter’s critique of positivism makes it clear that he would prefer a “naturalized jurisprudence” based on “which way of cutting the causal joints of the social world works best.”<sup>21</sup> This “primarily methodological” commitment to naturalistic jurisprudence is more a form of theory and concept choice than a radically different way of describing and explaining law. In most respects, the aims and theory-guiding norms of naturalistic jurisprudence and the social-scientific inquiries it is meant to assist are comparable to the aims and theory-guiding norms of descriptive-explanatory legal theories such as legal positivism. Leiter actually suggests that social scientists would choose to apply a Hard Positivist concept of law with its exclusive rule of recognition because of (what we have called) the *presumption in favour of generality*. “The motivation for demarcating the legal/non-legal in essentially Hard Positivist terms is, for most social scientists, to effect an explanatory unification of legal phenomena with other political and social behavior.”<sup>22</sup> In short, Leiter wants legal philosophers to join with their social-scientific colleagues, and if that requires choosing a concept of law suitable for several different methodological inquiries, then that is what we should do. “If social science cuts the causal joints of the legal world in Hard Positivist terms, is that not a far more compelling reason to work with that concept of law as against its competitors?”<sup>23</sup>

### 6.3 The Division of Labour Argument

There is nothing inherently wrongheaded with the notion that a theory might be considered better if, besides providing a good explanation of its

<sup>21</sup> Leiter, “The Naturalistic Turn.”

<sup>22</sup> *Ibid.* We’ve discussed the presumption in the context of a cross-cultural, trans-historical theory of law, but favouring a more general account in the sense Leiter describes amounts to much the same thing. Some theorists, such as Jules Coleman, call this “consillience.” See e.g. Coleman, *The Practice of Principle*, 38–40.

<sup>23</sup> Leiter, “The Naturalistic Turn.”



subject matter, it also is of assistance to other forms of theoretical inquiry into related matters. Hence what we might call “interdisciplinary assistance” is a valid meta-theoretical-evaluative criterion.<sup>24</sup> But is it a sufficient criterion for choosing either (i) one explanatory concept over another, e.g. an exclusive rather than an inclusive concept of the rule of recognition, or (ii) one legal theory over another, e.g. exclusive over inclusive positivism?

Setting aside his misguided critique of conceptual analysis, we can still note that Leiter opts for the Hard Positivist explanatory concept because it better fits with social-scientific inquiry into law. Liam Murphy prefers Hard Positivism for its putative moral consequences. Both Leiter and Murphy invoke additional theory-guiding norms in order to solve the problem of epistemic uncertainty and to allow for further legal theoretical inquiry unbound by that uncertainty. Leiter’s norm is that of interdisciplinary assistance, while Murphy’s is that of bringing about good moral consequences.

We rejected Murphy’s argument because it predetermined the features of an explanatory concept for worthy but explanatorily irrelevant reasons. That is, Murphy argued that we ought to choose our legal theory on moral grounds rather than according to its ability to describe and explain its subject matter. Leiter makes a similar though more subtle error. His theory-guiding norm is counterproductive to his stated aim of providing a more epistemically correct jurisprudential account. In this section we shall see that, while *ceteris paribus* interdisciplinary assistance is a worthy aim for any theoretical inquiry, this aim is subservient to the primary aims of any good theoretical explanation: to explain its subject matter. Leiter’s choice of Hard Positivism over Soft Positivism on the basis of interdisciplinary assistance overlooks the primary aim of positivist legal theory and leads to the very situation he wishes to avoid: the *a priori* determination of significant features of law in advance of an inquiry.

## Borrowing Untruths

Leiter advocates Hard Positivism because its explanatory concept of law, and in particular its exclusive account of the rule of recognition, is more convenient to social-scientific inquiry into law. In this sense he chooses his legal theory on social-scientific grounds rather than legal-theoretical grounds. This is a coherent position, but it is also a position which a legal theo-

---

<sup>24</sup> See e.g. my discussion in “Two Perspectives on Legal Theory”, 338, 341.

rist may reasonably reject. Perhaps social-scientific inquiry into law is best served by the exclusive rather than the inclusive explanatory concept of a rule of recognition. It does not follow, however, that legal-theoretical inquiry is best served by that concept for that reason.

Unless we are certain of the accuracy of a particular conception which appears to have legal-theoretical utility or relevance, such as the political theorist's concept of the constitution which we discussed in the previous section ( $C_{pol}$ ), we do not know whether it would be a good or bad conception to accept for our legal-theoretical purposes. Once we see that this is the case, it will be clear that the same holds for accepting a social-scientific concept of law for use in a jurisprudential account.

We might be tempted to take up  $C_{pol}$  for our descriptive-explanatory purposes because it has been developed through a long tradition of careful and reflective political-theoretical inquiry. Perhaps, we might think, political theorists can be presumed to have a particularly insightful account of their own field of study. They have, of course, closely studied and puzzled-over the nature of political practices and institutions. We legal theorists have paid more attention to other things, namely the nature of legal practices and institutions. If each discipline were to accept the authority of the other, this division of labour would benefit us all—legal theorists could defer, where appropriate, to political theorists, and *vice versa*. Let us call this the Division of Labour Argument.

It is unfortunately the case that the Division of Labour Argument is unsound, and for several reasons. First, it assumes that there is sufficient consensus amongst political theorists to constitute authoritative and well-established explanatory concepts from which we legal theorists might pick and choose. We know, however, that there is no more of a consensus among political theorists regarding the nature of extremely important concepts, e.g. the nature of political authority, than there is among legal theorists regarding the nature of other extremely important concepts, e.g. the nature of legal authority. Secondly, even if there were sufficient political-theoretical consensus on a concept relevant to legal theory, it does not follow that this consensus of agreement among political theorists was arrived at by means of methodological practices and meta-theoretical commitments which are acceptable to descriptive-explanatory legal theorists. Political theory may, for instance, require the direct moral evaluation of its explanatory object.

The third reason why the Division of Labour Argument is unsound is the most important. Suppose that (i) there is a consensus among polit-

ical theorists as to the best account of the nature of constitutions, and (ii) this account is arrived at by means of methodological practices and meta-theoretical commitments which are identical to those of descriptive-explanatory legal theorists. Does it follow that (iii) the best political-theoretical account of the nature of constitutions is also the best legal-theoretical account?

Oddly, (iii) does not follow from (i) and (ii). We tend to think that because a theoretical approach can be defined by its methodological practices and its meta-theoretical commitments—as when we characterized the minimalist positivist approach to law in § 2.3—these practices and commitments will, given the same set of pre-theoretical data, necessarily determine the results of the theoretical account. But that is not how things actually work. Recall that in § 3.1 we noted that there is no conclusive or “objective” way to judge the merits of legal theories apart from their success at addressing the questions and puzzles they aim to answer. The fact of *explanatory relevance* entails *explanatory relativism*: some standards of theoretical success are necessarily relative to explanatory aims rather than being objectively set for all theories. Two theorists could share a commitment to the pursuit of truth and the general aim of providing a descriptive-explanatory account based on the same set of pre-theoretical data. Despite this congruence of method and aim, however, they may still arrive at different conclusions *depending on which questions they decided were important to answer or which puzzles caught their attention*.

It is not that every theoretical account is necessarily different simply because it is offered by a different person. We can attribute a methodology or meta-theoretical commitment to a type of theory. It is perfectly sensible, for instance, to speak of positivism’s commitment to describing law as it is. When one theory, however, focuses on different questions and puzzles than another, its account of its explanatory object will be different than the other’s account. This is so even if both theories begin with the same set of pre-theoretical data, for it is not just the data to be explained but also the questions and puzzles regarding that data which drive the theoretical accounts. An account of phenomenon *X* can be judged superior to other accounts on many grounds. Some of these grounds are the pure meta-theoretical-evaluative criteria applicable to all theories. Explanatory relevance is meta-theoretical-evaluative criterion, but there is a sense in which this criterion is objective and a sense in which it is not. It is objective in that a theory of *X* is better insofar as it addresses the questions and

puzzles which are of interest to theorists of *X*. But the questions and puzzles may vary, and the criterion is met (or not) only in relation to them—in this sense it is impure.

Consider another meta-theoretical-evaluative criterion, namely the idea that a theory is better insofar as it does not multiply abstract entities beyond necessity. We can say that this criterion applies as it were objectively to all theories. But the goals of different theories, e.g. the level of abstraction a theory intends to pitch its account at, are what determines the necessity. A theory of the practice of arithmetic will require fewer abstract entities than a theory of the practice of factoring prime numbers. The important point is that the questions and puzzles are as determinative of theoretical results, e.g. an account of what a constitution is, as are the theory's methodological practices and meta-theoretical commitments. Thus the descriptive-explanatory political theorist who aims to give an accurate description and insightful explanation of the Canadian Charter may arrive at a conception of the constitution which is well-suited to the question "What is the constitution such that Canada is able to assert itself as a nation-state?" Yet that conception may not be so well-suited to a descriptive-explanatory legal theorist's concern ("What is a constitution such that the Supreme Court of Canada can strike down Parliamentary legislation?") or that of a moral theorist ("What is the constitution of Canada such that it does or does not evince a moral failure of Canadians to treat Aboriginal people with respect?").

I have given three reasons for rejecting the methodological possibility of using  $C_{pol}$  in our own legal-theoretical descriptive-explanatory account. The first is that our generalized epistemic uncertainty about the nature of law, and of the nature of the elements of law (including legal practices and social institutions), disallows the use of  $C_{pol}$  at the outset of our inquiry—that is, as a filter for the pre-theoretical data—given its obvious contradiction with actual social practices.<sup>25</sup> I argued, secondly, that we have no grounds to adopt that conception even if political theorists in general agreed on its accuracy and explanatory power. This is so because, thirdly, the accounts of phenomena presented by descriptive-explanatory theorists (of whatever discipline) are guided not only by methodological practices

---

<sup>25</sup>  $C_{pol}$  may well prove to be the best conception even given its contradiction of  $C_{judge}$ . But we cannot make that determination now unless we take up  $C_{pol}$  as a stipulative definition.

and meta-theoretical commitments, but also by the questions and puzzles which they aim to answer.

If the account of explanatory relativism I have just given is sound, then we not only have reason to be wary of using theoretical conceptions based on different approaches to the pre-theoretical data, such as  $C_{pol}$ , we also have reason to doubt any meta-theoretical-relational claim to the effect that descriptive-explanatory legal theory is necessarily dependent upon the conceptual claims of other theoretical accounts—even when those other accounts deal with the same pre-theoretical data. Explanatory relativism entails that different theoretical accounts may develop from the same explanatory object despite the use of identical methodological techniques and the presence of identical commitments to the same meta-theoretical values.

## Methodology and Convenience

Leiter's attempt to dismiss legal-theoretical uncertainty by appealing to the theory-guiding norm of interdisciplinary assistance is a mistake. Even if hard positivism were a better legal theory for the purpose of developing social-scientific explanations of law, that (supposed) fact would not provide a good reason *for positivists* to choose Hard Positivism since the social-scientific theories Leiter wants to encourage tell us, really, quite little about about a number of the features of law which positivists consider to be important. Yet Leiter seems to be quite comfortable with abandoning any attempt to explain them.

In his argument *contra* non-naturalistic legal theory, Leiter makes some rather bold and presumptive claims. The natural lawyer who objects to “cutting the joints of the social world” on the basis of convenience to social-scientific inquiry cannot, Leiter opines, offer good reasons for considering untestable or vague notions to be factors in how law works: “many of the candidate non-law explanatory factors at issue (e.g., an ideological commitment to the platforms of the Republican Party) are not plausible candidates for being legal norms.”<sup>26</sup> Here Leiter is being more than just uncharitable. Consider another “ideological commitment” which may or may not be a “non-law explanatory factor”: a commitment to *the rule of law*. It is not implausible to claim that the rule of law is a necessary feature of legal systems, but it is very difficult to determine what the rule of law *is* or which

---

<sup>26</sup> Leiter, “The Naturalistic Turn.”

practices actually qualify as *ruling according to law*. The rule of law, as an ideological commitment or as a particular form of social control, is not something that can be ascertained through empirical inquiry. Unless, of course, one employs a social-scientific or naturalistic accounts of law which makes use of a stipulative definition of what it is, just as Leiter would have jurists employ a stipulative definition of legal validity.

Yet Leiter's naturalistic approach offers no stronger defence of its pre-supposition against considering "non-law explanatory factors" than convenience:

it is not like the characterization of these factors as non-legal by social scientists is arbitrary and unmotivated: the moral and political factors invoked to explain decisions do not, for example, appear in the decisions, or in the explicit rationales for the decisions; they are often hidden and hard to detect, which make them quite unlike any of the paradigm instances of legal norms, like statutory provisions or precedent.<sup>27</sup>

In this quotation, what has Leiter offered in support of pedigree criteria for legal validity other than (i) they are easy to see, and (ii) they are especially easy to see given the difficulty of observing other potential legal norms?

Even when an "explanatory factor" can meet clear pedigree criteria, however, it does not follow that it can be explained purely in empirical, social-scientific terms. As a matter of fact, reference to "the rule of law" has on occasion been quite explicit, though nonetheless difficult to qualify and quantify through empirical study. Much of the Canadian Supreme Court's opinion in *Reference re Manitoba Language Rights* explicitly rests upon the perceived importance of the rule of law, e.g. "The principle of rule of law, recognized in the Constitution Acts of 1867 and 1982, has always been a fundamental principle of the Canadian constitutional order."<sup>28</sup> Although explicitly posited, the participant-level concept of "the rule of law" is not readily described or explained by a naturalistic analysis of the type Leiter advocates. Yet it is absolutely central to Canadian constitutional jurisprudence. In the Manitoba Language Rights case it was the rule of law which provided the only jurisprudential bulwark between Manitoba's having a legal order and its not having one. The Court first noted that, were it pressed to decide, it would have to find that Manitoba had no legal order:

<sup>27</sup> Leiter, "The Naturalistic Turn."

<sup>28</sup> *Reference re Manitoba Language Rights* [1985] 1 S.C.R. 721, 724.

The Court must declare the unilingual Acts of the Legislature of Manitoba to be invalid and of no force and effect. This declaration, however, without more, would create a legal vacuum with consequent legal chaos in the Province of Manitoba. The Manitoba Legislature has, since 1890, enacted nearly all of its laws in English only. The conclusion that all unilingual Acts of the Legislature of Manitoba are invalid and of no force or effect means that the positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 is destroyed and the rights, obligations and any other effects arising under these laws are invalid and unenforceable. From the date of this judgment, the Province of Manitoba has an invalid and therefore ineffectual legal system until the Legislature is able to translate, re-enact, print and publish its current laws in both official languages.<sup>29</sup>

In the next paragraph, however, the Court suggests that it is “necessary, in order to preserve the rule of law, to deem temporarily valid and effective the Acts of the Manitoba Legislature, which would be currently in force were it not for their constitutional defect.”<sup>30</sup> Although the concept of the rule of law is explicitly posited in case law and in constitutional documents, it is not something which can be explained by “cutting the joints of the social world” such that its political/ideological force is ignored.

A similar argument against Leiter’s support of Hard Positivist explanatory concepts might be made with regard to the putative morality of a legal system. Consider the old jurisprudential chestnut of the Nazi regime’s supposed legal system. Surely the fact that it is *difficult* to determine whether a “borderline case” of a legal system counts *as* a legal system is not a good reason for a legal theorist to presuppose that such difficult or recalcitrant data merits exclusion from consideration, or should simply be defined-away to further empirical study and avoid uncertainty? Yet Leiter’s argument in favour of the Hard Positivist concept of law amounts to not much more than a claim to convenience and, moreover, an unreasonable insistence (given the subject matter) on evidentiary certainty.

