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The Methodology of Legal Philosophy

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Legal philosophy, certainly in the Anglophone world and increasingly outside it, has been dominated for more than a half-century by H.L.A. Hart's 1961 book *The Concept of Law* (Hart 1994 [the 2nd edition]). Unsurprisingly, then, methodological debates in legal philosophy typically scrutinize either one of two (related) methodological claims in Hart's classic work. The first is that his theory is both general and descriptive (Hart 1994: 239). The second is that his theory is an exercise in both linguistic analysis and descriptive sociology (Hart 1994: vi). What do these two claims reveal about Hart's theoretical ambitions and methodological commitments, and what light do they shed on the debates in legal philosophy since then?

Hart's Methodology

In the Postscript to *The Concept of Law*, Hart says that his theory is *general* in that its aim is to give an account of the general structure and features exhibited by all modern legal systems, rather than the idiosyncratic features of any particular legal system. (In this respect, it is different than Ronald Dworkin's theory, which on Hart's [plausible] view is a case of "particular" jurisprudence, that is, an account of the law of particular jurisdictions, such as the Anglo-American ones.) He writes:

> It is *general* in that it is not tied to any particular legal system or legal culture, but
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> seeks to give an explanatory and clarifying account of law as a complex social
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> and political institution with a rule governed (and in that sense 'normative')
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> aspect. This institution, in spite of many variations in different cultures and in

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different times, has taken the same general form and structure, though many
misunderstandings and obscuring myths, calling for clarification, have clustered
around it. (Hart 1994: 239-240)

Hart's theory is *descriptive* in that his attempt to explain and clarify the general features of
modern legal systems includes no assessment of the (moral) value or reason-giving force of legal
rules or legal systems in general or in any particular case. "My account is *descriptive*," Hart
says, "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 1994: 240). On Hart's view, we can give an adequate constitutive
explanation of the general features of legal norms and systems without considering the moral
value or hazards of having law, whether and when one is obligated to obey the law, and so on.
Whether a theory of law can be both general and descriptive in this sense is one point of
contention in legal philosophy to which we will return, but for now we can just focus on what
this claim says about Hart's theoretical ambitions.

The object of Hart's theory is the complex social institution we call a legal system, one
that he thinks can be illuminated by examining our ordinary ways of talking about laws and legal
systems (about which more below). The most important elements of Hart's theory are well-
known to legal theorists. First, law is a union of primary and secondary rules (a combination of
rules that tell ordinary citizens what they can and cannot do, and rules *about* all the other rules,
e.g. rules of adjudication and legislation) (Hart 1994: 80-81). Second, in every legal system,
there is a secondary rule that Hart calls the "rule of recognition" which specifies the criteria any
norm must satisfy to count as a valid legal norm of that system (Hart 1994: 94-95, 103).[1] Third,
the rule of recognition in any legal system is, by contrast to all the other norms, simply a social
rule constituted by the convergent practice of its legal officials in applying certain criteria of
legal validity which they also view themselves as having an obligation to apply (Hart 1994: 101-
102, 110); all other norms are legally valid in virtue of satisfying the criteria in the rule of
recognition. Finally, on Hart's account, it is not necessary for a norm to be legally valid that it

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[1]Hart and others think there can be more than one rule of recognition in a legal system, but for sake of
elegance, we will speak of "rule of recognition" in the singular in what follows.

exhibit any moral feature or set of features (Hart 1994: 185-186). These claims are meant to apply to modern legal systems and to give a unifying explanation of what the ordinary person knows about them. Do they, then, define "the essence" of a legal system or does Hart implicitly reject an essentialist picture?

Leslie Green (1996) argues that Hart's recognition of borderline cases of law implies that his theory is an anti-essentialist one. Given that our concept of law or any revisionary concept we might adopt will inevitably confront borderline cases, it follows, he says, that "[f]or Hart, there is no essence to the phenomena we call 'law'…" (Green 1996: 1692). There may of course be properties *essential* to laws or legal systems even if there are no necessary and sufficient conditions. Hart claims, for example, that any society with a legal system must have a rule of recognition. Although he does not think the existence of such a rule is sufficient for a legal system, it is essential. Admittedly, Hart was deeply influenced by a tradition in post-WWII Anglophone philosophy associated with J.L. Austin, Gilbert Ryle, and the later Wittgenstein that was uneasy with the whole idea of essential properties and suspicious of metaphysics in general. An anti-essentialist approach to an historically contingent social institution like law certainly would have been in keeping with Hart's time and philosophical background. Moreover, *The Concept of Law* often displays a rhetorical restraint that suggests this was just the approach Hart intended.

Still, the balance of evidence supports a reading of Hart as a modest (if reluctant) essentialist. Otherwise it would be hard to explain what Hart says, for example, about the existence conditions of legal systems:

> There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rule of recognition specifying the criteria of legal validity…must be effectively accepted as common public standards of official behavior by its officials. (Hart 1994: 116)

The passage admits, it seems, of only an essentialist reading. [2] The existence of borderline cases, even in light of passages like the preceding, might just signal our inability to settle certain evidentiary questions: that we do not *know* where to locate the borderline cases does not mean there is no fact of the matter about where the border lies. We will proceed, then, on the assumption that Hart's theoretical ambitions are to explain and clarify the general features of modern legal systems, at least some of which rise to the level of essential properties. And this is certainly how he has been understood by his followers. Julie Dickson, for example, following Hart's student Joseph Raz, says that,

> A successful theory of law…is a theory which consists of propositions about the law which
> (1) are necessarily true, and (2) adequately explain the nature of law….I am using "the
> nature of law" to refer to those essential properties which a given set of phenomena must
> exhibit in order to be law. (Dickson 2001: 17)

She is echoed more recently by Scott Shapiro, who says that in inquiring into "the fundamental nature of law" we want to "supply the set of properties that make (possible or actual) instances of [law] the things that they are"(2011: 8-9) and offers the example of water being H2O: "Being H2O is what makes water *water*. With respect to law, accordingly, to answer the question 'What is law?' on this interpretation is to discover what makes all and only instances of law instances of *law* and not something else" (2011: 8-9).[3] In addition, says Shapiro (here again echoing Dickson who is following Raz), "to discover the law's nature" is also "to discover its necessary properties, i.e., those properties that law could not fail to have" (2011: 9).

