

**TRUTH IS TRUTH TO THE END OF RECKONING[†] BUT HOW TO RECKON
WHERE TRUTH BE FOUND? METHODOLOGICAL OBSTACLES FACING THE
LEGAL THEORIST IN ATTEMPTING TO EXPLICATE THE NATURE OF LAW**

Donna M. Lyons^{1*}

[†] *William Shakespeare, Measure for Measure Act V, Scene 1.*

ABSTRACT

This paper examines the methodological implications of hermeneutics for legal positivism.

Part II introduces hermeneutics as a method, and explores its relevance for analytic legal philosophy. Part III argues that legal positivism cannot maintain moral neutrality while using the hermeneutic method. Complete value neutrality is a fiction. However, theorists need not endorse a specifically *moral* position during theory construction. Nevertheless, the theorist's embedded moral position inevitably influences theory construction such that the jurisprudential picture which is thereby painted is always potentially fallible. Theories purporting to provide universal truths about the *nature* of law are fallible and thus do not provide *necessary* truths because such theories must be founded on presuppositions which are reflections of fallible intuitions. Parts IV and V propose that a theoretical analysis of folk concepts via the intuitions of the theorist cannot yield essential truths about law because the method is inherently subjective. Part IV analyses the relevance of *concepts* for philosophy, concluding that a philosophical theory which uses concepts as part of the hermeneutic method must inevitably rely on intuitions in conducting its analysis.

In Part V, the author examines the relevance of intuitions for philosophy generally, and for jurisprudence specifically. Folk intuitions are explored by the legal theorist using hermeneutics. Collective (folk) intuitions cannot explain the *nature* of the world: nothing necessarily and universally true can be claimed as a result of intuitionism, only contingent truths can be built therefrom. Furthermore, where the issue of cognitive diversity is ignored, the tendency of the legal theorist to superimpose her own intuitions onto those of her subjects

¹ LL.B. (Hons) Trinity College Dublin, LL.M. New York University. I would like to thank Oran Doyle, Eric Engle, Shane Glackin, James Hyland, Donal Lyons, Patricia Lyons, David Prendergast and David Walker for their patient proof reading of, and contributions to, an earlier draft of this article. I would also like to extend my gratitude to Ms. Justice Susan Denham, Christopher Gosnell, Jayne Huckerby, Judge Evan J. Wallach, the NYU LL.M. class of 2009, and my family, for their inspiration and support, both academic and otherwise, over the course of the year.

renders her results even more likely to be erroneous. Therefore, theory construction as a result of hermeneutics cannot claim to be objective. Part VI explores possible alternatives to the traditional analytic legal positivist position. The author argues that viewing law as an essentially contested concept, coupled with a pragmatic approach, is the most appropriate course for jurisprudence to take in order to maintain credibility.

In Summary the Argument is:

- 1) Hermeneutics is a method used by the theorist which involves understanding a social system from the perspective of the social subject.
- 2) A majority of legal philosophers use hermeneutics during theory construction.
- 3) Using hermeneutics does not mean that a philosopher must endorse a specifically moral position but it does mean that reliance on personal intuitions is inevitable.
- 4) Legal positivists who employ hermeneutics cannot claim to have discovered the *nature* of law because reliance on intuitions, which is inevitable, produces faulty results.
- 5) Rather than making false claims regarding law's nature, we, as philosophers, ought to strive to accept law as an essentially contested concept, and thereby acknowledge the limitations that are placed on our pursuit by intuitionism, but remain satisfied to choose between theories of law based on their pragmatic value.

I. INTRODUCTION

Hermeneutics has been defined as “the art or theory of interpretation, as well as a type of philosophy that starts with questions of interpretation. Originally concerned more narrowly with interpreting sacred texts, the term acquired a much broader significance in its historical development.”²

In the context of analytic legal positivism,³ Brian Bix notes that the methodology of social sciences, “with its emphasis on the internal aspect of rules and of law, is hermeneutic in the sense that it tries to understand a

² THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 323 (Robert Audi ed., 1995).