Leiter’s attempt to invoke a presumption in favour of generality is more sensible, but equally mistaken. He suggests that

the legal/non-legal demarcation in empirical social science usually reflects more general explanatory premises about the psycho-social

---

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

factors that account for behavior, well beyond the realm of the legal. The motivation for demarcating the legal/non-legal in essentially Hard Positivist terms is, for most social scientists, to effect an explanatory unification of legal phenomena with other political and social behavior.<sup>31</sup>

One need not impugn the motivation or even the effectiveness of social-scientific inquiry to understand why that form of inquiry may not be of much help to legal theory. It is good that social scientists also aim to develop general and ever more comprehensive explanations. Yet those explanations elucidate some features of law at the expense of others. Just as the political scientist's explanatory concept of a constitution can obscure the role of Canada's Charter as a typical feature of modern constitutional legal systems, the social scientist's focus on observable "political and social behavior" relies upon assumptions about what counts as political or social behaviour. Of course, inquiry cannot begin without such assumptions, and different explanatory aims may require different assumptions. But that is a reason which counts *against* choosing an explanatory concept according to the assumptions of other types of inquiry.

## 6.4 Constitutional Perspectives

### Written and Unwritten Rules

A legal theory whose "picture of courts . . . fits them to a broader naturalistic conception of the world in which deterministic causes rule, and in which volitional agency plays little or no explanatory role,"<sup>32</sup> is unhelpful for enabling us understand law in light of the social practices of a judge, lawyer, or citizen who is appealing to her (supposed) constitutional rights, however powerful a non-volitional, radically empirical theory might be at explaining cause-and-effect relationships. To see why this is so, let us reconsider our earlier example: Canada's legal system. Furthermore, let us examine those features of Canadian legal practices which a naturalistic jurisprudence cannot fully explain: its participants' conceptions. And let us consider these conceptions not only when they are explicitly specified in law, but also as they are reflected in the activities and efforts which make law, and Canadian

---

<sup>31</sup> Leiter, "The Naturalistic Turn."

<sup>32</sup> Leiter, "Legal Realism and Hard Positivism", 370.



law in particular, possible. Earlier I suggested that a commitment to the rule of law is part and parcel of a legal system, but that Leiter's pedigree criteria of what does or does not count as a "law explanatory factor" cannot describe, much less explain, that commitment. Now I want to suggest that a naturalized jurisprudence which cuts the joints of the social world in strictly empirical terms cannot account for another significant feature of modern legal systems: the legal right to vote.

To consider the general idea of a legal right to vote, and in particular what that right is as it is actualized in Canada, we must first very careful not to presume that only one participant-level conception is part of Canadian legal practices or institutions, or of the social practices or institutions directly related to them. Now that we are analysing the participant- or object-level—the actual social practices and institutions which appear *prima facie* to be part of or directly related to Canada's legal system—we should also keep in mind the fact that we are aiming to develop an account of that phenomenon as it actually is. We are not trying to discipline or otherwise correct the conception or conceptions therein by imposing or replacing them with our own theoretical conceptions. In fact, at this point in our analysis we do not yet have a working theoretical conception of our own, never mind a considered opinion regarding the truth, accuracy, conceptual coherence, or moral worth of the various possible conceptions.

What better place to begin than with some comments by the Supreme Court of Canada's regarding Canadians' legal right to vote? To set up the context of the voting franchise in Canada, and to anticipate some arguments we shall encounter in the next chapter, let us briefly digress so as to consider the elements of Canada's constitution. It shall become clear that some of these are the very sort of "non-law explanatory factors" which naturalistic jurisprudence ignores.

In *Reference re Resolution to Amend the Constitution of Canada*<sup>33</sup> the Court distinguished between two types of constitutional rules: written and unwritten. "Those parts of the Constitution of Canada which are composed of statutory rules and common law rules are generically referred to as the *law of the Constitution*."<sup>34</sup> Section 9 reads: "The Executive government

<sup>33</sup> [1981] 1 SCR 753.

<sup>34</sup> *Ibid.* The example used is that of Sections 9 and 15 of the *British North America Act*. The B.N.A. Act was Canada's primary written constitutional document until 1982, when Canada's constitution was "patriated"—freed from its (at that point wholly symbolic) subservience to the ruling queen or king of Britain—and the *Constitution*

and authority of and over Canada is hereby declared to continue and be vested in the Queen.” As the Court noted, the practical implications of this provision for “Executive government and authority” are somewhat unclear. Hence “one must look to the common law to find out what they are, apart from authority delegated to the Executive by statute.”<sup>35</sup> And so, in the opinion of the Supreme Court of Canada, Canadian constitutional law comprises both legislative enactments and rules of common law. Common law rules acquire a written form when they are recognized in judicial decisions. These decisions become precedents, or what is often called ‘case law’. We can thus say that the “statutory rules and common law rules” which make-up Canadian constitutional law are (according to the Supreme Court of Canada) always written or source-based rules. For now we shall leave aside the question of whether the Court’s account of ‘constitutional law’ is ontologically sound or epistemically correct. Our aim is merely to elucidate the conceptions already at work at the participant level.

In light of its political institutions and their inter-relationships, Canada can be categorized as a federalist parliamentary democracy. Insofar as it is a democracy, the nation-state of Canada would not exist and could not continue to exist in any contemporarily recognizable form unless Canadians had effective voting power. In Canada, however, there is a paradox regarding the *efficacy* of the legal right to vote. In order to explain how Canadians’ legal right to vote actually effects a change of government, the Court makes reference to another category of the elements of the Canadian constitution—a category distinct from ‘constitutional law’.

Canadians’ legal right to vote is paradoxical in that it is *merely* posited. I say “merely posited” because, in Canada, the efficacy of one’s valid vote is legally unenforceable. The Court rather ironically observes that

many Canadians would perhaps be surprised to learn that important parts of the Constitution of Canada, *with which they are the most familiar* because they are directly involved when they exercise their right to vote at federal and provincial elections, are nowhere to be found in the law of the Constitution. For instance, it is a *fundamental requirement of the Constitution* that if the Opposition obtains the majority at the polls, the government must tender its resignation

---

*Act, 1982* incorporated into it. Subsequent to patriation, the B.N.A. Act was renamed the *Constitution Act, 1867*. Since the reference case we are discussing came before the Supreme Court in 1981, they quite correctly used the older term.

<sup>35</sup> *Reference re Resolution to Amend the Constitution of Canada.*

forthwith. But fundamental as it is, this requirement of the Constitution does not form part of the law of the Constitution.<sup>36</sup>

It is a *constitutional convention* which ensures that, should Canadians vote a government out of Parliament, that government will relinquish power.

By law, then, Canadians have the right to vote—yet there is nothing in Canadian positive law to ensure that use of this right can force a change of government. If a Canadian citizen were denied his right to vote, he could go to court and obtain a legal remedy. But that legal remedy would pertain only to having the legal right to vote; the remedy would not and could not (according to Canadian positive law) ensure the efficacy of that right. If, for instance, every Canadian of voting age exercised his or her legal right to vote in a federal election, and it were the case that every single vote was for the opposing rather than the ruling party, and it were also the case that the ruling party refused to step down and continued, instead, to act as the official government—if all these facts were to be true—then there is absolutely nothing in Canadian law that could be done to directly force the ruling party to relinquish power. Nor, according to the Court, does the law of the Canadian constitution provide for a number of other “essential rules of the Constitution” upon which Canadians depend and which they would be quite surprised to see broken.<sup>37</sup>

Clearly it is the case that Canadian constitutional conventions are very important to the political life of the nation. Yet the basis of a constitutional convention is not positive law in the strict sense—law *set down* in writing or by pronouncement—but rather “custom and precedent” where precedent is understood as accepted but unwritten rules of institutional practice.<sup>38</sup> A significant characteristic of Canadian constitutional conventions is that they exist “merely” as a continuing historical practice on the part of legislative officials. A constitutional convention is a ‘continuing *historical* practice’ rather than simply a ‘continuing practice’ because it is reflectively adhered to. If Canadian legislative officials just happened to switch governments given circumstances similar to those in which governments were changed in

---

<sup>36</sup> *Reference re Resolution to Amend the Constitution of Canada*, emphasis added.

<sup>37</sup> For example, there is no provision in Canadian constitutional law for the Prime Minister of Canada to resign and call an election if and when his own political party fails to support him in a parliamentary vote. This is so despite the clear fact that so-called “votes of non-confidence” have effected changes of government in Canada.

<sup>38</sup> *Ibid.* Constitutional conventions are “usually unwritten rules” although they are sometimes written down, for example in the preamble of constitutional document.

the past, then we would not have a conventional practice which guides the behaviour of the individual members of a group. We would not, in other words, have a convention.<sup>39</sup>

It is worth noting, incidentally, that a strictly empirical social-scientific inquiry into the existence of a particular constitutional convention could not readily observe the difference between a change of government made according to this sort of convention and a change of government made in ignorance of it yet, perhaps coincidentally, in a superficially identical way. This might sound like an extreme example, but the point stands: unwritten conventions based on practices which are reflectively adhered to yet just *done* instead of explicitly *done according to the practice* are not the sort of social practices which are amenable to empirical observation and categorization. And yet, as we can see in this instance, Canadians rely on exactly this sort of convention.

At any rate, what is especially important—what makes a difference at the participant-level—is that constitutional conventions are “precedents established by the institutions of government themselves.”<sup>40</sup> Moreover, according to its Supreme Court, the constitutional conventions of Canada are *not* “in the nature of statutory commands which it is the function and duty of the courts to obey and enforce.”<sup>41</sup> Breaking a constitutional convention invites no formal judicial response, merely the certainty of widespread disapprobation and severe criticism.

The existence of a legal right to vote is a characteristic feature of the legal systems of modern democracies. An account of legal rights in modern democratic societies must surely consider the right to vote if it is to be thorough descriptive explanation of how such societies work. A descriptive-explanatory theory of law may not need to describe and explain the concept of a legal right to vote for, after all, being a democratic nation is not a necessary condition for having a legal system. But a good general theory of law must give an account of legal rights, or of the practices which underlay what we call “legal rights,” and this account ought in principle to be capable

---

<sup>39</sup> At this point it is not important to establish the exact type or types of convention. A constitutional convention could be a ‘convergent practice’ or a ‘shared co-operative activity’ or a ‘constitutive convention.’

<sup>40</sup> *Ibid.*

<sup>41</sup> “The conventional rules of the Constitution present one striking peculiarity. In contradistinction to the laws of the Constitution, they are not enforced by the courts” (*Ibid.*)

of dealing with actual existing legal rights, such as Canadians' right to vote.

## Participant Perspectives

Three significant fixed points of reference arise from our observations regarding the apparent state of just one aspect of Canada's constitution as it was in 1981.<sup>42</sup> Any good descriptive-explanatory account of Canada's constitution (as it then was) must take account of the following points:

- P1* The Supreme Court of Canada explicitly claimed that Canada's constitution consists of both written and unwritten elements, namely *positive law* (including codified principles of common law) and *historical conventions*.
- P2* According to the Court, the *effectiveness* of the legal right to vote is not secured by the adjudicatory officials of Canada's legal system. This is so because its efficacy is not a matter of law at all.
- P3* The so-called *ordinary Canadian's notion of a right to vote* goes beyond the Court's strict definition of constitutional law (which includes only the written elements of Canada's constitution) insofar as the legal right to vote entails, from the perspective of the "ordinary Canadian," that the government is legally obligated to act in accordance with the result of that vote.

*P1 P3* are defensible descriptive claims; they are "fixed points of reference." In other words, they appear to corollate with observable characteristics in the physical world, e.g., the texts produced by the Supreme Court, as well as some basic speculative propositions regarding mental states, e.g., that most Canadians would be surprised to find that they had no legal recourse should a government refuse to step down upon being voted out of power. The three points are thus "fixed" by their presence in a particular context. Additionally, they are "points of reference" insofar as any thoroughgoing descriptive-explanatory account of the relevant pre-theoretical data must make reference to and explain them.

It is at least possible to give such an account without aiming towards a particular moral-political result, and in the process of developing that ac-

---

<sup>42</sup> *Reference re Resolution to Amend the Canadian Constitution* predates the Canadian *Charter of Rights and Freedoms*.

count some interesting conceptual questions will arise.<sup>43</sup> *P1*–*P3* are significant features of Canadian institutional structures and socio-political practices. *P1* speaks to the relationship between positive law and the Canadian political system, as the Supreme Court of Canada understands it. *P2* reflects, among other things, the limits of legal-judicial authority in Canada. *P3* signals an important difference between what ordinary Canadians take to be part of the content of their legal right to vote, and what the supreme judicial authority considers that content to be. We could say ‘effectiveness’ rather than ‘content’ and *P3* would still stand. (I use the term ‘content’ in order to anticipate arguments I address in the next section.) A legal positivist could pursue many different lines of inquiry by focusing on these fixed points of reference, but *P2* and *P3* entail one particularly important observation, namely that the ordinary Canadian’s understanding of a legal right to vote *contradicts* the Supreme Court’s understanding of that legal right. This is a simple observation, yet it leads directly to important methodological issues. Some are familiar, but at least one is usually overlooked.

The first of the familiar methodological issues has to do with the general and descriptive aims of positivist legal theory. Traditional positivists aim to describe and explain a type of common yet complex social institution ordinarily referred to as a legal system. At least some positivists also aim to develop a *general* theory of law—a theory which accounts for the necessary features of all legal systems wherever and whenever they exist. A general theory of this sort which also purports to be *descriptive*, and which does not identify what is or is not juridical law according to a stipulative definition (as Ciceronian legal theorists have done), must take its cues from extant legal systems in order to develop a suitably abstract and general account of law. A general and descriptive theory of law, in other words, must reach its theoretical conclusions by considering what appear to be actual legal practices and institutions. Hence the boundaries of what does or does not count as an actual legal practice or institution are not set *a priori*, but are as it were “discovered” through the process of theoretical inquiry.

Another by now familiar methodological issue is the methodological principle of descriptive/conceptual reciprocity. It is one thing to allow that the abstract, generalized account of law has flexible boundaries in the initial

---

<sup>43</sup> For example: “Given that it is posited in law but legally unactionable, is a Canadian citizen’s right to vote properly characterized as a legal right?”; “Can a legal right’s efficaciousness depend on an historical convention?”; “Ought we to distinguish between the form or appearance of a legal right and its content or force?”

stages of theoretical inquiry. It is, however, quite another matter to know when to make a conclusive claim regarding the real status of any particular practice or institution which initially appears to be a legal system. The descriptive claims made by *P2* and *P3* are not abstract or general. Rather than stating true propositions about the nature of legal systems, *P2* and *P3* are descriptive claims made on the basis of an empirical observation of what may be an actual legal system. Taken as simple observations, *P2* and *P3* are unproblematic. To an external observer of the context in which they apply, they are merely two features amongst many in a vast amount of theoretical data having to do with the modern nation-state of Canada. They are reports of what the Supreme Court of Canada says is the case, and an observation of (or a speculation regarding) what ordinary Canadians seem to assume is the case. To a legal theorist, however, these same observations are data-points which appear (at least initially) to relate to the very idea of a legal system. They are theoretically significant in part *because* of the theorist's provisional definition of law.

Here is the methodological issue which is often overlooked: from the legal-theoretical perspective of one who aims to develop a descriptive and general account of juridical law, it is absolutely necessary to account for the difference between the Supreme Court's view of the content of the legal right to vote, and the ordinary Canadian's view of that right. Why? The concern here is not just that ordinary Canadians have a particular (possibly mistaken) conception of their right to vote; rather, the meta-theoretical concern is that this participant-level conception is part of what makes possible the social practices of voting and legislating. Hence it is important to account for that conception regardless of its epistemic standing, either with regard to the very idea of legal rights or more specifically with regard to the actual legal rights given by Canadian law. Likewise, the Supreme Court's conception must also be taken into account. Although it too may be mistaken, it is part of and reflects the social practice of adjudication.

In the Canadian *legal system*, the Court's conception has more *force*. In that context, the ordinary conception is simply mistaken. In the Canadian *political system*, however, we might reasonably infer that it is the ordinary conception which has more force. If the citizens of Canada vote the ruling political party out of office, that party will leave not because it has a legal duty to do so, nor merely out of the desire to continue an historical convention, but mostly because the political consequences of ignoring the ordinary conception of the right to vote would be tantamount to revolution. Thus *P2*

and *P3* entail two very different conceptions of a clearly-specified legal right as well as two very different ways in which that right has efficacy or force. The citizen perceives the right as having a particular content or power or force in virtue of its being a right granted by and (presumably) secured by law. The Supreme Court of Canada, conversely, perceives the legal right as having no legal force, despite its obvious political efficacy. There is a contradiction here, but it is not to be dismissed as a logical contradiction—it is an apparent contradiction between social practices which are necessary to the existence of Canada and its legal system.