How does Hart propose to fulfill the ambitions of producing a theory that is both general and descriptive? This brings us to his claim to be engaged in both linguistic analysis and descriptive sociology. *The Concept of Law* is not a piece of empirical social science, as any quick skim through its pages would confirm. All Hart means when he says his theory is a piece of descriptive sociology is that his goal is to give an adequate account of a particular kind of

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[2]This would be compatible with Hart thinking that the concept of "law" has no essence, even if the concept of a "legal system" does.

[3]This is a surprisingly strong claim for many reasons, not least of which is that water is a natural kind, while law is an artifact.

social institution, namely law. But how does linguistic analysis fit into the picture, and how does it relate to the descriptive sociological project? The type of linguistic analysis Hart has in mind is roughly the type associated with the ordinary language philosophers of post-war Oxford University, though Hart's claim to be engaged in this kind of project can be somewhat misleading. Unlike the ordinary language philosophers, Hart rarely argues explicitly for a position on the basis of some observations about the appropriateness of various expressions for a given context.[4]

However, his method does reflect the overall *spirit* of ordinary language philosophy: that we can gain philosophical insight about some phenomenon by attending to the conceptual distinctions we use to talk and think about it. In the preface to the *The Concept of Law*, Hart characterizes the relationship between this type of linguistic analysis and descriptive sociology as follows:

> Notwithstanding its concern with analysis this book may also be regarded as an
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> essay in descriptive sociology; for the suggestion that inquiries into the meanings
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> of words merely throw light on words is false. Many important distinctions,
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> which are not immediately obvious, between types of social situation or
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> relationships may best be brought to light by an examination of the standard uses
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> of the relevant expressions and of the way in which these depend on a social
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> context, itself often left unstated. *In this field of study it is particularly true that*
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> *we may use, as Professort J.L. Austin said, 'a sharpened awareness of words to*
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> *sharpen our perception of the phenomena'*. (Hart 1994: vi, emphasis added)

The key to understanding Hart's method—and thus its influence on subsequent legal philosophy--is to understand the precise sense in which we can use a sharpened awareness of words to

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[4]There are some exceptions: Hart's discussions of the difference between 'being obliged' and 'having an obligation', and between 'nullity' and 'sanction' are cases where the book's implicit method becomes explicit. See Hart 1994: 82-83, 33-35. These arguments are quite important, since they are supposed to establish one of Hart's major disagreements with earlier positivists like John Austin and Hans Kelsen: against them, Hart argues, through these ordinary language examples, that there is no necessary connection between law and coercion.

sharpen our awareness of legal phenomena. Hart was convinced that it is especially true of social phenomena like law that we can employ linguistic analysis to understand their nature. On its face, this seems puzzling: why should the actual nature of a social phenomenon be hostage to how ordinary people talk? A short detour into the metaphysics of social reality may provide a rationale, though not the one Hart had in mind.

For Hart and all legal positivists, legal systems are *socially constructed* (cf. Green 1996: 1687, 1691-92). To understand the philosophical import of that claim, it will prove helpful to introduce some ideas from John Searle's influential work on the "construction of social reality" as he calls it (Searle 1995, 2009); Searle's work obviously postdates Hart's, but it was deeply influenced by the same philosophical climate of ordinary language philosophy that influenced Hart. To say that law is socially constructed is to say that "legal facts"—e.g., that Buick is liable to MacPherson for its negligent design of the car,[5] that the speed limit on Lakeshore Drive in Chicago is 45 mph, or that Antonin Scalia[6] is an associate justice of the Supreme Court of the United States—are certain kinds of *socially constructed facts*.[7] Unlike physical facts, these kinds of social constructs are realizable only in the context of human institutions (1995: 2). Take Searle's frequent example, money. It is not a fact about the natural world that a greenish piece of paper with a picture of George Washington has a value of one dollar throughout the United States. Rather, that these physical facts constitute the social construct *of being a dollar* depends on the fact that those physical facts are so recognized by members of American society.

It is, thus, a hallmark of social constructs that they exist if and only if a society—or some subset of that society--collectively recognizes them as existing (Searle 1995: 32-34, 52-53). That is to say, these kinds of social constructs are constituted and sustained by a kind of collective agreement—at least, in the case of law, an "agreement" among those Hart calls "officials" of the system. Scalia is an associate justice of the U.S. Supreme Court because *and only because* other officials of the American legal system recognize that he is one and treat him accordingly (we

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[5]*MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916).
[6]Scalia, born in 1936, has been an influential conservative Supreme Court Justice in the United States since 1986. Nothing turns on our choice of example, we have simply picked a jurist well-known in our jurisdiction.
[7]We are using slightly different terminology than Searle. We use "social construct" to refere to aspects of reality that are constituted by human beliefs and attitudes; we use "social facts" as it is usually used in the jurisprudential literature to refer to those beliefs and actions of officials of a legal system that are constitutive of law.

shall say more about this, below). Although such facts are socially constructed, it is still possible for any individual to be mistaken about them.   One can be mistaken, for example, about who is an Associate Justice of the U.S. Supreme Court, because whether or not any particular individual is on the Court is not a matter of anyone's individual opinion. So, too, any individual can mistake a one dollar American bill for a ten dollar bill. Social constructs are not individual constructs: it is not up to any individual *what an American one dollar bill is*, and it is not up to any individual *who is an American Supreme Court justice*.