³ Analysis decomposes objects into their constituent elements to examine those elements and their relationships to each other, the system decomposed, and even other systems and other elements of systems. Analytic philosophy is philosophy that adopts an analytic approach as the central feature of its methodology. Analytic jurisprudence is legal philosophy that draws on the resources of analytic philosophy in attempting to understand the nature of law.

practice in a way that takes into account the way the practice is perceived by its participants.”⁴

Since Hart, hermeneutic methodology, by virtue of which the legal sociologist constructs her account of law consistent with the perspectives of legal participants, has been widely taken up in jurisprudence. However, the use of hermeneutics by the analytic legal positivist school of thought has caused a great deal of controversy.

In this paper, I examine the implications of hermeneutics for legal positivism. In Part II, I will introduce hermeneutics as a method, and explore its relevance for analytic legal philosophy. In Part III, I argue that legal positivism cannot maintain moral neutrality while adopting a hermeneutic approach. I will suggest that although complete value neutrality is a fiction, theorists need not endorse a specifically *moral* position⁵ during theory construction, but should instead make explicit all presuppositions on which their theory is based. Any theorist’s embedded moral position influences their construction of theory such that any resulting legal theory is necessarily fallible. Therefore, theories purporting to provide necessary universal truths about the essential, i.e. inevitable *nature* of law are untenable.⁶ In Parts IV and V, I continue this discussion by proposing that a theoretical analysis of folk concepts via the intuitions of the theorist cannot yield essential truths about law because that method is inherently subjective.⁷ In Part IV, I analyse the relevance of *concepts* for philosophy, as well as the entrenched controversy which surrounds them. I conclude that a theory which uses concepts as part of the hermeneutic method must rely on intuitions in conducting its analysis and thus, likewise, is fallible. In Part V, I will examine the relevance of intuitions for philosophy generally, and for jurisprudence specifically. Folk intuitions (i.e. collective intuitions) explored by the legal theorist using hermeneutics cannot explain the *nature* of the world. That is, nothing universally (i.e. *necessarily*) true can be claimed as a result of intuitionism. Furthermore, where the issue of cognitive diversity is ignored, the tendency of the theorist to superimpose her intuitions onto those of her subjects amplifies the already inherent fallibility of theories based on intuitions. Therefore, theory construction as a result of hermeneutics cannot claim to be objective because hermeneutics ultimately relies on (fallible)

⁴ BRIAN BIX, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory* 52 S.M.U. L. REV. 167, 176 (1999). It is these broad definitions of “hermeneutics” and “hermeneutic methodology” which I will adopt in the current article.

⁵ According to the CAMBRIDGE DICTIONARY OF PHILOSOPHY, morality is “an informal public system applying to all rational persons, governing behaviour that affects others, having the lessening of evil or harm as its goal.”

⁶ According to the CHAMBERS DICTIONARY, an entity’s nature consists of those qualities “which make it what it is, governing its character and behaviour.”

⁷ An intuition is the process of the mind by which it immediately perceives things without reasoning or analysis.

intuitions. As a result of the foregoing discussion, Part VI explores possible alternatives to the traditional analytic legal positivist position. I will argue that viewing law as an essentially contested concept, coupled with a pragmatic approach, is the most appropriate course for jurisprudence to take in order to maintain credibility.

II. METHODOLOGY IN THE SOCIAL SCIENCES

A. An Introduction to the Hermeneutic Method

The methodology of the social sciences differs from that of the natural sciences in important respects. Natural science is an inquiry into entities which are mind-independent and often complex. Thus, the objects of natural science are ordinarily not readily accessible to the layperson. Natural science reveals authoritative truths about the objects in question, and may override the ordinary conceptions of those who interact with such objects on a day-to-day basis. On the other hand, the social sciences generally restrict themselves to an examination of concepts with which the laity is familiar. That is, the *concepts* which are harboured by the subjects of social science are the central focus of the inquiry.⁸ A successful theory of a social practice will generally ring true with the layperson, striking him as something s/he already knew, because it is *his or her own concept* which is ultimately being uncovered and explained.