Describing and explaining this contradiction presents a challenge for legal theorists. It is exactly the sort of challenge which positivism is well-suited to consider, and which naturalist jurists, among others, cannot readily consider. As legal theorists we want, ideally, a single, suitably general, descriptively accurate concept of what a legal right is. Yet in the Canadian context, different conceptions of the legal right to vote exist at the participant-level. We cannot simply choose one participant-conception over the other, but neither can we dismiss them in favour of an *a priori* concept of our own.

Insofar as they aim to describe law as it is, descriptive-explanatory legal theorists do not advocate the outright dismissal of participant-conceptions. Rather, they aim to account for and make sense of them. On rare occasions, they may decide that a particular participant-conception is necessarily mistaken, but for the most part, the descriptive-explanatory legal theorist attempts to develop explanatory concepts which are sufficiently general as to encompass as many actual participant conceptions as possible.

Nonetheless, for the sake of expediency we might be improperly tempted to find reasons to dismiss either the Supreme Court of Canada's conception or the ordinary Canadian's conception. One temptation might be to distinguish between politics and law. We could say that the ordinary Canadian's conception of the legal right to vote is political rather than legal, hence unworthy of consideration, and that the Supreme Court's conception is legal rather than political, hence worthy of consideration. These claims would be mistaken, however. In the first place, the *actual social practices* which make Canadian political and legal institutions possible are not clearly demarcated as being *either* political *or* legal, so we cannot simply reject the ordinary Canadian's conception because it is "political rather than legal."



Consider the Morgentaler case.<sup>44</sup> Can we say that it was merely political or merely legal? Or is it obvious that a case which effectively decriminalizes abortion has both political and legal consequences, and affects both political and legal social practices? Brian Leiter's naturalistic jurisprudence favours pedigree-criteria of law because criteria of that type are (supposedly) not vague themselves yet exclude vague and difficult-to-observe factors such as political ideology. But, as we noted, adherence to "the rule of law" is in some sense ideological, not to mention difficult to discern or observe in some instances, and is arbitrarily excluded by Leiter's concern for empirically falsifiable results. It is perhaps possible to offer an account of law on that basis, but it will be a very poor account when it comes to describing a legal right to vote in Canada. And it seems to me, at least, that a theory of law which precludes an adequate description of an actual legal right to vote is a poor theory of law.

Rather than "naturalizing" our problem, perhaps we can appeal to an epistemic authority of some type. On questions regarding the actual nature of a Canadian legal right, we might be tempted to grant greater epistemic authority to Canada's supreme court than to the average person on the street. But this theoretical strategy is also a poor one. The Court could, for instance, be mistaken. While we might hesitate to state that this is so with respect to the point in question, we cannot grant general epistemic authority to the Court simply because it is a supreme court. *Perhaps* the Court is the epistemic authority regarding particular points of Canadian law. While this may be so, that fact would not entail that it is an epistemic authority regarding law in general. If we assumed that it is, then we would not be developing an account of what law actually is, but rather an account of what the Canadian Supreme Court says law is.

More importantly, the Court itself has expressed a conception of the franchise such that it (i) exists in virtue of being posited by law, (ii) lacks legal force, (iii) manifests considerable political force. Thus it seems at least possible that an illuminating account of a legal right requires more than giving an account of its strictly positive-law features. That would address (i), and perhaps (ii), but not (iii). Yet (iii) is important even though it is "political rather than legal."

---

<sup>44</sup> *R v. Morgentaler, Smoling and Scott* (1986) 2 OR (2d) 353 (CA, aff'd [1988] 1 SCR 30 (SCC)).

What lessons can we learn from the existence of a contradiction between participant-level conceptions of the Canadian legal right to vote? First, we can note that discerning at least some features of law may require reference to things other than readily observable characteristics, such as pedigreed legal statutes. Few legal theorists would disagree with this point, but we have seen that Leiter's attempt to break through legal-theoretical epistemic uncertainty regarding the concept of legal validity—that is, his attempt to support an exclusive account of the rule of recognition by means of appealing to its social-scientific utility—leads to an unwarranted emphasis on the practicalities of observation. We should not avoid difficult questions simply by choosing an easier route.

Secondly, and more generally, it is clear that a general, descriptive theory of law must have robust explanatory concepts. Those concepts must be able to describe and explain participant-level conceptions which contradict other participant-level conceptions. Moreover, these contradictions must be recognized for what they are rather than meta-theoretically explained away. The Canadian right to vote is an example: we cannot discipline our explanatory concept by choosing between or unreservedly accepting either the Supreme Court's conception or the ordinary Canadian's conception. At the same time, however, we cannot simply impose our own conception in order to disregard the contradictions which seem to appear in our explanatory object. The perspectival features of a legal system ought to be explained rather than explained-away.

# Chapter 7

## Perspectival Differences

In the previous two chapters we saw that a legal theory's goal is relative to its explanatory ambitions. We also saw that it is unwise to consider a legal theory's aims in terms of the false dichotomy of descriptive/normative jurisprudence. Between the extremes of Perry's caricature of methodological positivism and Dworkinian Interpretivism is the route of descriptive-explanatory positivist legal theory, a type of legal theory which does not engage in substantive moral-political argument, nor aim to predict anything, nor depend on a radically empirical methodology.

The positivist *via media*, however, is not one road, but two. It comprises both exclusive and inclusive positivism. Though similar, they are rival theories of law, and we must choose between them. There remain two quite reasonable grounds upon which to base that choice. We could allow that epistemic uncertainty vitiates the meta-theoretical-evaluative criterion of descriptive accuracy, and then make our choice of the basis of which version of positivism most benefits other inquiries, whether those benefits be moral, political, or a matter of observational convenience and evidentiary surety. In Chapters 3-6, however, we saw that there is not only no need to do this, there are good reasons not to do it. The other option for choosing which of the positivist paths to follow requires us to reconsider how descriptive accuracy functions as a meta-theoretical-evaluative criterion. In this chapter we shall follow that path by giving closer consideration to an often underemphasized feature of legal systems: the participant-level perspectives which largely determine how legal practices are understood and developed in their practical context.

## 7.1 The Middle Road

Law is inherently perspectival. A particular legal rule is a statement which, by its very nature, is addressed to someone. Legal rules have a perspectival character regardless of whether they are more specifically defined as commands, imperatives, precepts, or norms. More generally, juridical law is perspectival insofar as it depends upon individuals and institutions to make, change, and enforce particular laws. The significance of the perspectives which arise from this dependence can be seen in the debate surrounding the judicial practice of determining legal validity. All legal positivists agree that law's existence is conceptually separable from its moral force—morally reprehensible laws and legal systems can and do exist—yet positivists disagree with other positivists as well as other legal theorists about how best to describe and explain the role of substantive moral argument in judicial determinations of legal validity or invalidity.

Exclusive positivists like Joseph Raz argue on conceptual grounds that moral criteria cannot be directly incorporated into a legal system's rule of recognition.<sup>1</sup> Judges who uphold or overturn a law on moral grounds are acting in a legally-authorized but nonetheless extra-legal capacity. On this view, where determinations of legal validity involve moral criteria, judges *change* existing law or *make* new law.<sup>2</sup> Conversely, Ronald Dworkin, still one of positivism's most prominent critics, claims that judges often use their moral judgment to determine what the law already is: they must interpret the law so as to make it the morally best law it can be, and doing so requires that they consider and apply principles of political morality. Thus judges do not change existing law or make new law when they find a law to be valid or invalid for moral reasons—they *discover* what the law already is in light of the background principles of political morality.

Exclusive positivism seems to be at odds with the fact that judges making determinations of invalidity based on moral criteria posited in constitutional documents do not see themselves, or at least do not admit to seeing themselves, as overturning already-existing valid laws. Dworkinian Interpretivism, conversely, seems to be at odds with the fact that what

---

<sup>1</sup> See Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries", 160–62. See also *supra* n. 4 on p. 109.

<sup>2</sup> In § 7.5 we shall consider a rather different exclusive positivist account which speaks of the creation of new "rules of construction" rather than new laws.

Dworkin calls “background principles of political morality” are often explicitly posited rather than merely left implicit.

Wil Waluchow established a middle ground between exclusive positivists and Dworkinian interpretivists by showing that “there is a positivistic theory to be found somewhere between Raz’s exclusive positivism and Dworkin’s (natural) law as integrity.”<sup>3</sup> That theory—inclusive legal positivism—gives a very different explanation of why some legal systems appear to incorporate moral criteria of validity. Inclusive positivists reject the exclusive positivist claim that constitutionally-entrenched rights cannot be law in the strict sense; they also reject the Dworkinian claim that positivists cannot adequately account for the adjudicative role of principles of political morality. In short, inclusive legal positivism avoids the descriptive awkwardness of exclusive positivism without asserting that legal theory and legal argumentation *necessarily* require substantive moral argument. Hence, when *Inclusive Legal Positivism* was published more than fifteen years ago, Waluchow hoped to “dispel at least some of the chaos into which general jurisprudence seems to have fallen in recent times.”<sup>4</sup>

Although it has become an influential theory of law, inclusive positivism has not put to rest one of the most important and controversial of contemporary debates in legal theory. That debate centers on what we shall call the *the validity question*: In legal systems where moral criteria for legal validity are explicitly posited, can these criteria actually serve as criteria for legal validity? The validity question is a striking example of the current state of jurisprudential chaos, due in part to the presence of actual legal systems with constitutionally-entrenched legal rights and increasing theoretical interest in such constitutional adjudication.<sup>5</sup> The legal-theoretical debate about legal validity arises from different theoretical claims about the nature of law. John Eekelaar notes that “[t]hree propositions are currently advanced as conceptual truths about law.”<sup>6</sup> He attributes these propositions to exclusive positivists, inclusive positivists, and Dworkinian interpretivists:

The first is the Social Thesis (also called the Sources Thesis or Ex-

---

<sup>3</sup> Waluchow, *Inclusive Legal Positivism*, 3.

<sup>4</sup> *Ibid.* 2.

<sup>5</sup> Giorgio Pino observes that “the concept of legal validity changes radically in constitutional states . . . [because] legal validity is no longer reducible to mere enactment” (“The Place of Legal Positivism in Contemporary Constitutional States”, 534). See also Peter Hulsen, “Back to Basics”.

<sup>6</sup> Eekelaar, “Judges and Citizens: Two Conceptions of Law”, 497.

clusive Positivism): that all law is source based. The second is that all law is either source-based or entailed by source-based law. (This takes two forms, Incorporationism or Inclusive [Soft] Positivism). The third is the Coherence Thesis: that law consists of source-based law together with the morally soundest justification for source-based law. (This could also be referred to as the Interpretivist Thesis).<sup>7</sup>

Eekelaar concludes that Waluchow, alongside other legal theorists,<sup>8</sup> has successfully occupied the middle ground between the Sources Thesis and the Coherence Thesis,<sup>9</sup> even though “Inclusive Positivism has failed to win over supporters of the Social Thesis.”<sup>10</sup> Thus it seems that general jurisprudential chaos continues apace.

As we have already seen, this chaos has prompted Liam Murphy to argue that the traditional positivism’s methodological commitments are no longer viable.<sup>11</sup> Murphy does not claim that positivism is conceptually incoherent or otherwise incapable of describing and explaining law; rather, he notes that positivists exhibit such complete disagreement regarding the boundaries of the concept of law that they might as well choose between exclusive and inclusive positivism according to moral consequences rather than explanatory power. Legal theory is saddled with an equivocal concept of law, hence legal theorists are trapped in a state of *epistemic uncertainty*. There is no middle ground—only a conceptual muddle.

Yet things may not be quite so bad. Murphy’s second-best approach to theory choice assumes that the epistemic uncertainty caused by an equivocal concept of law is an insurmountable conceptual barrier to legal positivists.<sup>12</sup> But that assumption is incorrect. The key to overcoming the equivocal character of the concept of law, and the epistemic uncertainty it gives rise to, can be found by focusing our attention on law’s perspectival features. Eekelaar, for instance, argues that we can reconcile contradictory jurisprudential theses about law by identifying them with the perspectives of the different

---

<sup>7</sup> *Ibid.*

<sup>8</sup> E.g. Jules Coleman and Matthew Kramer.

<sup>9</sup> As Eekelaar’s labels for the various theses show, there is also a significant degree of terminological chaos. Compare Eekelaar’s use of these terms with, for example, Waluchow, “The Weak Social Thesis” and “Herculean Postivism”.

<sup>10</sup> Eekelaar, “Judges and Citizens”, 497, citation omitted.

<sup>11</sup> See *supra* Chapters 1 & 3.

<sup>12</sup> See *supra* § 1.2. Recall, also, that Perry and Leiter each have their own reasons for citing epistemic uncertainty as grounds for abandoning inclusive positivism.

participants within legal systems. The fundamental yet contradictory conceptual claims of inclusive positivists, exclusive positivists, and Dworkinian interpretivists would thus be included in a comprehensive legal theory which allows for some degree of internal contradiction.

Eekelaar's proposal exhibits the growing tendency among legal theorists to lessen the divide between positivists and Dworkinian interpretivists. In *Law's Empire*, Dworkin claimed that "a social practice [like law] creates and assumes a crucial distinction between the acts and thoughts of participants one by one, in that way, and interpreting the practice itself, that is, interpreting what they do collectively."<sup>13</sup> For many reasons, not least of which is Dworkin's unfortunate tendency to present caricatures of his opponents' claims,<sup>14</sup> Dworkin's emphasis on the different participant perspectives within the social practice of law has often gone unnoticed. And yet, as legal theorists like Eekelaar and Avner Levin stress,<sup>15</sup> the perspectives of *different types* of participants are extremely significant features of legal institutions. Recall that in the previous chapter we saw how, in the case of a particular legal system, different participant-level conceptions of the legal right to vote entailed different types and degrees of efficacy. The judges on Canada's highest court suggested that the right has no legally-guaranteed force, but they also noted that politicians in Canada demonstrate through their customary actions that the right has a great deal of political efficacy. Hence ordinary Canadians appeared to confuse the customary political force of their right to vote with a non-existent legal force.

Clearly, the perspectival features of legal systems merit further consideration. The importance (though not necessarily the actual character) of participants' perspectives has been underscored in the general line of debate taken up by Anglo-American legal theorists in last half-century, an argumentative route which runs from Hart's concept of the internal point of view to the Hart/Dworkin debate to a subsequent development of positivism into two main branches.<sup>16</sup> In the remainder of this chapter, we shall consider the

---

<sup>13</sup> Dworkin, *Law's Empire*, 63.

<sup>14</sup> See e.g. Brian Leiter's criticism of Dworkin in "Beyond the Hart/Dworkin Debate," n. 3 at 1.

<sup>15</sup> See Avner Levin, "The Participant Perspective".

<sup>16</sup> See Hart, *The Concept of Law*, especially the Postscript to the second edition, and Dworkin's essays "The Model of Rules I" and "The Model of Rules II". For a representative sampling of the inclusive branch, see both Waluchow, *Inclusive Legal Positivism*, and Coleman, *The Practice of Principle*. The exclusive branch is most prominently de-

importance of participants' perspectives by examining a new exclusive positivist account of determinations of legal validity in constitutional cases, and then determine whether it is exclusive or inclusive positivism which best describes and explains Canadian constitutional adjudication.

## 7.2 A Burden of Proof

Waluchow coined the term 'charter society' to refer to "a nation which, like Canada, has formally adopted a constitutionally-entrenched charter of rights recognizing, and giving legal effect to, certain rights of political morality."<sup>17</sup> These systems appear to grant legal force to principles of political morality. There is no question that constitutional documents such as Canada's *Charter of Rights and Freedoms* appear to establish morally-based limits on legislative, executive, and judicial authority by constraining and/or extending the social practices of creating and enforcing law. Documents like the Charter also appear to establish positive legal rights by describing those rights in what is clearly moral language.