Social constructs generally involve the imposition of a status or function on a person, object, or event that it could not have solely in virtue of its physical features (Searle 1995: 39-42, 2009: 7). Scalia, for example, is not a Supreme Court justice just in virtue of the physical facts about his person. Rather, Scalia is a justice because we impute to him the status of a particular kind of judge, with all of the powers and duties that entails. More precisely, on Hart's view, Scalia is an associate justice of the U.S. Supreme Court because officials of the American legal system recognize that he satisfied the criteria for occupying such a role that are set out by the public power-conferring rules (partly specified in the U.S. Constitution) for becoming a justice of the Supreme Court. The imposition of these statuses or functions is accomplished through collective recognition of rules of the form "X counts as Y in context C," where the X term specifies some physical object or objects and the Y term specifies some status or function that things satisfying the X term cannot have simply in virtue of their satisfaction of the X term. These involve what Searle calls *constitutive rules* (Searle 1995: 43-49; 2009: 9-10, 96-98), and they play a particularly important role in Hart's theory. As we mentioned above, one of Hart's most important contributions to legal philosophy is the idea that a norm is legally valid in a given legal system if and only if it satisfies the constitutive criteria specified by the rule of recognition of that system. But a rule of recognition for Hart is also just constituted by the actual practices and attitudes of legal officials in deciding questions of legal validity. That is, on Hart's view, the rule of recognition has the content it does (e.g., "no norm is legally valid unless enacted by Parliament") *only* in virtue of the fact that officials, in fact, treat enactment by Parliament as a criterion of legal validity and the officials take themselves to have an obligation to do so. So a rule of recognition is itself a constitutive rule, and it is one that is constituted by the acts and attitudes of legal officials. A legal system exists, at bottom, because of the actions and beliefs of officials of that system: their practices and attitudes *constitute* the legal system.

Law, then, is an example of a social construct in something like Searle's sense. Yet as Searle also notes, "language is essentially constitutive of institutional reality [i.e., social constructs]" (Searle 1995: 59). If this is right, it follows that linguistic analysis is an important if not indispensable part of legal theory. We can and should use a sharpened awareness of words (construed broadly to include not just words but also whole expressions, speech acts,[8] and the mental states revealed therein) to sharpen our perception of legal phenomena, because these phenomena are wholly constituted by the beliefs and attitudes these linguistic practices reveal. And so it appears that Hart's theory can be both linguistic analysis and descriptive sociology in one stroke. If law is socially constructed, and social constructs are constituted by language, then when we analyze our ordinary ways of speaking and thinking about legal systems we are simultaneously analyzing the general features of a very important human institution.

This basic methodological position would explain many of Hart's most important arguments in *The Concept of Law*. Consider Hart's distinction between *duty-imposing* and *power-conferring rules*. Duty-imposing rules obligate others to do or refrain from doing something, while power-conferring rules specify procedures through which certain individuals can acquire legal powers and thus alter the duties of others and/or themselves. Hart's case against command theories of law (according to which laws are the commands of a sovereign backed by threats of sanction) relies heavily on the claim that we need the concept of a power-conferring rule to explain various legal phenomena (rights, wills, contracts, etc.) and that command theories cannot explain such rules without distortion (Hart 1994: 40-42, 48-49). The distinction is also called on to explain the nature of secondary rules of change and adjudication. Hart's argument for this distinction is simply this:

> Such power-conferring rules are thought of, spoken of, and used in social life [via speech acts] differently from rules which impose duties, and they are valued for different reasons. What other tests for difference in character could there be?
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> (Hart 1994: 41)

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[8]The relevant "speech acts" will include those that involve "overruling," "deciding for the plaintiff," "awarding injunctive relief" and so on.

In other words, all we need to know in order to distinguish these two types of rules is that they play different roles in social life, and the fact they play such different roles is exhausted by the way we conceptualize and talk about those roles. Our "talk" and the behavior that accompanies that talk *is the evidence* of the differing social roles and indeed explains the distinction itself.

Hart's method can now be summarized by the following claims: (1) a theory of law should be an account of the essential properties of modern legal systems in general; (2) a theoretical account of law's essential properties can proceed without consideration of its value or reason-giving force; (3) legal systems are socially constructed, and a theory of law is therefore a theory of the social facts about beliefs, attitudes and actions that constitute a legal system; (4) this social construct is amenable to linguistic analysis, given that it is constituted by language; and (5) given that law is socially constructed, a general theory of law is just an attempt to elucidate the folk concept of law, that is, the concept manifest in the language we use to think and talk about it.

Objections to Hart's Methodology

We shall consider in this section several lines of objection to Hart's influential approach to the problems of legal philosophy. One line of objection questions the fruitfulness of the methodology of conceptual analysis, as described above. Another line of objection largely accepts the method of "linguistic" or "conceptual" analysis, but questions whether there is a concept of law there that can simply be "described." We take these up in turn.

A. The Naturalistic Challenge

In many areas of philosophy, doubts about the kind of conceptual and linguistic analysis Hart relies upon have become common (e.g., Weinberg et al. 2001), but not so in legal philosophy, where almost everyone, following Hart, employs the method of appealing to intuitions about possible cases to fix the referent of "law," legal system," "authority" and the other concepts that typically interest legal philosophers. The Hartian approach to jurisprudence thus seems to be a case of what Frank Jackson (1998: 43) calls "immodest" conceptual analysis, in the sense that it aims to deliver knowledge about the actual nature of its subject-matter by consulting intuitions about how the concept extends to possible cases (the contrast is with conceptual analysis that aims only to determine *to what* the concept refers, while allowing that

the sciences will answer the question about the actual character of the referent, if there is one). Hart identifies the touchstone of his theory as "the widespread common knowledge of the salient features of a modern municipal legal system which…I attribute to any educated man" (Hart 1994: 240). Any educated person in a modern society, Hart thinks, knows a fair bit about legal systems. Most importantly, Hart thinks any educated person can be expected to have the following skeletal understanding of these general features of law:

> They comprise (i) rules forbidding or enjoining certain types of behavior under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones. (Hart 1994: 3)

In other words, we can expect the (educated) folk concept of law to identify these as the real features of legal systems. Hart's method is, thus, clearly a form of immodest conceptual analysis in Jackson's sense, but (and this is key) it has to be since the concept, as manifest in our language, constitutes the social construct of law! Hart's theory may rely somewhat less obviously on intuitions about possible cases than many contemporary legal philosophers do (like Joseph Raz, Matthew Kramer, and Scott Shapiro), but it is still the case that on Hart's theory we can derive knowledge about the actual nature of law by analyzing our shared concept of it as manifest in ordinary language.