Social sciences focus on social subjects (and their concepts) because of the general belief that individuals are ordinarily the best candidates for understanding the operation of their own minds. Due to the fact that social phenomena are *ipso facto* social creations, their features may be uncovered by understanding how those privy to the phenomenon collectively conceive of it.⁹ A certain affinity between theorist and subject is therefore advisable:¹⁰ because social concepts are mind-dependent, the theorist must describe and analyse them, at least in part, as understood from the subject's point of view in order to be certain that it is the subject's conception of the entity, rather than the theorist's, which is truly under investigation. Habermas summarizes the position well:

⁸ Weber is a strong advocate of this approach. *See generally* MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES (1949).

⁹ Searle forges a useful distinction between *brute facts*, which are facts about the natural world and which exist independently of the mind, and *social facts*, which depend for their existence on human thought. The latter would include legal concepts such as rule, authority, justice, and so forth, because these concepts require human consciousness and intentionality for their creation and continuity. *See* JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995).

¹⁰ That entity which is subject to examination or interpretation by the theorist.

Without the view of law as an empirical action system, philosophical concepts remain empty. However, insofar as the sociology of law insists on an objectivating view from the outside, remaining insensitive to the symbolic dimension whose meaning is only internally accessible, sociological perception falls into the opposite danger of remaining blind.¹¹

Weber has made important advances in this regard.¹² For Weber, because human action is purposive and meaningful, any description of such action must account for the values and ideals of social subjects. Weber is of the view that sociology “is a science concerning itself with the interpretative understanding of social action... We shall speak of ‘action’ insofar as the acting individual attaches a subjective meaning to his behaviour – be it overt or covert, omission or acquiescence.”¹³ He rejects the possibility of superimposing the methodology of the natural sciences onto the social sciences for this very reason: an analysis of values and motives – the subjective intent of the legal practitioner – is central to any adequate social scientific study. Out of this, Weber develops his method of *Verstehen*, or understanding. This approach requires the theorist to move closer to the attitude and motives of the subject by placing herself within the subject’s mind. The *Verstehen* method is a hermeneutic method, in that it views the interpretation of human reasoning as central to any discussion about human practice. This requires the theorist to remain as value-free as possible; to put aside all value judgments when engaging in analysis, so that the position of *Verstehen* does not taint the relative objectivity of the analysis. Weber’s is a dualist approach in this sense: it is sufficiently engaged to allow for an understanding of the motives behind human action, but sufficiently disengaged to allow for an objective assessment of cultural values. It is equally tailored both to the normative engagement and to the empirical description of the legal system.¹⁴

Peter Winch is also critical of any proposed link between the methodology of the natural sciences and that of the social sciences. In *The Idea of a Social Science*, he argues that the only way for a social scientist to understand a social practice is to analyse it from the viewpoint of the rules of that particular practice, which are essentially societal constructs.¹⁵ For Winch, human behaviour can only be understood through the concepts which are central to that behaviour because an external analysis would inevitably

¹¹ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 66 (1996).

¹² See MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* (1949).

¹³ MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 4 (1978).

¹⁴ According to the OXFORD COMPANION TO PHILOSOPHY, “normative” is the adjective derived from the noun “norm,” which signifies...a standard, rule, principle used to judge or direct human conduct as something to be complied with.”

¹⁵ PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE* (1958).

misconstrue human action.¹⁶ Winch denies the possibility of prediction of human behaviour, because motives and reasons do not emerge from an agreed, objectively secure source. For example, the fact that two men have the same motives and reasons for undertaking something does not mean that they will both carry out the task in the same way, or indeed, that they will carry it out at all. Conversely, two practices may appear to be the same from the observer's perspective, but in fact differ widely from the participant's point of view.