It is important to recall that it is methodologically improper to dismiss out of hand the apparent relation of moral criteria to practical determinations of legal validity—a defensible explanation of the phenomenon is required. As Waluchow notes,

[w]hile we must acknowledge the theoretical possibility that Canadian courts are generally confused about what it is they are about in Charter cases, the burden of proof is surely on one who wishes seriously to urge this possibility as a sufficient reason to dismiss judicial characterizations of judicial practice.<sup>18</sup>

This burden of proof has a two-fold character. It entails, first, a meta-theoretical methodological consideration which is generally accepted: the use of an explanatory concept which contradicts the apparent features of our object of explanation must justify that contradiction. In other words, if a legal theory purports to describe law as it is—that is, to offer a descriptively accurate account—then it must defend those of its conclusions

---

fended by Raz. See e.g. *The Authority of Law*. One might include a third branch, if one counts "ethical positivisms." See e.g. Campbell, *The Legal Theory of Ethical Positivism*, and MacCormick, "A Moralistic Case for A-moralistic Law?"

<sup>17</sup> Waluchow, *Inclusive Legal Positivism*, 95.

<sup>18</sup> *Ibid.* 148.



which appear to contradict the apparent facts of the matter. The burden of proof which the judicial and legislative practices of charter societies place on legal theorists also takes the form of a meta-theoretical evaluative consideration, namely that *ceteris paribus* the congruence of a theory's explanatory claims regarding juridical law with the evident practices of particular legal systems supplies us with a reason to commend that theory. In short, such theories fulfill the meta-theoretical-evaluative criterion of descriptive accuracy by aligning their explanatory concepts with their explanatory objects. Descriptive accuracy, then, is a value which may be taken as a guide for *developing* a legal theory or as a criterion for *evaluating* a legal theory.

The utility or importance of descriptive accuracy, however, is relative to the aims of the theory. Not all legal theories will take up descriptive accuracy as a guide to theory construction. A legal theorist who aims to prescribe how law ought to be rather than to describe law as it is may reject descriptive accuracy insofar as it is ultimately irrelevant to her theoretical goal—she aims only to establish and argue for the morally best legal practices and the morally best legal system. Legal theorists like Hart and Waluchow, however, do aim to describe the general features of actual legal systems. Raz's exclusive positivist account of law is also usually thought of as aiming for and guided by descriptive accuracy. There are, however, reasons to be wary of assuming that the shared descriptive aims of exclusive and inclusive positivists entail an identical set of methodological commitments. Moreover, if the methodological commitments of exclusive positivists differ from those of inclusive positivists, and if their descriptive explanations differ because of those methodological commitments, then we may be able to evaluate the appropriateness of each positivist methodology with respect to the espoused goal of descriptive-explanatory legal theorists, namely the production of descriptively accurate and enlightening explanations of juridical law.

### 7.3 “Prescriptive” Exclusive Positivism?

Julie Dickson has demonstrated that it is unwise to classify every legal theory according to the descriptive/normative dichotomy. Avner Levin raises similar doubts about the prescriptive/descriptive dichotomy. He argues that exclusive and inclusive legal positivism are methodologically distinct in at least one important sense and that this difference gives us hitherto unnoticed grounds for preferring inclusive positivism.

“Waluchow,” Levin notes, “distinguishes between descriptive-explanatory theories on the one hand, and ‘morally committed rationalizations’ on the other.”<sup>19</sup> Dworkin’s legal theory, on this account, is a morally-committed theory which prescribes how law ought to be. Usually inclusive and exclusive positivism are not considered to be morally-committed theories because they do not subject law to direct moral evaluation. And yet, while both exclusive and inclusive positivists claim to describe and explain law in general,<sup>20</sup> Levin argues that only inclusive positivism’s *methodological commitments* are coterminous with Hart’s legal theory. “Waluchow first sees it as a task of legal theory to account for salient features it identifies as generally existing in legal systems (and identifies as significant according to meta-theoretical amoral values), and second, believes that legal theories are to be judged according to the degree in which they fulfill this task.”<sup>21</sup> Raz’s legal theory, according to Levin, is importantly dissimilar in that it does not aim to “to provide a general and descriptive theory of law” but rather offers “an account of law *in light of its purpose as understood from Raz’s political philosophy*, manifested by law’s claim to authority and the salient or essential features of law this perspective on it points out.”<sup>22</sup> In short, Levin argues that the function Raz and other exclusive positivists attribute to legal systems is far more specific than the general function noted by theorists like Hart and Waluchow,<sup>23</sup> and that by doing so exclusive positivists import a *prescriptive* methodology into what is ordinarily taken to be a descriptive-explanatory theory.

Calling Raz’s legal theory ‘prescriptive’ is misleading,<sup>24</sup> but Levin’s argument does raise an important point. Recent debates about the methodology of legal theory appear to confirm Levin’s observation that the descriptive/prescriptive dichotomy is problematic. Recall, for example, our evaluation of Perry’s discussion of “methodological positivism.”<sup>25</sup> Like ourselves,

<sup>19</sup> Levin, “The Participant Perspective”, 584.

<sup>20</sup> See *supra* § 3.3.

<sup>21</sup> Levin, “The Participant Perspective”, 586.

<sup>22</sup> *Ibid.* 589, emphasis added.

<sup>23</sup> Hart considered it “quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct” (*The Concept of Law*, 248–49).

<sup>24</sup> Not everyone agrees. Richard Halton argues that Raz’s legal theory is a form of “moral attitude positivism.” See “Positivism and the Internal Point of View”. Cf. S. Aiyar, “The Problem of Law’s Authority”.

<sup>25</sup> See *supra* Chapter 4.

Levin doubts whether “Hart’s paramount goal was to provide an account of law’s normativity” and, accordingly, concludes that “Perry’s characterization of descriptive-explanatory methodology as inadequate for legal theory rests on an understanding of this methodology that is too narrow.”<sup>26</sup> Levin is clearly not a supporter of Perry’s caricature of inclusive positivism, but unlike Waluchow and most other legal theorists who take exclusive positivism to be the descriptive-explanatory rival of inclusive positivism, Levin holds that exclusive positivism is a *prescriptive* legal theory insofar as its explanation of law is informed by, and in some instances pre-determined by, the *function* it attributes to legal systems. He argues that exclusive positivism predetermines its own explanation of law and that, when pressed to describe particular observable features of law which contradict that the explanatory concepts supporting that explanation, exclusive positivists simply suggest that the participants of legal systems are systematically confused about the character of their own social practices.

Legal theories are usually called ‘prescriptive’ when they rely on substantive moral argument to determine the values law ought to and does realize, including the valuable functions it might serve. Dworkin’s theory is clearly prescriptive in that sense: law must justify coercion and must be the morally best it can be, thus we can only describe it insofar as we also directly evaluate its moral merits. Raz’s exclusive positivism, however, is clearly *not* prescriptive in that respect.<sup>27</sup> To justify his claim that Raz’s legal theory is prescriptive, Levin notes that so-called prescriptive theories of law evince two features:

---

<sup>26</sup> Levin, “The Participant Perspective”, 568, 582. Perhaps the most striking parallel between Levin’s conclusions and our own is apparent in light of Hart’s insistence that “the objective standing of moral judgements” ought to be left open by (descriptive-explanatory) legal theory. (See Hart, *The Concept of Law*, 254.) Earlier, I argued that Hart’s comment about “soft positivist provisions” was simply an observation that, given meta-ethical epistemic uncertainty regarding the objectivity of moral values, we are uncertain as to whether soft-positivist provisions *really do* make reference to objective morality or whether they make reference only to a social convention present in that particular society, a convention which is understood in that context to involve reference to objective morality. (See *supra* p. 117.) Levin also believes that “Hart’s methodology is the reason why Hart believed these questions had better be left open, undecided, by legal theory, for any form of answer would have resulted in a moral evaluation of the law” (“The Participant Perspective”, 576).

<sup>27</sup> One can ascribe a function to law without that function being normative (in the sense of morally-loaded). See Waluchow, *Inclusive Legal Positivism*, 117–23.

1. “Prescriptive theories of law are offered as part of a more comprehensive philosophy of politics and society in general, and in this manner the attempt of these theories to explain the normativity of law is situated in a broader social and political context.”<sup>28</sup>
2. “Prescriptive methodology dictates therefore not only the existence of a participant perspective in support of an account of the normativity of law, but the content (i.e., the purpose participants take the law to have) of this perspective as well . . .”<sup>29</sup>

Here Levin has provided meta-theoretical grounds for considering Dworkinian Interpretivism and Raz’s exclusive positivism to be prescriptive.

Levin suggests that when a theory of law is informed by a social-political theory, its explanation of law may be predetermined by the “parent” theory: just as an ethical theory may predetermine the character of an explanation of juridical law (e.g., “Human laws must adhere to divine law, else they are not really laws at all”), a social-political theory can prescribe the explanatory categories of a legal-theoretical explanation of juridical law (e.g., “A constitution is simply the formal relation of legislative, executive, and judicial powers”). Levin’s argument, then, has meta-theoretical relational and meta-theoretical methodological characteristics. He is not asking whether we must use some other theory in order to understand law, but rather is suggesting that when our legal theory is informed by a more general social or political theory, then in at least some instances our description and explanation of law is subject to *a priori* restrictions.

Levin’s second point also speaks to a meta-theoretical methodological issue. He asks us to consider whether Raz’s theory can be properly evaluated according to the criterion of descriptive accuracy. If it is the case that the perspectival features of law are important and merit explanation without prejudice, then a legal theory which predetermines the *content* of a particular participant perspective—as Raz’s theory supposedly does—is on very thin ice indeed. Such a theory necessarily entails, prior to any examination of actual participant perspectives, what at least some of those perspectives must be; most importantly, it entails that certain participant perspectives are necessarily mistaken.

Do these two points give us sufficient reason to join Levin in calling Raz’s legal theory ‘prescriptive’? Certainly the first point does not. Re-

<sup>28</sup> Levin, “The Participant Perspective”, 593.

<sup>29</sup> *Ibid.* 594.

call that, along with Dixon, we identified the ambiguities of the descriptive/normative dichotomy, such that descriptive-explanatory legal theories are in some sense normative in that they (i) use meta-theoretical-evaluative criteria as norms of theory construction and evaluation, and (ii) take account of the morally relevant features of law by considering the role of moral norms within (at least some) legal systems. A good description of some legal systems requires us to make indirect moral evaluations of their features, hence our explanations of juridical law are informed to some degree by our understanding of what is or is not morally relevant or significant, and so a good descriptive-explanatory legal theory must employ moral concepts to identify and describe important features of law. If our reasoning is sound with regard to the appropriate role of moral theory within the indirectly evaluative descriptive-explanatory methodology, then it is likely also sound with regard to the appropriate role of social-political theories.

However, Levin's second claim—that it is inappropriate to place *a priori* restrictions on the content of participant perspectives—may give reason to pause. To what degree should we, as descriptive-explanatory legal theorists, rely on social-political theories and theoretical conclusions? A methodological minimalist will not use explanatory concepts which clearly contradict the observable features of law, including participants' perspectives, without a very good reason. This is especially evident when we consider the views different participants may have about what law's function is (for them). Of course, some participants may be mistaken in their own views, just as ordinary Canadians presuppose that their effective legal right to vote is enforceable by the courts. And yet the force of that general misunderstanding is significant nonetheless. Accounting for the role of participant-level conceptions—even and perhaps *especially* when they are mistaken—is extremely challenging.

So long as we aim to describe law as it is, we must take account of a variety of participant perspectives. Once again, as descriptive-explanatory legal theorists we can see the need for the presumption in favour of generality. Rather than deciding *ab initio* what law is, we want to develop an explanation which is general enough to be robust in the face of epistemic uncertainty yet specific enough to describe and explain actual legal systems. Levin's second point speaks to the need to be aware of balancing, on the one hand, the benefits of a general legal theory which is relatively independent of controversial moral or social-political theories, and on the other hand, the benefits of a thoroughgoing explanation of juridical law.

The relevant issue is whether Raz's theory imposes undue restrictions on a descriptive explanation of law. Does exclusive positivism stray from the descriptive-explanatory methodology in order to address questions and puzzles which require substantive value judgements (where those values are not "epistemic norms" or meta-theoretical-evaluative criteria)? Levin certainly believes so: "what separates Raz from Hart and draws him closer to Dworkin is his employment of not only meta-theoretical values in conducting this evaluation of law (of the sort that Hart, Coleman, and Waluchow mention) but also of values that emanate from Raz's political philosophy."<sup>30</sup> Raz, according to Levin, evaluates law in light of a necessary function which he imports from his political theory. To identify and clarify the "'salient', 'essential', or 'distinctive' features of law,"<sup>31</sup> Raz relies on his theory of authority<sup>32</sup> and his claim that the function of law is to mediate between persons and reasons in a very particular way. "It is the ability to claim authority," Levin correctly observes, "that dictates . . . that only social sources identify what the law is."<sup>33</sup>

If Raz is correct, and the nature of legal authority is such that it must exclude the consideration of moral reasons, then it follows that exclusive positivism is a better account of law than inclusive positivism since the latter fails to preclude the possibility that moral reasons may be used in making determinations of legal validity. Yet we are epistemically uncertain about the true character of legal authority.<sup>34</sup> There are a number of alternate or supplementary conceptions of authority have been offered. Perhaps "issuing . . . directives that exclude all moral factors is only one possible way in which practical authority can be exercised"<sup>35</sup> and so the aim of a practical authority is not always what Raz takes it to be.<sup>36</sup>

It is not possible to settle the debate about the character of legal au-

---

<sup>30</sup> *Ibid.* 605.

<sup>31</sup> *Ibid.* 594.

<sup>32</sup> "Law, for Raz, and laws' normativity, are defined by law's claim to authority. Its structure as a social institution is constructed by Raz on the basis of this claim and is a result of this claim" (*Ibid.* 606). Coleman also observes that "the theory of law for the exclusive positivist is driven by the theory of authority" ("Incorporationism, Conventionality, and the Practical Difference Thesis", 133).

<sup>33</sup> Levin, "The Participant Perspective", 606.

<sup>34</sup> See *supra* § 5.3.

<sup>35</sup> Waluchow, "Authority and the Practical Difference Thesis", 49.

<sup>36</sup> "Settling disputes conclusively is neither the only, nor a necessary, goal of the exercise of practical authority" (*ibid.*).

thority here, but it does highlight the need for a general legal theory which allows for a consideration of all the relevant contexts where legal authority has force. If “[t]he kind of reason provided by an authority’s directive or pronouncement depends very much on context”<sup>37</sup> then we ought to consider the different participant perspectives to be a part of each context.<sup>38</sup> In fact, that is exactly John Eekelaar would have us do when he claims that the seemingly contradictory exclusive and inclusive positivist accounts of legal validity “are reconcilable by recognizing that the institutional role played by the law in mediating between citizen and state differs from the role it plays in guiding judges.”<sup>39</sup> Instead of developing a super-theory which incorporates exclusive and inclusive positivism as well as Dworkinian Interpretivism, however, a more straightforward approach is to develop inclusive positivism so as to make it more able to describe and explain the contextual/perspectival features of law.

At this point we need only note the importance of law’s perspectival features and the fact that exclusive positivism is bound-up with a contestable (though defensible) concept of authority. Since there is nothing methodologically improper in using moral or social-political explanatory concepts to further our understanding of law, we need not dismiss exclusive positivism as being unreasonably “prescriptive” simply because its account of authority is, arguably, grounded in a moral-political theory. In point of fact, it is more accurate to say that Raz’s conception of authority is grounded in a theory of practical reason rather than a political theory. Raz thinks that law is the kind of thing which must be capable of possessing authority, but he does not claim that any particular legal system actually does, or actually must, possess that authority. So far as Raz is concerned, it is entirely possible that every actual legal system lacks the authority it must be capable of having: legal systems must have the capacity to possess legitimate authority, but perhaps there never ever has been nor ever will be a morally or politically legitimate legal system.

Thus we need not concur with Levin’s first claim. Exclusive positivism’s methodological approach does not fail to be a descriptive-explanatory one

---

<sup>37</sup> *Ibid.* 56.