Of course, there is more to elucidating a folk concept than opinion polling or intuition pumping, and there has to be conceptual space for revision to the concept. Folk reports about some phenomenon are not an infallible guides even to the folk concept of that phenomenon (and for obvious reasons: they can be unreflective, inconsistent, etc.). As Searle points out, a society can go about creating and sustaining institutions without being aware that this is what they are doing (Searle 1995: 47). In particular, the members of a society can fail to be conscious of the

patterns of collective agreement that constitute their own institutions. This could be because social institutions tend to evolve over time, such that there is no discernible point in a society's history when its members engage in any overt act of social construction. A society might also fail to be conscious of these collective agreements because they do not even realize that some institution of theirs is in fact socially constructed (gender roles are a relevant example here). Nevertheless, these collective agreements are an important part of the folk concept, and it is the theorist's job to bring them to light. We find that this is the best way to understand Hart's introduction of the concept of a rule of recognition. The idea that what makes any norm legally valid in a given legal system is its satisfaction of the criteria specified by a particular social rule (namely, the rule of recognition) is not intuitively obvious to the ordinary person. Indeed, it is not even intuitively obvious to legal professionals or many legal philosophers! But the idea of a rule of recognition is implicit in our folk concept of law—in the fact that everyone distinguishes, for example, between legally binding norms and other norms, and that criteria of legal validity can and do differ between legal systems--and introducing it into one's theory is necessary to make sense of other familiar features captured by the folk concept according to Hart.

Conversely, Hart aims to rid the folk concept of certain inconsistencies; in this respect, his kind of conceptual analysis is explicitly revisionary of the folk concept. For example, it certainly seems to be part of the folk understanding of law that legal systems guide conduct primarily through coercion or the threat of coercion (indeed, Hans Kelsen, the other great theorist in the modern positivist tradition, thought coercion was essential to law!). Hart was surely aware of the prevalence of this belief, but he is explicit that it is mistaken:

> Plainly we shall conceal the characteristic way in which such rules function if we concentrate on, or make primary, the rules requiring courts to impose the sanctions in the event of disobedience; for these latter rules make provision for the breakdown or failure of the primary purpose of the legal system. They may indeed be indispensable but they are ancillary. (Hart 1994: 39)

In other words, while the use of coercion is an important feature of legal systems (bordering on the indispensable), we will fail to do justice to other important features of the folk concept—such

as the idea that law can impose *obligations*-- if we overstate its role. So, for Hart, the legal theorist's task is to elucidate the folk concept of law, but this involves throwing light on implicit features of our concept that may go unnoticed by the ordinary person.

Ordinarily, naturalists worry that "folk" intuitions about the extensions of concepts can not be informative as to the actual nature of their referents since what the folk believe is hostage to ignorance and other epistemic infirmities. Naturalists typically defer to the more epistemically robust methods of the various sciences: if our best physics says that space can be non-Euclidean, then Kant's "a priori" intuiion about the structure of space be damned! Why not think the same is true of law? Why not defer to our best social scientific theory of law and legal phenomena to demarcate what law really is? Hart obviously does not adopt that approach: he treats ordinary language and concepts as his starting point, and his revisions appeal only to inconsistencies and tensions that are manifest in how the "folk" think and talk about law.

One difficulty for the naturalist is that there is not, at present, an epistemically robust social science of law and legal phenomena (cf. Leiter 2007: 192). But Joseph Raz has given a different, and more ambitious, answer to the naturalist challenge:

> In large measure what we study when we study the nature of law is the nature of
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> our own understanding. The identification of a certain social institution as law is
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> not introduced by sociologists, political scientists, or some other academics as
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> part of their study of society. It is part of the self-consciousness of our society to
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> see certain institutions as legal. And that consciousness is part of what we study
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> when we inquire about the nature of law. (Raz 2009: 31)

This rejoinder to the naturalist, however, seems weaker than Hart's position actually allows. It is not just that law "is part of the self-consciousness of our society to see certain institutions as legal," it is that-- per Hart's actual method and Searle's related account of socially constructed reality—that law *really is* what society, or some subset of society ("officials" of the system in Hart's terminology), "understands" it to be, perhaps not self-consciously of course, but in terms of their practices and attitudes, which are made manifest in their language

Again, consider the case of money. In fact, money is a concept of interest to sociologists, political scientists and other scholars who study social and economic orders. But the fact that some piece of metal or paper *is money* (such that it admits of empirical study) is conceptually prior to the claims of sociologists and political scientists, and is, per Searle, constituted by the attitudes of people in that society. If law is the same, then the stronger argument against the naturalist is that the metaphysics of a social construct like law *precludes* deference to the empirical sciences for purposes of general jurisprudence, since the way people use and understand the concept just constitutes the fact in question. Interestingly, this "metaphysical" defense of Hart's methodology—which is the methodology of almost all legal philosophy these days—is not one offered by Hart himself or any of his many followers. Yet it may be the best way to resist the familiar kind of naturalistic worries about "immodest" conceptual analysis (for such worries in the jurisprudential context, see Leiter 2007: 175-81, 183-199).

Yet this kind of argument does not wholly deflect the naturalist's challenge. For a naturalist can reasonably allow that a social phenomenon like law is, at least in the first instance, individuated by shared beliefs and attitudes, and still press the point that the "folk" concept of the phenomenon ought to be revised in light of whatever refined understanding of the phenomenon is explanatorily and predictively fruitful. After all, even the proponent of Hart's basic methodological posture allows that the understanding of the ordinary "folk" needs revision in various ways, as long as it does not forego some core of folk commitments. The Razian rejoinder, then, that we want to "understand our own self-understanding" is neither here nor there—the latter is a fine topic for social psychology and anthropology, but if it turns out that sacrificing parts of the folk concept yields a more powerful theoretical understanding of law as a phenomenon in human societies, why should we prefer Razian hermeneutics? If, in fact, the social scientific accounts of law and legal phenomena rise to the level that warrants epistemic confidence, why not revise the folk concept so that it fits with what the sciences discover? A different kind of philosophical naturalist, the experimental philosopher, can also properly object at this point that if a theorist *really* wants to "understand our own self-understanding," she ought to adduce reliable evidence of what that understanding is rather than rely on the armchair method of appeal to intuitions about how the concept applies in possible cases.

B.   Objections to "Descriptive" Jurisprudence

Even those comfortable with Hart's "armchair" methods have expressed doubts about Hart's evident assumption that there is in fact a robust and homogeneous folk concept of law for the theorist to describe: a cohesive set of beliefs, attitudes, and dispositions that can be found in every modern society that has law. Hart never offers much motivation for this assumption in his published work, and the second line of objection we will consider here suggests that his optimism is unwarranted. This objection, put forward first in 1980 by John Finnis (Finnis 2011) and then in a series of papers by Stephen Perry (e.g., Perry 2001), argues that every theory has to select the important features of its subject-matter that merit theoretical accounting, but that there is no way to do that without first engaging in moral reflection on the value of law and legal systems. These critics thus reject Hart's idea that we can explain what law is without any consideration of its moral value or reason-giving potential.[9] Whereas the methodological debates in epistemology, philosophy of mind and other areas have taken for granted that the aim is to analyze and describe the contours of the concepts at issue,[10] in legal philosophy the main debate, perhaps surprisingly, has been about whether a good theory of its subject matter can proceed without any substantive moral theorizing. And it would not be an overstatement to say that the literature on methodological issues in legal philosophy has been primarily concerned with this question.

More precisely, *methodological positivists* claim that a descriptive account of law's nature is explanatorily prior to any moral assessment or evaluation of law, including any moral assessment or evaluation of whether law provides us with genuine reasons for action. *Methodological anti-positivists* deny the preceding: a theory of law does require moral theorizing because we simply cannot understand what law is prior to some account of what law ought to be.

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[9] It is of course not the only possible motivation for rejecting Hart's descriptive aspirations. One could accept that there is a shared folk concept of law *and* that the goal of legal theory is to describe that concept while also rejecting the idea that legal theory can be descriptive. For example, one could argue that legal systems have an intrinsic moral objective or function and that we cannot therefore understand the nature of law without reference to this objective or function. On this view, part of the legal theorist's task is to describe the conditions under which law succeeds or fails to achieve its objective or discharge its function, and this task unquestionably involves moral argument. All the same, one could think that this function or point is implicit in the relevant social facts and that it is the legal theorist's job to bring this to light. Examples of such approaches include Murphy (2006) and, arguably, Shapiro (2011). The viability of this view turns on many substantive questions of legal philosophy that we cannot address here, but it is worth noting this point in logical space.

[10] Radical naturalists like Hilary Kornblith go further, denying that concepts are even what we are interested in, as opposed to the phenomena themselves.

There is no master argument for methodological positivism. It is an hypothesis about how parsimonious a theory of law can be, and it is supported to the extent that an explanatorily adequate theory can be given consistent with that hypothesis. Methodological anti-positivism on the other hand must be motivated by some perceived shortcoming in positivist theories of law, and the present line of objection attempts to locate one.

Finnis's version of the objection begins with an innocuous observation about theory construction: a theory of some phenomenon must begin with some assumptions about which aspects of it are significant or important for the purposes of explanation. Without some provisional discrimination between the important and unimportant features of a phenomenon, what we get is not a theory at all but "a vast rubbish heap of miscellaneous facts" (Finnis 2011: 17). Finnis's question is this: how can we identify the important features of law in a principled way?

We have already surveyed Hart's answer to that question. The salient features of law are the ones picked out as salient by the folk concept. Since the folk concept of law constitutes the phenomenon to be explained, this is as principled as a judgment of salience could hope to be. The theorist does not have to accept all the folk explanations of these features, because these can fail to track the folk concept for the reasons we mentioned above. But descriptive adequacy to what the "ordinary man" knows about law is the starting point for the theory.

Finnis thinks this answer fails because there is no folk concept whose judgments can be authoritative with respect to all legal systems. He agrees with Hart that legal systems are constituted by various facts about the behavior and attitudes of officials and that the legal theorist's task is to explain these patterns. But to this Finnis adds an important proviso: we cannot fully understand these social facts without understanding "their objective, their value, their significance or importance, *as conceived by the people who performed them, engaged in them, etc.*" (Finnis 2011: 3, emphasis added; Finnis 2003: 118). In short, we cannot fully understand a society's legal practices without accounting for the participants' understanding of the point or purpose of those practices. (Hart denies this, but we put that to one side for now.) There is, however, no universal or even general agreement about the point or purpose of law. Societies can and do vary greatly in their conceptions of this point or purpose (Finnis 2011: 4),

and this variation will manifest itself as significant variation in the social facts that constitute these societies' respective legal systems.

If that is right, then there is no one folk concept of law shared by every society that has law. There are only particular, and perhaps incommensurable, conceptions of law. *"How then,"* Finnis asks, *"is there to be a general, descriptive theory of these varying particulars?"* (Finnis 2011: 4) Analyzing our folk concept clearly will not do, because that will only get us an account of some particular conception of law or a loose assemblage of different conceptions. "And jurisprudence, like other social sciences, aspires to be more than a conjunction of lexicography with local history, or even the juxtaposition of all lexicographies conjoined with all local histories" (Finnis 2011: 4).