<sup>38</sup> See e.g. Waluchow’s response (*ibid.* 52–54) to Tim Dare’s defence of Raz’s theory of authority (Dare, “Wilfrid Waluchow and the Argument from Authority”), where Waluchow distinguishes between objective and subjective senses of ‘exclude’ by noting the difference between “being” and “being treated as” an exclusionary reason for action.

<sup>39</sup> Eekelaar, “Judges and Citizens”, 499.

merely because it employs a Razian conception of authority informed by a theory of politics or of practical reason. Levin's second claim, however, deserves careful consideration. If exclusive positivists are, for whatever reason, willing to forgo descriptive accuracy in favour of some other guide to theory construction or evaluation, then it is far more likely that inclusive positivism is the better descriptive-explanatory theory of law.

## 7.4 The Descriptive-Explanatory Challenge

A concrete example is in order, one which brings descriptive-accuracy to the foreground. Let us consider two competing positivist descriptive explanations of Canadian constitutional adjudication. Michael Giudice has argued that "exclusive positivism... provides a superior descriptive-explanatory account of Charter cases" because "appeals to reasons of political morality in Charter cases are best understood as entailing *changes* to pre-existing law."<sup>40</sup> Giudice's argument directly challenges Waluchow's claim that inclusive positivism "offers a much better account of certain common features of law"<sup>41</sup> because it "provides a better account of the moral argument which takes place in charter challenges."<sup>42</sup>

In *Inclusive Legal Positivism*, Waluchow takes up the fact of moral-legal debate as it presents itself in Canada's system of constitutional adjudication.<sup>43</sup> He argues that Raz's legal theory, when applied to Canada's charter cases, contradicts the general understanding of participants within that system. Within that system, Waluchow observes,

it is generally understood ... that the violation of a charter right is not merely a legitimate reason for a court's declaring that a law or decision shall henceforth be invalid, but rather a ground for the claim that it *already is* invalid, and that a court therefore has the legal-adjudicative obligation to declare it so.<sup>44</sup>

---

<sup>40</sup> Giudice, "Unconstitutionality, Invalidity, and Charter Challenges", 69, emphasis added.

<sup>41</sup> Waluchow, *Inclusive Legal Positivism*, 79.

<sup>42</sup> *Ibid.* 143.

<sup>43</sup> See *ibid.* Chapter 5. See also van der Burg, "The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues".

<sup>44</sup> *Ibid.* 96, emphasis added.



In short, a legal rule purporting to be a valid Canadian law will be found invalid by a court of competent jurisdiction if that legal rule unjustifiably violates a charter right.

The inclusive positivist account of contemporary Canadian constitutional adjudication holds that a purported law which is deemed invalid by a Canadian court because of a Charter violation is understood by that court to be an illegitimate legal rule which lacked or lost legitimacy from the moment it violated the Charter. This is to say that, in Canada, the judicial practice of determining that a purported law is invalid due to an unjustifiable infringement of a charter right entails that the court's decision is not a *new* interpretation of the purported law which changes its validity status *at the time of the decision*, but rather is a description of the purported law's status *prior to the decision*. That the Charter invalidates efficacious legal rules even prior to a judicial recognition of invalidity is, according to Waluchow, a fact about how participants in the Canadian legal systems actually understand their own legal practices. It follows that a descriptive-explanatory legal theory must account for this fact. Moreover, this fact is directly relevant to current debates between supporters of the Sources Thesis and supporters of the Social Thesis.

Waluchow aims to discredit the Sources Thesis by means of a descriptive claim: "it's the conflict with the constitutionally recognized moral right that makes a law or decision legally invalid, not the (morally-neutral) fact that a judge has declared it to be invalid in a trial testing its validity."<sup>45</sup> This claim, if correct, has at least three significant implications for the exclusive/inclusive positivist debate.

1. It highlights a contradiction between the exclusive positivist explanatory concept of authority and legal authority as it seems to be understood by the participants in at least one charter society. This raises the question of whether the exclusive positivist concept of legal authority is the solely correct one.
2. Waluchow's descriptive claim also speaks to the question of the veracity of the Sources Thesis, which holds that the existence/validity of a law never directly depends on moral constraints.
3. The descriptive claim also raises the issue of what degree of explanatory weight we are willing to grant to participants' own understand-

---

<sup>45</sup> *Ibid.*

ings of their legal practices, such that we, as legal theorists, might modify our conceptual claims in light of participant-level understandings of legal practices.

Each of these implications signals the relationship between the meta-theoretical-evaluative criterion of descriptive accuracy and the methodological principle of descriptive/conceptual reciprocity.

We have already come to terms with (1). The Razian account is clearly not the only reasonable account of legal authority. Razian authority may be completely absent from actual legal practices or, more likely, it may correspond with just one facet of actual legal authority. Our analysis of charter challenges may, by means of defensible conclusions, cast doubt on or give further credit to the exclusive positivist account of law, but at the present time epistemic uncertainty entails that we cannot appeal directly to the Razian conception of authority to settle the true status of charter challenges. Moreover, the existence and efficaciousness of participant understandings which contradict Raz's conception entail a burden of proof which exclusive positivists must meet.

Can an argument based on the question raised by (2) settle the issue of which positivist account of law is best? Again, this seems unlikely. As descriptive-explanatory theorists who value descriptive accuracy more highly than other meta-theoretical evaluative criteria, such as Leiter's notion of interdisciplinary assistance, the existence of charter challenges forces us to re-evaluate the Sources Thesis as both a conceptual claim about law ("The existence of law is a matter of amoral observable social facts") and as a methodological guide ("When developing a descriptive explanation of law, we ought to consider only amoral observable social facts to be part of existing law"). If, as legal theorists, we can always determine the existence and validity of a law according to observable amoral facts, then the Sources Thesis is not only a true claim about the nature of law, it is also an important methodological guide for descriptive-explanatory legal theorists. Yet the conceptual claim is sound only if the methodological approach which secures it is appropriate, and the methodological approach is appropriate only if the conceptual claim is true. If charter challenges do in fact signal the existence of moral criteria for non-discretionary judicial determinations of legal validity, then we would be foolish indeed to employ a methodology which obscures that fact; but if charter challenges are not what they *prima facie* appear to be, then we would be foolish to take them as a reason to

deny the Social Thesis. This relationship between our theoretical goals and the methodological means to achieve those goals precludes any simple determination of the truth of the Sources thesis, and so also precludes any easy resolution to the inclusive/exclusive positivist debate on that basis.

Perhaps (3) provides a reason to think that Avner Levin's argument can settle the inclusive/exclusive debate about charter challenges. Levin suggested that Raz's legal theory improperly predetermines the possible content of participants' understandings of their own legal practices. Conversely, inclusive positivism's methodological approach and explanatory concepts do not dictate the content of participant-level conceptions. Inclusive positivism admits of the possibility that, if the society in Leiter's Extreme Scenario were able to consider "natural law" rights as constitutional rights, then that society would have a functioning legal system, one which is indeed dependent on *their* conceptions of and practices regarding "natural law." Inclusive positivism is, therefore, a legal-theoretical approach which is open to innumerable contingent instances of political morality; it employs a methodologically minimalist and presumptively general approach to describing and explaining law; and it leaves the question of the *actual* moral status of a charter society's understanding open to further investigation. Thus, according to Levin, only inclusive positivism allows us to avoid predetermining the nature of the actual participant-level practices which make juridical law possible. Yet exclusive positivists can still account for the apparent existence of judicial determinations of legal invalidity according to moral criteria. It is open to the exclusive positivist to argue that judicial determinations of this type involve a legally-authorized appeal to extra-legal criteria. There is room for such determinations within an exclusive positivist account of charter *societies* even if, properly speaking, such determinations not part of charter *systems*.

It seems wise to admit that at least some aspects of charter systems fall within the penumbra of uncertainty surrounding legal practices. Inclusive positivists consider the judicial practices apparent in charter challenges to be part and parcel of some legal systems, while exclusive positivists see them as social practices which are relevant to legal systems, but which go beyond legal practices *in strictu sensu* since they lapse into the extra-legal realm of moral-political criteria. Both inclusive and exclusive positivism can *describe* the Charter cases which abide in this penumbra of epistemic uncertainty. We cannot, however, escape the fact that only one of the two theories is offering an *accurate* account of what is really going on.

## 7.5 Meeting the Descriptive Challenge

By taking up the validity question in light of Canadian charter challenges, and by giving due consideration to the manner in which our legal-theoretical methodology and explanatory concepts may inadvertently prefigure our answer to that question, we can determine whether it is inclusive or exclusive positivism which offers the most accurate account of law, including the fine-grained context of participant-level understandings of their own practices.

The hallmark of inclusive legal positivism is its answer to the validity question: the validity of a legal rule can (but need not) depend on political morality, so that in some legal systems there is a (contingent) fusion of law and morality insofar as legal validity tracks certain participant-level understandings of posited rights of political morality. In charter systems with the practice of judicial review, legal validity is sometimes determined not just by amoral social sources, but also by judges who must reason about the content of posited moral-political principles. Exclusive positivists deny that legal validity can work in this fashion, though they have alternate explanations. Waluchow provides four reasons for concluding that inclusive positivism offers the more accurate descriptive explanation of one charter system in particular, namely the Canadian legal system:

1. The inclusive account is less counter-intuitive than the exclusive account. Canadians believe that they have fundamental freedoms and legal rights which their charter entrenches.<sup>46</sup>
2. The plain-language of the Charter shows that it has a “special institutional force”<sup>47</sup> and clearly posits moral-political rights as legal rights. We have no reason to reinterpret the plain language of the Charter, but exclusive positivists must do so.
3. The inclusive account better describes and explains actual institutional practices in Canada, such as the decision in *Morgentaler* where “the Court discovered that Morgentaler had at all times been acting within his legal rights.”<sup>48</sup> The exclusive account must describe the Court’s decisions as a retroactive invalidation of a hitherto valid

---

<sup>46</sup> *Ibid.* 158–59.

<sup>47</sup> *Ibid.* 159–60.

<sup>48</sup> *Ibid.* 161.

law, even though “[t]here was no recognition by the Court that its declaration had retroactive effect.”<sup>49</sup>

4. The inclusive account explains why section 24(1) of the Charter provides a ground for a legal remedy: legal rules which unjustifiably violate Charter rights are invalid. The exclusive account, on the other hand, cannot offer such an explanation because legal rules which are eventually found to violate a Charter right are, according to the exclusive account, valid laws *until* they are struck-down.<sup>50</sup>

Michael Giudice contests each of Waluchow’s claims and in doing so presents what appears to be a strengthened exclusive positivist account of charter challenges. Giudice argues, first, that exclusive positivism can account for our “ordinary understanding” of the Charter by describing the relevant Charter provisions as interpretive rules (“rules of construction”) which judges are both empowered and obligated to develop and apply. Second, he suggests that the language of the Charter can be understood to signal a distinction between “unconstitutionality” and “invalidity,” and that the exclusive positivist account fits best with this distinction at both the participant-level of legal practices and the legal-theoretical level of providing a descriptive explanation of those practices. Third, Giudice argues that the importance of the objectives inherent in Charter provisions can justify retroactive remedies. Finally, he suggests that these objectives explain the existence of section 24(1) of the Charter as well as the practices which provide legal remedies for Charter infringements.

## Institutional Force

Before considering Giudice’s defence of exclusive positivism, let us take note of a particularly important explanatory concept. It is uncontested that the Canadian Charter exerts an *institutional force* which (i) sets out criteria for valid Canadian law, and (ii) determines what the legal-adjudicative duties of Canadian judges are with respect to laws which violate those criteria. The force of the Charter, that is, its ability to affect the actions and practices of individuals and institutions, is of course contingent on the social practices of contemporary Canadian society. Moreover, that force varies from individual to individual and institution to institution. I propose that we refine

---

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.* 162.

Waluchow's explanatory concept of institutional force. Further distinctions within the concept will not only enable us to offer an improved inclusive account of charter challenges, they will also allow us to better understand some meta-theoretical problems.

We can take our cue from already accepted distinctions within positivist legal theory, namely the distinction between an efficacious authoritative pronouncement and an ineffective one, and the distinction between legal rules which are valid laws and those which are not. Cashing these out in terms of institutional force gives us two descriptive terms:

1. Efficacious authoritative pronouncements, such as legal rules and court decisions, have *effective institutional force*. The Supreme Court of Canada's decision in *Morgentaler*, for instance, has effective institutional force, while the Criminal Code prohibition against procuring a miscarriage lost the effective force it had prior to that decision.
2. Legal rules which have institutional force, and which abide by the criteria for validity of the system of which they are a part, have *legitimate institutional force*.

Let us first consider (1) and (2) from the participant perspective. Effective institutional force is a matter of degree. It is also the facet of institutional force which creates so much difficulty for theories of adjudication. A particular judicial precedent, for instance, can have varying degrees of institutional force depending on both the court which issues the decision and the one which is considering that decision as a precedent. A lower court is generally bound by the precedent of a higher court, but final courts of appeal, such as the Supreme Court of Canada, may overturn their own decisions as well as those of lower courts. Legitimate institutional force does not admit of degree, but it does admit of epistemic uncertainty. Participants may be uncertain as to whether a particular legal rule meets the criteria for validity in that system (and so is a valid law) or whether it fails to meet those criteria (and so is not a valid law). They know, however, that it is necessarily the case that the legal rule is either valid or invalid. When morality becomes part of a system's criteria for validity, as appears to be the case in Canada, then the potential for this type of epistemic uncertainty increases.

From the positivist legal-theoretical perspective, (1) still describes a spectrum of potential or a capacity for the exertion of social power. But

does (2) still map onto the distinction participants make between validity and invalidity? Oddly, it does not. Inclusive positivists hold that legal rules with legitimate institutional force are valid laws; exclusive positivists, however, hold that in some instances efficacious legal rules which clearly do not meet the participants' own posited criteria of legal validity (for that system) are, nonetheless, valid laws. For the exclusive positivist, the existence and validity of a law are inseparable. A legal rule which is efficacious and which has a clear social source is an existing (hence valid) law. It is of course possible that at some later point the valid law will be invalidated, perhaps by a court or through the process of repeal, but until that time point the efficacious rule is a valid law. Thus epistemic uncertainty regarding the validity of a law is far less likely to be a factor from the legal-theoretical perspective of exclusive positivists than it is to be a factor from the perspective of the participants in a legal system.<sup>51</sup>

It seems, then, that inclusive positivists can offer a descriptive explanation of charter challenges where the terms 'validity' and 'invalidity' appear to more closely correspond to their meaning from the participant perspective, while the descriptive explanations of charter challenges offered by exclusive positivists grant those terms a technical legal-theoretical meaning which diverges from the meaning it has for participants. This difference between exclusive and inclusive positivists is very important indeed.

## Ordinary Understanding

In § 6.1 we saw that legal positivists neither develop nor modify their explanations in light of their own intuitions. It is, then, perhaps unfortunate that Waluchow suggested that the inclusive positivist account of charter challenges was superior in part because it was less "counter-intuitive" than the exclusive positivist account. Nonetheless, Waluchow's claim is a straightforward one: "inclusive positivism allows us to escape a distorted picture of the way in which charters are understood, interpreted, and applied."<sup>52</sup> The inclusive positivist descriptive explanation of charter challenges does not bear the burden of proof which demands a justification for descriptive claims which contradict ordinary (participant-level) understanding.

---

<sup>51</sup> Again, however, this is not to say that Raz claims that the Sources Thesis precludes legal-theoretical or participant-level epistemic uncertainty.

<sup>52</sup> *Ibid.* 140–41.