Finnis argues the only solution is to adopt a *central case methodology*, a method that takes its cue from Aristotle's notion of focal meaning or core-dependent homonymy (Finnis 2011: 9-11, 429-430). A central case analysis of some phenomenon identifies some subset of possible or actual instances of that phenomenon as explanatorily privileged. The members of this subset are the paradigm or *central cases* of the phenomenon, and they are privileged in two respects. First, the central cases are privileged insofar as a theory of the phenomenon is primarily concerned with explaining the important features of these cases. Second, the central cases are explanatorily prior to those instances of the phenomenon that are not members of the set of central cases. These are the *peripheral cases* of the phenomenon, and they are explanatorily posterior in that they can only be understood as defective, failed, or "watered-down" (Finnis 2011: 11) versions of the central cases.

How do we identify the central case of law? Finnis's answer is that the central case of a legal system is one whose valid norms are at least presumptive moral requirements, and that it is therefore impossible for the theorist to describe the central cases of law without engaging in some moral theorizing to determine what would have to be true of a legal system that actually generated moral obligations (Finnis 2011: 3, 15). Finnis even claims that Hart and Raz are *sotto voce* practitioners of this same method. For Hart and Raz, significance and importance are to be assessed from the perspective of those who take the "internal point of view" towards their society's law, meaning those who treat the law as a genuine standard of conduct, use it to guide their conduct, and appeal to it to evaluate the conduct of their peers (Hart 1994: 89-90). One of

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Hart's lasting contributions to legal philosophy is his observation that we cannot understand law if we fail to account for the way legal norms are used as reasons for action and normative standards "in the lives of those who normally are the majority of society" (Hart 1994: 90). For this reason, the central case of law (as Finnis reads Hart) cannot be a legal system in which the majority of society sees the law merely as a system of state-issued threats or predictions about when coercive force will be used against them. Rather, the central case of a legal system is one whose norms are generally treated as reasons for doing or refraining from certain acts and reasons for criticizing or punishing non-conforming conduct.

Hart and Raz both noticed, though, that there are many motivations for treating law this way. One might take oneself to have a general moral obligation to obey the law, and view the law as a standard of conduct for that reason, but one could also have less lofty motives. For example, one could take the internal point of view out of unreflective habit, or out of a desire to get along with one's peers, or out of a sense of professional duty or consideration of longterm self-interest. But for the purposes of legal theory, these different motivations are explanatorily idle. Differentiating between them does not help us explain any interesting *general* feature of legal systems.

Finnis thinks that this is where Hart and Raz go wrong. There are central and peripheral cases *of the internal point of view itself*, and we have to discriminate between them to identify the central case of law. Hart and Raz, on his view, stop arbitrarily with those who merely treat the law as creating obligations, whereas the central case of the internal point of view for Finnis is the perspective of one who *correctly* treats the law as morally obligatory (which we will call *the moral point of view* on law). Although it is possible to treat the law as a standard of conduct out of habit or longterm self-interest, these are, for Finnis, "deviant" cases of recognizing something as a genuine reason for action. That is, these attitudes towards the law can only be understood as defective, corrupted versions of the moral point of view. Hart and Raz corectly see that the central case of law can not be, as O.W. Holmes arguably thought, the case of someone who obeys the law only when afraid of sanction, but they then incorrectly treat as central the case of someone who simply treats the law as obligatory, even when it is not really morally obligatory.[11]

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[11]We are merely trying to describe Finnis's argument here, though it is clear it misdescribes Hart's argument. Hart's argument is not that the point of view of those who treat the law as obligatory is morally

Why do we need to privilege the moral point of view to identify the central case of law? According to Finnis, this point of view is the one "that brings law into being as a significantly differentiated type of social order and maintains it as such" (Finnis 2011: 14). Other points of view "will, up to a point, maintain in existence a legal system…if one already exists. But they will not bring about the transition from the pre-legal (or post-legal!) order…" (Finnis 2011: 14). If this is an empirical claim about how legal systems emerged in human history, it is both implausible and unsupported. More importantly, it is also of unclear relevance to the question what the concept of law in modern societies is. But perhaps Finnis does not mean it as an empirical claim; he also says that it is only from the moral point of view that it is "a matter of *overriding importance* that law as distinct from other forms of social order should come into being, and thus become an object of the theorist's description" (Finnis 2011: 15, emphasis added). The suggestion, it seems, is that we can only assess the good reasons for having law from the moral point of view. That might be true, but it is, again, unclear why we need to know the good reasons for having law in order to assess which of its features are important for the legal theorist. There appears to be no answer to this question that does not beg the question against methodological positivism. The answer cannot be that we cannot understand law without understanding its moral value, for that is precisely what this argument is supposed to show. It is hard to resist the conclusion that Finnis has simply changed the subject: what began as an argument about how to justify judgments of salience has now become an argument about how to assess the moral value of law, with no motivation for linking the two considerations (see Leiter 2007: 167-68 for a related objection).

Liam Murphy presents a different kind of objection to descriptive jurisprudence (Murphy 2001). According to Murphy, although there is widespread agreement about many aspects of law, there is also intractable disagreement about many of the most important questions of legal theory. Murphy cites the pervasive disagreement among legal theorists over whether the laws of any given system can be determined by moral criteria as opposed to facts about the behavior and attitudes of officials as evidence of the thinness of our folk concept (Murphy 2001: 381). The existence of intractable disagreement about such issues implies that the folk concept will be silent about them, and so we cannot hope to answer these questions by analyzing our shared

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superior to the point of view of the Holmesian "bad man," it is that it is descriptively false that everyone, legal officials included, adopts the point of view of the "bad man."

concept of law. Therefore, a successful theory of law cannot be merely a descriptive theory of the folk concept of law, because such a theory will be rather obviously incomplete.

Murphy's proposed solution is to abandon methodological positivism in favor of what he calls a *practical-political methodology*, whereby questions about the nature of law are decided according to which answers will yield the best moral or political outcomes. On Murphy's view the legal theorist should ask for a significant range of questions which of any number of competing theories of the nature of law, if adopted, would yield the best moral or political consequences? Thus, for example, Murphy endorses Joseph Raz's thesis that all legal norms are valid in solely in virtue of their social pedigree over Dworkin's claim that a norm is legally valid if and only if it follows from the best constructive interpretation of a society's legal practices on the grounds that the former will have more desirable political consequences (Murphy 2001: 408).

The problems with this kind of methodological position are obvious and well-documented (see Soper 1986; Dickson 2004: 147-149). A theory of law is a theory of what we should *believe* are the central features of a particular kind of social institution, but Murphy's practical-political methodology suggests that it is up to the legal theorist to decide what to believe—but belief does not work that way! The truth of a theory of law is not determined by the moral or political consequences of widespread adoption of that theory. To suppose otherwise turns large swaths of legal theory into wishful thinking.

Finally, we turn to Ronald Dworkin's challenge to methodological positivism. He rejects methodological positivism on the grounds that the concept of law is an *interpretive concept*. On Dworkin's view it is a crucial feature of the folk concept of law that it includes what he calls an "interpretive attitude." Participants in a social institution evince an interpretive attitude towards that institution just in case (1) they see it as having some value or as serving some purpose, and (2) they take the requirements of that institution to be partly determined or constrained by what would count as fulfilling that purpose (Dworkin 1986: 47). Law satisfies the first condition because the participants in a legal system generally take their law to serve the purpose of justifying state coercion (Dworkin 1986: 98, 109). In Dworkin's words, "[l]aw insists that force not be used or withheld…except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified" (Dworkin 1986: 93). (All positivists deny this, and Dworkin never offers any satisfactory explanation for what is

essentially a stipulation on his part.) Law satisfies the second condition because the participants take this scheme to be partly determined by the principles of political morality that do in fact justify the use of coercion in light of past political decisions. More concretely, it is Dworkin's view that a society's law is the scheme of rights and duties that figure in or follow from the explanation that best fits and best justifies that society's institutional history (i.e. its legislative enactments, judicial opinions, constitution, etc.).[12] This style of explanation is what Dworkin calls *constructive interpretation*.

Dworkin believes that law's interpretive nature has profound implications for the methodology of legal philosophy. In particular, all "useful" theories of law for Dworkin must themselves be constructive interpretations of some particular society's institutional history (Dworkin 1986: 102, 108-10). The legal theorist's task on this view is to offer an account of what the law of his or her community is, or a theory of how disputes about the law are to be decided in that community. "Jurisprudence," Dworkin says, "is the general part of adjudication, silent prologue to any decision at law" (Dworkin 1986: 90). Positivism may be useful for identifying the institutional history of a legal system, but it does not tell us what the law really is, since that is what follows from constructive interpretation

This methodological stance makes it difficult to put Dworkin's views into conversation with other theories of law. Debates in legal philosophy are almost exclusively debates about how to formulate a general theory of law, and substantive debates are almost exclusively about the general features of legal systems. By building in "justifies coercion" to the concept of law, most legal theorists think Dworkin has limited his theory to a subset of legal systems in which legal coercion is morally justified, thus making it a case of "particular jurisprudence" (see Hart 1994: 240-42; Leiter 2007: 159). Dworkin sometimes suggests that all viable theories of law must be constructive interpretations because any other kind of theory is doomed to fail. Many theorists think this a *reductio* of Dworkin's view since it entails that everyone in a legal system

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[12] It justifies the institutional history with respect to the purpose of justifying state coercion.

could, in fact, be mistaken about *what the law is*, since they might not realize what the best constructive interpretation would say the law really is![13]

Dworkin's strongest argument for understanding law as an interpretive concept claims that it allows us to make better overall sense of the actual practices of judges, lawyers, and other legal professionals.[14] In particular, it does a better job of explaining the existence and nature of *theoretical disagreements* about law. Disagreement about the law is, of course, a familiar fact, but Dworkin observes that these disputes can come in two forms. A *theoretical disagreement* is a disagreement about the criteria of legal validity of a particular legal system, i.e. about what makes a particular proposition of law true in a given society. For example, if we disagree about whether the fact that the city council's vote on the speed limit suffices to set that limit, we are having a theoretical disagreement. This type of disagreement contrasts with what Dworkin calls *empirical disagreement* about the law, in which parties agree about the criteria of legal validity but disagree about whether those conditions set out by those criteria have been satisfied. Thus if we agree that a city council vote would suffice to make the speed limit on Lakeshore Drive 45 mph, but disagree about whether such a vote has actually taken place, we are having an empirical disagreement.

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[13]"Soft" positivism, which allows that the rule of recognition could incorporate moral criteria of legal validity, actually faces the same problem, one of several reasons for thinking that Hart was mistaken in his posthumous "Postscript" in thinking that was a viable response to Dworkin's early criticisms.

[14] Dworkin also offered the argument known as the "the semantic sting." In *Law's Empire*, Dworkin argues that all non-interpretive theories of law must be theories of the semantics of legal terms (Dworkin 1986: 31-44). He furthermore takes all such theories to be committed to a *criterial semantics*: the thesis that an analysis of the meanings of legal terms is an analysis of the shared criteria used by lawyers, judges, and other legal professionals to apply these terms (Dworkin 1986: 35-36). But this combination of views is untenable, because it cannot adequately explain the fact that legal professionals often disagree about what the law is. "Semantic theories", as Dworkin calls them, are committed to saying that when professionals disagree about whether some proposition of law is true (e.g. "it is illegal to drive over 45 mph on Lakeshore Drive"), they must be using different criteria to apply the relevant legal terms. But then it follows that they must *mean different things* by their terms, and that they therefore are not really disagreeing, which is absurd (Dworkin 1986: 43-45). All non-interpretive theories fall prey to this semantic sting, and the only plausible alternative to a semantic theory of 'law' is an interpretive theory.