Conversely, the alternative exclusive account Waluchow describes does carry that burden.<sup>53</sup> Giudice acknowledges that the alternative exclusive account of charter challenges is weak. It suggests that when a Canadian court recognizes and gives force to an pre-existing Charter provision, such as the section 15 provision for “equal protection and equal benefit of the law,” the court is either (i) creating a new legal right applicable to the case before it, or (ii) determining that the case is sufficiently familiar to some prior case such that the legal right created in the prior case is also applicable to the instant one. Thus every case of first instance resulting in a judicial determination that a Charter right or freedom has been violated must also result in the creation of a new legal right in the form of a new law. Since the principle of equality requires substantive moral argument, it cannot be the case (according to most exclusive positivists) that the principle of equality *itself* is a clearly specified legal right whose content can be determined independently of moral argument. In short, the exclusive positivist’s Sources Thesis appears to generate a plethora of case-specific legal rights. A Charter provision never acts as a legal right *per se*; rather, it is merely the substantive moral (hence *extra-legal*) principle which the Charter directs and obligates judges to consider.<sup>54</sup>

The notion that section 15 of the Charter is not itself a legal right but is instead the source of innumerable case-specific legal rights clearly contradicts our ordinary understanding of the Charter. As Waluchow notes, most Canadians understand the Charter to have *already* granted them constitutional rights and freedoms. In *Andrews v. Law Society of B.C.*,<sup>55</sup> for instance, a Canadian court decided that the citizenship requirement for becoming a member of the Law Society was an unreasonable violation of section 15 of the Charter. Inclusive positivists describe that judicial determination as the result of the violation of an *already-existing legal right*. Likewise in *Morgentaler*,<sup>56</sup> where there was a judicial determination that the Canadian Criminal Code prohibition of abortion was of no force and effect because it, too, violated an already-existing Charter right.

<sup>53</sup> For Waluchow’s description of the alternative exclusive positivist account, see *ibid.* 157–58. For ease of reference, I will refer to it as ‘the alternative exclusive account’.

<sup>54</sup> See Raz, *The Concept of a Legal System*, 225–26. Scott Shapiro puts it this way: “Inclusive rules of recognition do not tell judges which moral rules they should apply—they simply tell judges to apply moral rules” (“On Hart’s Way Out,” 178).

<sup>55</sup> [1986] 4 W.W.R. 242 (B.C.C.A.).

<sup>56</sup> [1988] 1 SCR 30.



To show that exclusive positivism can also account for the social fact of Canadians' ordinary understanding of the Charter, Giudice offers a new exclusive positivist description of Charter adjudication without the plethora of contextualized or case-specific legal *rights*. Giudice suggests instead that Charter adjudication often involves the creation of novel *rules of construction* which act to clarify, refine, limit, and extend the pre-existing rights specified in the Charter. In *Andrews*, for instance, the Court's consideration of section 15 of the Charter resulted in "a finding of a legal right to equality possessed by citizens but also as the objective of a directed power of the courts" such that the Court was "obligated to make new rules of law in accordance with the fundamental principle of equality to achieve the objective of equality before and under the law."<sup>57</sup> Giudice thus acknowledges that section 15 grants Canadians a legal right. He also recognizes that judicial determinations and applications of that right often (and in cases of first instance *always*) involve the legally-authorized use of substantive moral argument. In a successful charter challenge, however, the result is not the simple recognition of a pre-existing legal right (as inclusive positivists would suggest) nor is it the creation of a case-specific legal right derived from an extra-legal moral principle (as the alternative exclusive account has it)—it is the creation of a *new legal rule*.

One could argue that the exclusive positivist account is needlessly complex insofar as it replaces the notion of creating case-specific legal rights with case-specific legal rules. That line of argument against exclusive positivism, however, would not aid us in furthering our understanding of law as it is. The actual judicial practice of *stare decisis* seems to be quite amenable to a descriptive explanation which makes use of the idea of a rule of construction. It makes sense to understand each case regarding a different aspect of a particular statute as an instance where a new rule of construction is given, thus allowing for the further development of a general and shared participant-level understanding of that statute. If the explanatory concept of a rule of construction helps us describe and explain non-charter cases, then there is no obvious reason to reject it as an aid to describing and explaining charter cases as well. It may not be necessary for a legal theory to offer a theory of adjudication, but is foolish to develop a legal theory which unreasonably forecloses what appears to be a useful explanatory concept for describing and explaining judicial practices.

---

<sup>57</sup> Giudice, "Unconstitutionality, Invalidity, and Charter Challenges", 74–75.

Our “ordinary understanding” of the Charter is more complicated than might first be thought. While most Canadians do understand the Charter to have established principles of political morality as legal rights, the participant-level actually comprises at least three different perspectives on the Charter. Citizens and residents of Canada may perceive the Charter in one way, yet judges and legislators may perceive it in other ways. These participant perspectives are part and parcel of the social practices which provide for the existence of charter systems, and it is important for a general and descriptive theory of law to leave conceptual space for them. Nonetheless, the ordinary understanding of the Charter, the notion of rules of construction, and the perspectival features of law are best understood in light of the general explanatory concept of law’s *institutional force*.

## Describing Invalidity

As descriptive-explanatory legal theorists, we must at a minimum distinguish between (i) ordinary citizens,<sup>58</sup> (ii) legislators, and (iii) judges. Legislators, judges, and citizens, as well as laws and other legal rules, all have the potential for being vehicles of and subject to that system’s institutional forces. The overall institutional force of a legal system is, moreover, distinct from its moral force. Since a legal system and its rules may be efficacious yet morally reprehensible, we ought not to equate legitimate institutional force with actual moral force.<sup>59</sup>

The explanatory concept of institutional force allows for an account of legal systems where the perspectives of the various participants are given due weight. For example, Waluchow uses it to distinguish between “the obligations and responsibilities of citizens” and “the legal-adjudicative obligations and powers of judges” with respect to a particular law.<sup>60</sup> John Eekelaar proffers a similar distinction in order to account for the fact that “the institutional role played by the law in mediating between citizen and state differs from the role it plays in guiding judges.”<sup>61</sup> Eekelaar further observes

---

<sup>58</sup> By “ordinary citizens” I mean to refer to legal subjects *simpliciter*—those who are not acting in an official role.

<sup>59</sup> Key to the inclusive positivist account of law is the conceptual separability of a law, its institutional force, and its moral force. See Waluchow, *Inclusive Legal Positivism*, chapter 3.

<sup>60</sup> *Ibid.* 33.

<sup>61</sup> Eekelaar, “Judges and Citizens”, 499.

that practicing lawyers will offer different accounts of legal states of affairs when they are consulting with clients rather than presenting arguments in front of judges. “The client will not want to know what, according to the lawyer’s interpretation of the law, the court *should* do, but what it is *likely* to do.”<sup>62</sup> Note that the lawyer’s prediction of what the court is likely to do is not based on what the court ought *morally* to do. Lawyers giving advice to clients do not usually make pronouncements about the moral force of particular laws; instead, they predict of what the court is likely to do is based on the lawyer’s interpretation of positive law or, perhaps more likely, on her opinion of what the court’s interpretation of the relevant positive law is likely to be. In short, lawyers’ expertise comes from their understanding of the effective and legitimate force of legal rules. Thus the “perception of law into which lawyers feed when advising clients” is “a very different conception of law than represented by the Coherence Thesis [of Dworkin interpretivists].”<sup>63</sup> It is also important to note that the distinction between a regular citizen’s conception of law and that of lawyers and judges is not merely an issue for theories of adjudication. While Dworkin argues that a legal theory must be a theory of adjudication, it is nonetheless the case that “there is no a priori reason why the adjudicatory conception of law should be the only possible conception. In fact, the different role played by the law for judges and for citizens makes it unlikely that it is.”<sup>64</sup>

Distinguishing between the different participant-level conceptions of law is, then, a necessary condition for providing a thorough account of the social practices which make law possible, which perpetuate a particular legal system, and which provide the means for law to guide individuals. A good descriptive explanation of law in a charter society will identify how participant practices differ even though each type of practice is part and parcel of a charter system and its broader social context.

The distinction between different participant-level conceptions of law, then, relates directly to charter challenges and the debate between inclusive and exclusive positivists. We can best consider this fact by returning to Giudice’s response to Waluchow’s challenge. According to Waluchow, exclusive

---

<sup>62</sup> *Ibid.* 500.

<sup>63</sup> *Ibid.* In a legal system where principles of political morality serve as posited criteria of legal validity, something like a Dworkinian interpretation may be appropriate. But in legal systems where legal validity is not tied to morality, such an interpretation is merely an opinion regarding the moral force of law rather than its institutional force.

<sup>64</sup> *Ibid.* 501.

positivists fail to take seriously the language used in the Charter. Insofar as the language of the Charter shows that it has “special institutional force,” and insofar as the Charter clearly posits principles of political morality as constraints on the legitimate force of legal rules in Canada, the exclusive positivist’s insistence that those principles must be extra-legal criteria seems to contradict the express form of the source of those criteria. Giudice’s exclusive positivist directed-power account goes some way towards addressing that concern. But does it go far enough?

Giudice offers “an important distinction between (i) the existence of an inconsistency and (ii) the enforcement or recognition of a legal measure or right to remedy the inconsistency.”<sup>65</sup> Although Waluchow observes that “inconsistencies do not begin to exist only when judges declare that they exist,”<sup>66</sup> Giudice thinks that we must distinguish between *unconstitutionality* and *invalidity* in order to account for the force of purported laws which effectively guide conduct even though they are later found to be unconstitutional, hence invalid according to the posited criteria of that system. Waluchow and Giudice offer what are, in effect, two different notions of legal validity.<sup>67</sup> The inclusive positivist account describes unconstitutional legal rules as being invalid from the moment they conflict with the Charter provisions which invalidate them. As the Charter itself puts it, such rules are “of no force and effect.” The exclusive positivist account, however, deploys a concept of legal validity such that any purported law created by a recognized source of law, such as Parliament, is valid *until it is declared otherwise* by a recognized authority with the power to do so, such as the Supreme Court of Canada. It is for the latter reason that Joseph Raz does not employ a distinction between the existence of a law and its validity: (purported) legal rules promulgated by recognized sources of law are, according to the Sources Thesis, laws by definition.

There is truth to both accounts. On the one hand, the inclusive positivist account *separates* a legal rule’s validity from its effective institutional force, such that Parliament may introduce a rule which effectively guides conduct in the way that laws guide conduct, even though the legal rule is later found to be unconstitutional and determined to have no legitimate force and effect. Yet, just as valid legal rules may have legitimate institutional force, invalid

<sup>65</sup> Giudice, “Unconstitutionality, Invalidity, and Charter Challenges”, 79.

<sup>66</sup> Waluchow, *Inclusive Legal Positivism*, 160.

<sup>67</sup> See *supra* p. 182.

rules may have effective but illegitimate institutional force until such time as their invalidity is recognized. On the other hand, the exclusive positivist account *joins* the notion of legal validity with the observable efficacy of a legal rule. Effective legal rules have institutional force until they are struck-down or repealed, and until that point they are valid laws.

Both Waluchow and Guidice commend their own accounts as being the most descriptively accurate. Waluchow notes that the inclusive account is consistent with both the language of the Charter and the language of judicial decisions. The Charter clearly states that unconstitutional “laws” have no force and effect—that is, whatever institutional force such rules exert is illegitimate according to Canada’s positive legal order—and judges who strike-down unconstitutional laws speak and write in language consistent with the Charter. For example, in *Morgentaler*, prosecution ceased once the Criminal Code provision prohibiting Morgentaler’s actions was found to be unconstitutional. The Court did not argue that its decision retroactively rendered his actions legal: it noted that Morgentaler “had not in fact performed actions which were illegal at the time.”<sup>68</sup> The inclusive account of that particular charter challenge aligns its descriptive and conceptual claims with the language of the Charter and the stated reasoning of the Court.

The directed-power exclusive positivist account, however, also tries to align its descriptive and conceptual claims with actual Canadian legal practices. The Criminal Code provision against abortion, despite later being found to be unconstitutional, exerted either the same, or at least a very similar type of force as a Criminal Code provision which is held to be constitutional. Morgentaler’s actions were initially considered to be illegal, he was charged and brought before a court, and it was not until he won his case that the institutional force of the prohibition against his actions was extinguished.

It seems that both the inclusive and exclusive accounts of *Morgentaler* can make a claim to descriptive accuracy. We could, following Liam Murphy,<sup>69</sup> apply Lewis Kornhauser’s distinction between a legal order and a legal regime to say that inclusive positivism better describes Canada’s legal order (Canada’s system of legal rules which are valid according to its own posited norms), while exclusive positivism better describes Canada’s legal regime (the social-political structure and force of Canada’s system of legal

---

<sup>68</sup> Waluchow, *Inclusive Legal Positivism* 160.

<sup>69</sup> See Murphy, “The Political Question”, 377–78.

rules as they are actually applied at any given moment regardless of whether those rules ought, according to its posited standards, to be applied). Yet, for a number of reasons, the inclusive/exclusive positivist debates regarding charter challenges cannot be so simply dealt with.<sup>70</sup>

Both inclusive and exclusive positivists can describe and explain charter challenges. On what grounds, then, can we commend one theory over the other? Inclusive positivism is still the more descriptively accurate theory, but to understand why this is the case we must recognize that descriptive accuracy is more than the seemingly simple meta-theoretical-evaluative criterion it is sometimes taken to be. A descriptive-explanatory theory of law aims to describe law “as it is,” including and perhaps especially the social practices which make law what it is. To do so, it develops explanatory concepts which elucidate the features of juridical law. At times, as with the exclusive positivist conception of authority, those explanations may differ from or even contradict participant-level explanations or understandings of their own activity. Here is the important point: the explanatory concept which contradicts the participant-level understanding is methodologically appropriate (as a descriptive-explanatory legal-theoretical concept) only so long as it can justify the contradiction it imposes. I submit that the exclusive positivist conception of authority, contestable as it is, does not provide sufficient grounds for us to accept the contradiction it leads to with regard to the judicial practices of at least one charter system, namely Canada’s legal system.

I am *not* suggesting that the exclusive positivist conception of authority is necessarily wrong or conceptually incoherent. I am, however, suggesting that not only does it fail to establish the necessity of attributing a specific function to law, but also that the function it does attribute to law leads exclusive positivists to offer a description and explanation of law which contradicts law as knowledgeable participants in Canada’s legal system understand it. It may perhaps be the case that the exclusive account of law is in fact true, and that the participant perspective of the Canadian Supreme Court is mistaken as to the nature of its own legal system. But the burden

---

<sup>70</sup> The distinction does not map onto the inclusive/exclusive positivist debate insofar as the inclusive positivist’s concept of institutional force encompasses both the proper (according to its own standards) rules of a legal order as well as the actual force of those rules (regardless of their systematic propriety). Moreover, all modern legal positivists aim to describe not just the legal order—the rules of positive law—but also the social practices which make that order and thus the effective *rule* of law possible.

of proof necessary for such a claim to truth has not been met, and so long as we wish to describe and explain law as it is—that is, so long as we wish to offer a descriptive-explanatory account of law—we cannot accept the exclusive positivist conception of authority as the sole form of legal authority nor the contradictory descriptive claim entailed by that conception.

## Descriptive Accuracy, Language, and Social Practices

It is not only the case that exclusive positivism fails to sufficiently justify the contradiction it posits—it is also the case that it *precludes further debate* about whether that contradiction is real or merely apparent. Thus exclusive positivism suffers from at least two serious shortcomings: it unjustifiably employs explanatory concepts which put the lie to participant-level understandings of their own practices, and it disengages itself from the collaborative enterprise of continuing to develop a descriptive-explanatory account of law. To elucidate these two shortcomings, I will first show that Giudice's exclusive positivist account of charter challenges does not correspond to participant-level understandings of the practices involved, and then I will show why exclusive positivism cannot resolve or sufficiently justify the contradictory account it offers.

Giudice's directed-power account of charter challenges transforms the language of the Charter and the explicit pronouncements of Canadian judges into a form of legislative and judicial prevarication. Although it avoids the theoretical pitfall of suggesting that charter rights manifest themselves as a plethora of actual legal rights, it is nonetheless at odds with the actual judicial practices of Canadian courts. As Waluchow notes, both the Charter's plain language and the plain language of judicial decisions state that unconstitutional legal rules are, according to the standards of Canada's posited legal order, not laws at all. In Canada, unconstitutionality and invalidity are conjoined. Thus any legal rule which unjustifiably contravenes the provisions of Canada's Charter lacks legitimate institutional force. Morgentaler's prosecution, for instance, ceased because the charge pressed against him failed, in the Court's opinion, to provide a legitimate reason for prosecution. Giudice attempts to explain-away this fact by suggesting that the Court engaged in a form of double-speak: it said that there was no legitimate ground for prosecution, yet it was "really" retroactively clearing Morgentaler of criminal wrongdoing.

The legal-theoretical issue is not whether Giudice offers a sound defence of retroactive judicial determinations.<sup>71</sup> That is a moral-political issue separable from Giudice's claim that Canadian legislators and judges are really saying one thing while doing something else. Regardless of the moral-political justifiability of retroactive judicial determinations, it remains the case that Canadian courts themselves do not describe their findings of invalidity as retroactive. The plain language of such decisions says otherwise, and a descriptive-explanatory theory of law should aim so far as possible to describe (rather than reinterpret) participant-level practices.

Consider an example raised by Giudice himself. In *Reference re Manitoba Language Rights*<sup>72</sup> the Supreme Court of Canada dealt with an instance of pervasively unconstitutional legal rules. By failing to enact its laws in French as well as English, the Manitoba Legislature had produced rules with effective but illegitimate institutional force. Giudice argues that this example speaks to the veracity of his distinction between unconstitutionality and invalidity insofar as "inconsistencies existed yet went unrecognized and unenforced."<sup>73</sup> According to Giudice, the fact that for almost a century Manitoba was governed by unconstitutional laws (as well as an unconstitutional legislature) presents a challenge to inclusive positivists:

[H]ow does inclusive positivism account for 'laws' which would, if challenged, be determined unconstitutional yet, as a matter of social fact, are never challenged before the courts or other authorities? Must inclusive positivism deny validity and hence existence to these norms which continue to be practised and in that way recognized by legal officials?<sup>74</sup>

Inclusive positivists actually have a very straightforward explanation for unchallenged yet unconstitutional legal rules: they are rules which have the force of law because of their institutional source even though that force is legally illegitimate *according to the posited standards of the legal order which applies to that system*.

To say that inclusive positivism must "deny validity and hence existence to these norms" begs the question of whether it is appropriate to make a

<sup>71</sup> Giudice's defence is offered in "Unconstitutionality, Invalidity, and Charter Challenges", n. 33 at 76.

<sup>72</sup> [1985] 1 S.C.R. 721.

<sup>73</sup> Giudice, "Unconstitutionality, Invalidity, and Charter Challenges", n. 41 at 79.

<sup>74</sup> *Ibid.* 81.



legal-theoretical distinction between the existence and the validity of purported law. On the inclusive account, the unconstitutional rules produced by the Manitoba Legislature existed in virtue of having effective institutional force. That institution and its enforcement apparatus improperly treated the rules as valid laws, just as the police and the Crown Prosecutor's Office treated the Criminal Code prohibition against abortion as grounds for enforcement and prosecution. But the social fact of the production and enforcement of rules which purport to be valid laws despite being legally invalid according to the criteria of that system need not lead us to characterize those rules as laws. Certainly the Supreme Court of Canada did not feel the need to identify them as such when it ruled that "[a]ll of the unilingual Acts of the Legislature of Manitoba are, *and always have been*, invalid and of no force or effect."<sup>75</sup>

To argue that unchallenged unconstitutional legal rules are laws because they have effective institutional force seems plausible when we take the legal-theoretical position that law is simply a matter of social fact and not of some ideal order. But we need not attribute an ideal legal order to all charter systems in order to separate the existence of a legal rule from its validity. In Canada the *Constitution Act, 1867*, the *Constitution Act, 1982* (of which the Charter is a part), and the *Manitoba Act, 1870* are social facts. Their enactment and the Supreme Court's appeal to them as grounds for its decision provide sufficient evidence of their existence as actual rather than merely ideal. While one can sympathize with the desire of a legal theorist to disregard those facts when faced with the fact of forceful yet legally invalid rules which nonetheless "possessed many salient features of 'law',"<sup>76</sup> the inclusive positivist's concept of institutional force enables us to explain those rules without forcing us to conclude that the Supreme Court of Canada is duplicitous.

Unless we have a very good reason not to, as descriptive-explanatory legal theorists it is better to employ a legal-theoretical distinction between the existence and the validity of a legal rule such that our explanatory concept aligns itself with the concept used by the participants in that system. An account of "unlawful laws" is better served by the descriptive terms 'effective institutional force' and 'legitimate institutional force,' terms which maintain a legal-theoretical distinction between the existence and the validity

---

<sup>75</sup> Reference re *Manitoba Language Rights*, 767, emphasis added.

<sup>76</sup> Giudice, "Unconstitutionality, Invalidity, and Charter Challenges", n. 41 at 79.

of legal rules. We do less violence to the Supreme Court's expressed understanding of Canadian law by noting that, from its perspective, the "force" of a law relates to its legitimate institutional force rather than suggesting that its expressed understanding of legal validity is simply incorrect. The inclusive account, then, does not predetermine the content of the Supreme Court of Canada's conception of legal validity. Rather, it accepts that conception, one which is invariably reflected in their practices and self-reports, as part and parcel of a particular instance of an actual legal system.

Note, however, that the inclusive positivist who aligns her legal theory's explanatory concepts with those of actual participants in legal systems need not accept the participants as epistemic authorities with regard to the correct use of their concepts (e.g., of legal validity) in any particular instance. For instance, the Supreme Court of Canada may incorrectly apply its own criteria of validity—it may in fact be clearly wrong in some instances—such that a legal-theoretical descriptive explanation could not help but observe that the Court is fallible. My claim is not that the Court—nor any other participant institution or actor—is always correct. Rather, my claim is that, when developing and offering a descriptive explanation of law, a legal theorist should not replace participant concepts or introduce new explanatory concepts unless doing so results in a better descriptive explanation. Giudice's attempt to replace the participant-level concept of legal validity with his concept of unconstitutionality is not, I suggest, appropriate. The distinction, the replacement it leads to, and the contradictory account of Charter adjudication which results are, it seems to me, driven by the Sources Thesis rather than the goal of descriptive accuracy.

## Entailed Mistakes

Although inclusive positivism offers a description of Canadian legal practices without contradicting the participant's own understanding of those practices, we might wonder whether inclusive positivism is at risk of losing sight of its intention to describe law "as it is" rather than "as it ought to be." In this instance, however, the concern is not whether inclusive positivists confuse law as it is with law as it morally ought to be; rather, the concern is that inclusive positivists confuse law as it is with law as it is perceived by the participants in a legal system.

While I have argued that to understand Canadian law as it is requires us to accept the Supreme Court of Canada's distinction between the effective

institutional force of legal rule and the legitimate institutional force of that rule, it is still necessary to respond to a Giudice's concern that "inclusive positivism [is] insufficiently sensitive to the practice-oriented or customary (indeed 'positive') reality of law."<sup>77</sup> The grounds for Giudice's concern are reasonable. He wonders whether the inclusive account entails that "not only would there be norms which are practised and recognized by legal officials which are not valid existing law, but there would be norms which are not practised or recognized by legal officials but which *are* valid existing law."<sup>78</sup> Can our account of law be based on observable social practices, hence remain consistent with the methodological constraint of descriptive-conceptual reciprocity, and yet still allow for the possibility of non-practised and non-recognized norms within a legal system? In short, must inclusive positivists who wish to maintain the distinction between the existence and the validity of legal rules abandon the meta-theoretical methodological position that law exists only insofar as it is maintained by social practices?

We must distinguish between two senses whereby what we call positive law is a matter of practice or custom. Consider first the practice of making determinations of legal validity. From the legal-theoretical perspective, the exclusive positivist holds that legal rules exist if and only if those rules are recognized by the participants in a legal system. If they are so recognized, then they not only exist but are (according to the exclusive positivist) also valid legal rules. Thus Giudice can claim that the unconstitutional legal rules set-down by the Legislature of Manitoba were existing laws so long as they were treated as such; once the Supreme Court refused to grant them recognition as valid laws, those rules were no longer existing law in Canada. From the participant perspective of the Canadian Supreme Court however, judicial determinations of legal validity are guided by the posited legal standards specified in documents of positive law such as the Charter. Being clearly unconstitutional, the legal rules set-down by the Legislature of Manitoba were not by the Supreme Court as ever having been valid laws. The Supreme Court's own capacity for giving its decisions institutional force entails that anyone who treats or had treated those unconstitutional rules as valid Canadian law is and was simply mistaken. We can differentiate between an exclusive positivist legal-theoretical determination of existing Canadian law based on the social practices which give legal rules

---

<sup>77</sup> *Ibid.* 81.

<sup>78</sup> *Ibid.*

force, and a participant-level determination of existing Canadian which is itself a practice that refers to posited legal standards of Canadian law. In Giudice's account of charter challenges, the former determination happens to contradict the latter one.

Does the fact of this contradiction between a legal-theoretical claim and a participant-level claim entail that one claim or the other is mistaken? Giudice's exclusive positivist account appears to require that entailment. Because the legal rules given by the Manitoba Legislature were efficacious and their recognition and enforcement was a matter of customary and continuous social practice, it must follow (from the legal-theoretical perspective of the exclusive positivist) that the Supreme Court's practice of determining validity is really something else: the practice of recognizing unconstitutional laws and retroactively invalidating them. As Giudice puts it, "the nullification of unconstitutional laws is always retroactive" since prior to "any court decisions declaring laws to be unconstitutional and so invalid, those laws are indeed valid and do exist."<sup>79</sup> In this way Giudice drives a conceptual wedge between the actual invalidity of a efficacious legal rule—or, as he calls it, its unconstitutionality—and the authoritative recognition of that invalidity, such that "[t]reating laws *as if* they had always been invalid is not equivalent to those same laws always *actually* having been invalid or non-existent."<sup>80</sup> On this account, insofar as legal rules are recognized as if they have legitimate institutional force during the period of time that they are efficacious, and insofar as their effective institutional force is extinguished only when they are recognized to be illegitimate, illegitimate legal rules are valid laws until they are struck down. Hence, on the exclusive positivist account, the Canadian Supreme Court's words and its actions are contradictory. Moreover, there is a discrepancy between legal validity as it is understood by exclusive positivists and legal validity as it is understood by Canadian judicial authorities.

While the methodological principle of descriptive-conceptual reciprocity guides the construction of descriptive-explanatory legal theories so as to encourage an alignment of our descriptive claims with our explanatory concepts, it is also true that in some instances we should accept a divergence between the two. In the Extreme Scenario, for instance, we allowed that

<sup>79</sup> *Ibid.* 77. As partial support for his claim, Giudice cites Peter Hogg, a noted expert on Canadian constitutional law.

<sup>80</sup> Giudice, "Unconstitutionality, Invalidity, and Charter Challenges", 77.

the participants in that legal system may well be mistaken when they claim that their laws are valid by virtue of their congruence with objective moral truth. The legal order of the Extreme Scenario joins legitimate institutional force with actual moral force. Perhaps the question of what legal validity really is ought to be resolved into a similar caveat: participants in a legal system may sometimes be mistaken about what they are actually doing.

We could say that applying an existential predicate to a particular legal rule is something which is best done by a legal theorist who is not bound by the posited criteria of the legal system wherein that rule is found. That is, we could say that the claim “*X* is an existing law” is properly a descriptive or external claim based on an explanatory concept employed by legal theorists rather than a participant-level concept. For instance: “The laws of the Manitoba Legislature existed from the moment they were enacted because they were perpetuated and recognized by customary legal practices.” If it is the case that we can describe the existence of conventional standards of morality without thereby affirming their truth, then why not do something similar with respect to our legal-theoretical recognition of the existence of practised legal rules? Were we to follow that path, our legal-theoretical descriptive claims regarding the existence of laws could diverge from participant-level claims about the existence of valid laws. The exclusive positivist could try to justify this divergence on the grounds that, just as participants in a legal system may mistakenly take their conventional morality to be objectively certain (when in fact they ought to be uncertain), participants may also create, enforce, and recognize laws which they have nonetheless decided, on some prior occasion, to refrain from creating, enforcing, or recognizing. From our external perspective we can identify such instances as involving contradictory intentions on the part of participants, but we would not allow those contradictions to lead us into confusion—laws are simply those social rules which are created, enforced, and recognized within a particular institutional framework.

The exclusive positivist line of argument I have presented has an obvious appeal to an empirically-oriented legal theorist. If strictly held to, it would make it much easier for a legal theorist to decide when a law exists or not. It is for that very reason that Brian Leiter advocates exclusive positivism: when considering law in the strict sense, we need not concern ourselves with epistemically uncertain or indeterminate notions like “equality before and under the law.” We would, instead, confine ourselves to the observable facts of the matter. Or so it would seem.

However streamlined this methodological approach might be,<sup>81</sup> it is methodologically improper to conflate the explanatory concepts of existence and validity by identifying effective institutional force with legitimate institutional force. To understand law as it is requires that we describe and explain law in such a way as to make sense whenever possible of the general participant-level conceptions of it. Giudice's exclusive positivist account of charter challenges is inferior to the inclusive positivist not merely because it contradicts the plain-language of the Charter and of Canadian judicial decisions—it is also inferior because that contradiction signals an unwillingness to accept a very important characteristic of charter systems.

## Unconstitutionality as Invalidity

Inclusive positivists need not remedy or justify a self-induced discrepancy between their conception of legal validity and the conception voiced by the Supreme Court of Canada. Since they distinguish between the existence and the validity of a law, inclusive positivists can:

1. Identify, describe, and explain the nature of social rules which effectively act as legal rules in societies with a legal system. In short, the inclusive positivist can provide criteria for making the legal-theoretical claim that a particular social practice constitutes a social rule of a certain type, namely the legal type, where "legal" is taken as a general descriptive category. This task involves the identification of *existing* legal rules with effective institutional force.
2. Identify, describe, and explain social rules which are valid laws in a particular legal system according to its posited criteria of validity.

---

<sup>81</sup> Leiter goes further than Raz is asserting the utility of this approach. Raz acknowledges that questions of legal validity, even those that involve non-moral factors, can be difficult. It is not the case that Raz espouses exclusive positivism because it removes that difficulty: "the point of the thesis is finality not certainty or predictability" (*The Concept of A Legal System*, 215). Raz simply argues that the distinction between the deliberative and the executive stage "is a necessary condition for the existence of law" and that there is law "only in societies in which there are judicial institutions which recognize the distinction" (*Ibid.* 214). That is why "[t]he sources thesis assigns the law to the executive stage of social decision-making" (*Ibid.*). Note, too, that Raz recognizes the social context of legal systems: "[T]he law is an aspect of a political system, be it a state, a church, a nomadic tribe, or any other. Both its existence and its identity are bound up with the existence and identity of the political system of which it is a part" (*Ibid.* 211).

This task of involves the identification of *valid* laws with legitimate institutional force.

Exclusive positivists are also capable of (1) and (2). However, they can succeed at (2) only by introducing their own legal-theoretical distinction to account for the existence of the sorts of legal rules which are struck down in charter challenges. Giudice offers, as his solution, the distinction between *unconstitutionality* and *invalidity*.

What reason is there to prefer Giudice's distinction to the Canadian Supreme Court's own distinction? Perhaps we can allow that Giudice's distinction appears to allow exclusive positivists to minimize legal-theoretical epistemic uncertainty regarding the validity of a legal rule. All existing laws are valid, on the exclusive account, so we legal theorists need never wonder whether a particular existing law is actually a valid law from the participant perspective.