The semantic sting fails in myriad ways, as several commentators have observed (see Raz 2001, Coleman and Simchen 2003, and Shapiro 2007 for a thorough discussion). Most immediately, there is no reason to think that all non-interpretive theories of law are committed to criterial semantics, as they must be if they are to be stung by Dworkin's argument. More generally, there is no reason why all non-interpretive theories must be theories of the semantics of legal terms. Indeed,, Hart specifically disavows any real concern with the norms governing the application of legal terms in the opening sections of *The Concept of Law*. Dworkin must be basing this conclusion on Hart and others' endorsement of linguistic analysis as an important tool of legal theory. However, the usefulness of linguistic analysis, as we saw earlier, is not limited to its ability to elucidate the meanings of terms.

Dworkin argues that theoretical disagreement is a significant feature of law, citing, in particular, disagreement about the canons of statutory interpretation among (American) appellate court judges as evidence. Moreover, positivists appear to have a difficult time accounting for this type of disagreement. If positivism is correct, then whatever counts as law in a particular society is determined exclusively by facts about official behavior and attitudes, the social facts that constitute the rule of recognition. If officials do not, in fact, converge on the criteria of legal validity, then there is no fact of the matter about what the criteria of legal validity are, and therefore no fact about which to have a genuine disagreement. Positivists therefore appear to be committed to saying that in all cases of theoretical disagreement, the parties to the disagreement are either mistaken or disingenuous (Leiter 2009: 1224-26; Shapiro 2011: 290-91). And if theoretical disagreement is as common as Dworkin suggests, it follows on the positivist view that a typical legal system is characterized by massive amounts of error or disingenuity about what the law is.

Dworkin takes this to be an unpalatable consequence of legal positivism and its methodological posture. On the surface, judges appear to disagree about what the law requires because they disagree about the criteria of legal validity. And in resolving such disputes, they at least claim to be deciding according to what the criteria of validity *really are*. Methodological positivism demands a debunking explanation of what is going on in such cases, and this, Dworkin thinks, counts against positivism and in favor of his theory, which offers, he thinks, an explanation of theoretical disagreement more faithful to a literal, rather than a debunking, interpretation of the disagreement.. When judges disagree about the criteria of legal validity, they are disagreeing about what counts as the best constructive interpretation of their society's institutional history, and the existence of disagreement does not rule out the possibility of a right answer to this question. Understanding law as an interpretive concept, then, allows us to preserve the surface features of legal argument and disagreement.

Positivism is, sometimes, committed to explaining away theoretical disagreement,[15] though the theoretical costs of this commitment are proportional to how common that

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[15]Some legal systems, in fact, have pedigreed interpretive rules for resolving such disagreements: e.g., in Canadanian constitutional law, an argument that appeals to the original intent of the drafters of the Charter is forbidden. There can be no theoretical disagreement about this kind of interpretive issue in Canada, even though it is rife in American constitutional law.

disagreement really is. If it turns out to be a relatively marginal feature of law, the costs of adopting a debunking explanation might be acceptable in light of positivism's other theoretical virtues. Dworkin's case for the pervasiveness of theoretical disagreement rests on his analysis of several Anglo-American legal cases, though questions have been raised about the adequacy of his reading of those (Leiter 2009: 1232-1248). More importantly, appellate cases represent only a tiny fraction of all litigated disputes, and even a smaller fraction of all legal disputes (Leiter 2009: 1226-1227). Furthermore, appellate courts choose to hear these cases precisely because of their novelty relative to typical legal disputes. They tend to be cases that stand out because they point to areas where the law is particularly unclear or unsettled. By contrast, the vast majority of cases never make it to trial or never make it onto the docket of a court of appeals precisely because there is no real question about what the law requires in these cases. The most obvious explanation for this is that the parties to a dispute *agree about what the law is*. Functioning legal systems are most notable for the massive amounts of agreement about the law, which is exactly what a positivist theory predicts (Leiter 2009: 1227). So, *contra* Dworkin (and others sympathetic like Shapiro 2007, 2011), theoretical disagreement is not nearly so pervasive, and where it does occur, the debunking explanations are actually the most plausible.

All of the objections to methodological positivism considered in this section are alike in that they each rely on premises about the existence of some form of disagreement, and that they each rely on premises that cannot be confirmed from the armchair. They are all motivated by some putative observations about social facts, observations for which there can be no *a priori* argument. We have offered some preliminary reasons for thinking that methodological positivism can survive these challenges, but ultimately these disputes can only be decided by closer attention to the social facts that all parties agree partly constitute a legal system.

Conclusion

We have focused in this essay only on the methodology for the central topics in philosophy of law: the nature of law and the relationship between legal and other norms, especially moral ones. But much work in philosophy of law concerns philosophical questions about substantive legal doctrines, questions like: Are contracts morally binding promises, or agreements that can be breached to yield efficient outcomes? What is the difference between excuse and justification in the criminal law? Is the law governing private wrongdoing (the law

of "torts") implementing a kind of corrective justice, or is it better explained in terms of economic efficiency? This work has a great advantage over the work in the core of legal philosophy, because it has an undisputed datum: a substantive body of doctrine enacted by legislatures and courts in various jurisdictions. The ambition of such work is almost always the same: to try to identify the moral (or at least normative) coherence of the substantive doctrine. It also almost always confronts the same problem: the law is morally incoherent, since it has been created over a long period of time, by persons with many different interests and concerns. Thus this work typically shifts to an explicitly normative perspective, that raises the usual methodological issues in normative philosophy, but these are beyond the scope of this essay.[16]

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