Of course, the exclusive positivist may still wonder whether an existing legal rule (hence "valid" in the exclusive positivist's technical sense of the term) in a particular legal system is, according to the participant-level practice of positing and applying criteria for legal validity, a legal rule with legitimate institutional force—that is, valid according to the participants' own standards. But the exclusive positivist's conflation of a legal rule's existence with its validity means that *the epistemic uncertainty which exists at the participant-level is not directly reflected at the legal-theoretical level*. Rather, the participants are first thought to be mistaken or duplicitous as regards their own practices, and then a further legal-theoretical distinction—the distinction between unconstitutionality and invalidity—is introduced to account for those mistaken or duplicitous practices.<sup>82</sup>

Yet this new distinction—a legal-theoretical one—diverges from how that distinction is used at the participant-level in some charter systems, for it is the case that some legal rules with effective institutional force are determined (by participants) to be invalid because they violate moral-political criteria for validity, while other legal rules are determined to be invalid for other reasons. The exclusive positivist's unwillingness to distinguish between the validity and the existence of a law makes for a poor description

---

<sup>82</sup> Note, also, that Giudice's notion of unconstitutionality captures only one of the two senses Peter Hogg attributes to the term: unconstitutionality because of "a breach of law" and unconstitutionality because of a "breach of convention" (Peter Hogg *Constitutional Law of Canada*, § 1(10a), emphasis added).

and explanation of Canadian judicial and legislative practices in circumstances other than charter challenges. For instance, Peter Hogg notes that the *Colonial Laws Validity Act* specified that “colonial laws were void” if they conflicted with “an imperial statute.”<sup>83</sup> He goes on to observe that the Act spoke to “the *capacity* of colonial legislatures to enact laws that were inconsistent English law” and the limitation of that capacity by leaving “colonial legislatures powerless to alter any imperial statute which by its own terms applied to the colony.”<sup>84</sup> If it is sensible to speak of the *incapacity* of a legislature to enact “valid laws” under certain circumstances, even though in that same circumstance the legislature may illegitimately issue efficacious legal rules, then should we not avoid a theoretical conflation of the existence and the validity of a law?

Inclusive positivists do not describe charter challenges in the circuitous fashion exclusive positivists do. Moreover, they do not first try to avoid epistemic certainty at the legal-theoretical level and then introduce epistemic uncertainty at that level by deploying additional legal-theoretical concepts which contradict conceptions we can readily observe at the participant level. It is a certainty that a social rule introduced by a legal source can have institutional force despite being illegitimate according to the institutional standards of that system. It is equally clear that some posited legal rules can be observed, by both participants and legal theorists, to deserve legitimate institutional force according to the standards of that system and yet lack that force because the rule does not enjoy sufficient support (e.g., laws that fall out of use yet remain “on the books”). It is also clear, to some participants and some legal theorists, that a particular legal rule may have institutional force, even legitimate institutional force according to the standards of that system, despite lacking any degree of plausible moral force (e.g., laws of slavery). We can distinguish between the effective institutional force of a law, its legitimate institutional force, and its moral force.

Existing laws have effective or legitimate institutional force. To say that invalid existing laws are effective despite being illegitimate is part of a legal-theoretical account of the general social practices which instantiate juridical law. Noting that a valid existing law is effective and legitimate is part of a legal-theoretical account which describes both the general social practices involved in legal systems as well as the particular social practices

---

<sup>83</sup> Peter Hogg *Constitutional Law of Canada*, §3(2).

<sup>84</sup> *Ibid.*, emphasis added.



of a particular legal system, including its often idiosyncratic and contingent means for recognizing valid law.

Consider, once again, Leiter's Extreme Scenario. A charter society could exist where its charter system's standards of legal validity are based on the participants' understanding of what "natural law" requires. So long as that understanding is sufficiently coherent as to allow for legal rules to be recognized as having legitimate institutional force, that social practice and its shared understanding instantiates an effective legal system with its own standards of legal validity. Those standards may be contestable or mistaken: that system's determinations of legitimate institutional force may, due perhaps to errors in the moral judgement of legislative and judicial officials, result in that society having legal rules with legitimate institutional force which are actually lacking moral force despite the expressed attempt to fuse legal validity with true moral norms. From a moral-theoretical perspective, then, we might have our doubts about the veracity of the participants' understanding of natural law. But we need not doubt the efficacy of those standards, given the participants' ability to use them to secure a functioning system of law.

The Extreme Scenario is in some ways analogous to a charter society and its legal system. Posited criteria of legal validity may be given through the practice of legislation, such as Canada's *Charter of Rights and Freedoms*. The standards specified in those posited rules effectively determine which legal rules count as valid in that system. It is, of course, possible that some legal rules are taken to be valid and never recognized as being invalid, even though a judicial determination of the validity of those rules would make it clear that they are illegitimate according to the standards of that system. Likewise, some legal rules may be posited and fall into disuse, even though a close consideration would make it clear that those ineffective rules are in fact valid according to that system's criteria. The inclusive positivist's explanatory concepts of legal validity and institutional forces, however, allows for a thorough description and illuminating explanation of such systems without disregarding the actual practices of participants in that system. It is important to recall that the positing of a standard or set of standards for legal validity is just as much a social practice as the participants' ongoing social practice of creating, identifying, and determining legal rules which *they* consider to be legitimate according to their own standards. Exclusive positivism obscures the social fact of posited legal standards which are not continuously and correctly recognized, and it does so at the further expense

of introducing theoretical concepts which contradict clear participant-level understandings and practices.

Inclusive positivism is the best descriptive-explanatory theory of law. It provides for a full description of charter systems by recognizing the force of social rules which take a legal form regardless of the concurrence of those rules with the standards of validity imposed by the systemic social practices which is their actual context, by describing and explaining the participant-level understanding of validity rather than replacing it with an explanatory concept which contradicts that social fact, and, moreover, inclusive positivism retains the logical distinction between the purported and the actual moral force of any particular law or legal system. Finally, and equally importantly, inclusive positivism does not deny or reify the problem of epistemic uncertainty. It can admit that sometimes the participants within a legal system may be as uncertain about the status of their rules according to their own criteria as legal theorists may be about the status of those rules as morally acceptable or proper products of practical reason. Rather than explain away such uncertainty by predetermining the content of participants' concepts, or by appealing to highly contestable concepts of morality, politics, or practical reason, the inclusive positivist simply attempts to describe juridical law as it is.

# References

- Aiyar, S. "The Problem of Law's Authority: John Finnis and Joseph Raz on Legal Obligation." *Law and Philosophy* 19 (2000). Pp. 465 489.
- Austin, J.L. "A Plea for Excuses." *Proceedings of the Aristotelian Society* 57 (1956 7). Pp. 123 52.
- Bobbio, N. *Giuridical Positivism E Positivismo Giuridico*. Milan: Ed. di Comunità, 1972.
- Buckland, W.W. *A Text-Book of Roman Law from Augustus to Justinian*. Cambridge: Cambridge University Press, 1963.
- Burge-Hendrix, Brian. "Tchaikovsky versus the Western Canon." *Philosophy and Literature* 24 (2000). Pp. 467 76.
- . "Two Perspectives on Legal Theory." *Canadian Journal of Law and Jurisprudence* 16 (2003). Pp. 357 46.
- Campbell, Tom. *The Legal Theory of Ethical Positivism: Applied Legal Philosophy*. Brookfield, Vt.: Dartmouth Publishing Co., 1996.
- Cicero, Marcus Tullius. *De Legibus*. Translated by Clinton Walker Keyes. Cambridge: Harvard University Press, 1928.
- Coleman, Jules L. (ed.) *Hart's Postscript: Essays on the Postscript to the Concept of Law*. Oxford: Oxford University Press, 2001.
- . *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory*. Oxford: Clarendon Press, 2001.
- . "Incorporationism, Conventionality, and the Practical Difference Thesis." *Hart's Postscript: Essays on the Postscript to the Concept of Law*, Jules L. Coleman (ed). Oxford: Oxford University Press, 2001. Pp. 99 147.

- Dare, Tim. "Wilfrid Waluchow and the Argument from Authority." *Oxford Journal of Legal Studies* 17 (1997). Pp. 347 66.
- d'Entréves, Alessandro Passerin. *Natural Law: An Introduction to Legal Philosophy (2nd (rev.) edn.)* London: Hutchinson University Library, 1970.
- Dickson, Julie. *Evaluation and Legal Theory*. Oxford: Hart Publishing, 2001.
- Dworkin, R. M. "A Model of Rules: I." *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.
- . "A Model of Rules: II." *Taking Rights Seriously*. Cambridge: Harvard University Press, 1977.
- . *Law's Empire*. Cambridge: Harvard University Press, 1986.
- . "Legal Theory and the Problem of Sense." *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*, Ruth Gavison (ed.) Oxford: Oxford University Press, 1987. Pp. 9 20.
- Dyzenhus, David. "Positivism's Stagnant Research Programme." *Oxford Journal of Legal Studies* 20 (2000), pp. 703 22.
- Eekelaar, John. "Judges and Citizens: Two Conceptions of Law." *Oxford Journal of Legal Studies* 22 (2002), pp. 497 516.
- Finnis, John. *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980.
- Fuller, Lon L. *The Morality of Law (2nd edn.)* New Haven: Yale University Press, 1969.
- Füßer, Klaus. "Farewell to Legal Positivism: The Separation Thesis Unravelling." In *The Autonomy of Law*, Robert P. George (ed.). Oxford: Clarendon Press, 1996. Pp. 120 52.
- Giudice, Michael. "Unconstitutionality, Invalidity, and Charter Challenges." *Canadian Journal of Law and Jurisprudence* 15 (2002), pp. 69 83.
- Green, Leslie. "Review of the Concept of Law, 2nd Ed." *Michigan Law Review* 94 (1996). Pp. 1687 717.
- Halton, Robert. "Positivism and the Internal Point of View." *Law and Philosophy* 17 (1998). Pp. 597 625.

- Hart, H. L. A. "Positivism and the Separation of Law and Morals." In *Essays in Jurisprudence and Philosophy*. New York: Oxford University Press, 1983. Pp. 49–87.
- . "Lon L. Fuller: The Morality of Law." In *Essays in Jurisprudence and Philosophy*. Oxford: Oxford University Press, 1983. Pp. 343–64.
- . "1776-1976: Law in the Perspective of Philosophy." *Essays in Jurisprudence and Philosophy*. Oxford: Oxford University Press, 1983. Pp. 145–58.
- . "Scandinavian Realism." *Essays in Jurisprudence and Philosophy*. Oxford: Oxford University Press, 1983. Pp. 161–69.
- . *The Concept of Law (2nd edn.)*. Oxford: Clarendon Press, 1994.
- Himma, Kenneth Einar. "H.L.A. Hart and the Practical Difference Thesis." *Legal Theory* 6 (2000). Pp. 1–43.
- Hogg, Peter W. *Constitutional Law of Canada (2001 Student Edition)*. Scarborough: Carswell, 2001.
- Hulsén, Peter. "Back to Basics: A Theory of the Emergence of Institutional Facts." *Law and Philosophy* 17 (1998). Pp. 271–99.
- Kramer, Matthew H. *In Defense of Legal Positivism: Law without Trimmings*. Oxford: Clarendon Press, 1999.
- Leiter, Brian. "Naturalism in Legal Philosophy." *Stanford Encyclopedia of Philosophy*.
- . "The Naturalistic Turn in Legal Philosophy." *emphAmerican Philosophical Association Newsletter* 00 (2001).
- . "Beyond the Hart/Dworkin Debate." Draft Manuscript (2002). Pp. 1–31.
- Levin, Avner. "The Participant Perspective." *Law and Philosophy* 21 (2002). Pp. 567–617.
- MacCormick, Neil. "A Moralistic Case for a-Moralistic Law?" *Valparaiso University Law Review*, 20 (1985). Pp. 1–41.
- . "Norms, Institutions, and Institutional Facts." *Law and Philosophy* 17 (1998). Pp. 301–45.
- Marmor, Andrei. "Legal Conventionalism." In *Hart's Postscript: Essays on*

*the Postscript to the Concept of Law*, Jules L. Coleman (ed.). Oxford: Oxford University Press, 2001. Pp. 193–217.

Morigiwa, Yasutomo. "The Semantic Sting in Jurisprudence: Hart's Theories of Language and Law." *Archiv für Rechts- und Sozialphilosophie* 40 (1991). Pp. 21–30.

Murphy, Liam B. "The Political Question of the Concept of Law." In *Hart's Postscript: Essays on the Postscript to the Concept of Law*, Jules L. Coleman (ed.). New York: Oxford University Press, 2001. Pp. 317–409.

Okafor, F.U. "Legal Positivism and the African Legal Tradition." *International Philosophical Quarterly* 24 (1984). Pp. 157–64.

Oladosu, Jare. "Choosing a Theory of Law on Cultural Grounds: An African Case for Legal Positivism." *West Africa Review* 2 (2001). Pp. 1–31.

Paulson, Stanley L. "Lon L. Fuller; Gustav Radbruch, and the 'Positivist' Theses." *Law and Philosophy* 13 (1994). Pp. 313–59.

Perry, Stephen R. "The Varieties of Legal Positivism." *Canadian Journal of Law and Jurisprudence*, 9 (1996), pp. 361–95.

. "Hart's Methodological Positivism." In *Hart's Postscript: Essays on the Postscript to the Concept of Law*, Jules L. Coleman (ed.). Oxford: Oxford University Press, 2001. Pp. 311–54.

Pino, Giorgio. "The Place of Legal Positivism in contemporary Constitutional States." *Law and Philosophy* 18 (1999). Pp. 513–36.

Radbruch, Gustav. "Gesetzliches Umrecht Und Übergegesetzliches Recht." In *Gesamtausgabe*, A. Kaufman (ed.). Heidelberg: C.F. Müller, 1990.

Raz, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 1979.

———. *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn.). Oxford: Clarendon Press, 1980.

———. "Authority, Law and Morality." *The Monist* 68 (1985), pp. 295–306.

———. "On the Authority and Interpretation of Constitutions: Some Preliminaries." In *Constitutionalism: Philosophical Foundations*, Lawrence

- A. Alexander (ed.). Cambridge: Cambridge University Press, 1998.
- . “Two Views on the Nature of the Theory of Law: A Partial Comparison.” In *Hart’s Postscript: Essays on the Postscript to the Concept of Law*, Jules L. Coleman (ed.). Oxford: Oxford University Press, 2001. Pp. 1–37.
- Ross, Alf. *On Law and Justice*. London: Steven and Sons, 1958.
- Ross, Hamish. *Law as a Social Institution*. Oxford: Hart Publishing, 2001.
- Schauer, Frederick F. “Positivism as Pariah.” In *The Autonomy of Law: Essays on Legal Positivism*, Robert P. George (ed.). Oxford: Clarendon Press, 1996. Pp. 31–56.
- Shapiro, Scott J. “On Hart’s Way Out.” *Hart’s Postscript: Essays on the Postscript to The Concept of Law*, Jules L. Coleman (ed.). Oxford: Oxford University Press, 2001. Pp. 150–91.
- Soper, Philip. *A Theory of Law*. Cambridge: Harvard University Press, 1984.
- . “Choosing a Legal Theory on Moral Grounds.” *Social Philosophy & Policy* 4 (1986). Pp. 31–48.
- . “Searching for Positivism.” *Michigan Law Review* 94 (1996). Pp. 1739–57.
- Summers, Robert S. “Notes on Criticism in Legal Philosophy — an Introduction.” In *More Essays in Legal Philosophy: General Assessments of Legal Philosophies*, Robert S. Summers (ed.). Berkeley and Los Angeles: University of California Press, 1971.
- van der Burg, Wibren. “The Expressive and Communicative Functions of Law, Especially with regard to Moral Issues.” *Law and Philosophy* 20 (2001). Pp. 31–59.
- Villa, Vittorio. “Legal Theory and Value Judgments.” *Law and Philosophy* 16 (1997). Pp. 447–77.
- Waluchow, W.J. “The Weak Social Thesis.” *Oxford Journal of Legal Studies* 9 (1989). Pp. 23–55.
- . “Charter Challenges: A Test Case for Theories of Law.” *Osgoode Hall Law Journal* 29 (1991). Pp. 183–214.
- . *Inclusive Legal Positivism*. Oxford New York: Clarendon Press,

1994.

———. “The Many Faces of Legal Positivism.” *University of Toronto Law Journal* 48 (1998). Pp. 387–449.

———. “Authority and the Practical Difference Thesis.” *Legal Theory* 6 (2000). Pp. 45–81.

———. “In Pursuit of Pragmatic Legal Theory.” *Canadian Journal of Law and Jurisprudence* 15 (2002). Pp. 125–50.

Whitman, James Q. *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change*. Princeton: Princeton University Press, 1990.