For example, the practice of baptism is common to many cultures but does not always symbolize the eradication of original sin. One can argue that baptism thus has a deeper, more fundamental meaning which can be rationalized from an external vantage point, or, one can take the more satisfactory approach of examining each practice in light of the motivations of those involved, allowing that there may be practices which appear to be the same, but which in fact differ widely.¹⁷ Trying to explicate a *deeper* meaning from what seem to be common practices as between different cultures is, in my opinion, a meaningless expedition. The practice of baptism may appear to be the same as between different cultures, but what is truly being performed can only adequately be understood where the social scientist is directly engaged with the thoughts and motivations behind the practice. When the subject under examination is physical, according to Winch, the criteria for reference as to what is the *same* or *different* are available to the observer. On the other hand:

[W]hen one is dealing with intellectual (or indeed any kind of social) "things", that is not so. For their *being* intellectual or social, as opposed to physical, in character depends entirely on their belonging in a certain way to a system of ideas or mode of life...It follows that if the sociological investigator wants to regard them *as* social events...he has to take seriously the criteria which are applied for distinguishing...within the way of life he is studying. It is not open to him arbitrarily to impose his own standards from without. In so far as he does so, the events he is studying lose altogether their character as *social* events.¹⁸

This methodological advance has had far-reaching effects in the social sciences, and its influence in the jurisprudential sphere has been felt in no

¹⁶ *Id.* at 83-84.

¹⁷ Pareto argues that baptism should be examined from the point of view of the observer, revealing deeper and more fundamental truths about the practice, rather than explicating its content via the self-understandings of those internal to the system. *See* VILFREDO PARETO, *THE MIND AND SOCIETY* (1935).

¹⁸ WINCH, *supra* at 108. Emphasis original.

small way. I will examine the philosophy of law in light of this development before analysing the criticisms which have arisen out of its formulation.

B. The Initiation of Hermeneutics in the Jurisprudential Arena

Hart was the first well known contemporary jurist to model his theory of law on a hermeneutic foundation. *The Concept of Law* is a self-proclaimed essay in “descriptive sociology.”¹⁹ Hart’s philosophy is both descriptive and analytic and his project began as a critical response to the Austinian conception of law as orders backed by threats of sanction, as “key to the science of jurisprudence”.²⁰ Austin reduces all of law to commands of the sovereign, a conclusion which leads him to adopt a scientific and therefore predictive approach. As a result of this, Austin cannot capture the meaning of (purely theoretical) concepts which are exclusively internal to the practice of law, since predicting human behaviour based on scientific models will lead to inaccurate results.²¹ For Hart, a descriptive account which proceeds from an external perspective such as Austin’s cannot successfully capture much of what occurs in legal life: it is value-free, but it lacks descriptive depth.²²

Per Hart: if the theorist defers to the views of legal participants, rather than making judgments which are external to the social practice, she will be in a better position to select what is important and significant about that practice, and thereby have a foothold from which to construct her theory of law. From his position of understanding how others understand themselves, Hart concludes that normativity in general, and primary and secondary rules in particular, are of prime importance to the actors within any legal system.²³

Austin was blind to this fact because he maintained an external perspective, whereby the spectator can note nothing more than the observable regularities of conduct of legal participants. By Hart’s lights, “[f]or such an observer, deviations by a member of the group from normal conduct will be a sign that

¹⁹ H.L.A. HART, *THE CONCEPT OF LAW* § Preface (2d ed. 1994).

²⁰ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* Lecture I, 13 (Weidenfeld and Nicolson eds., 1968).

²¹ For example, Austin would posit that legal subjects are inclined to stop at traffic lights on the basis that they will be sanctioned should they not do so. However, as an examination of the internal perspective highlights, individuals will stop at traffic lights for a variety of reasons, for example, the desire one might have to lead life according to normative rules, and thus the preceding account of human behaviour at traffic lights would be inaccurate.

²² According to Hart, “For the understanding of [law] the methodology of the empirical sciences is useless; what is needed is a ‘hermeneutic’ method which involves portraying rule-governed behaviour as it appears to its participants...” H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, 13 (1983).

²³ For a discussion of primary and secondary rules leading to the normativity of which Hart speaks, see H.L.A. HART, *THE CONCEPT OF LAW*, *supra*, at 91-99.

hostile reaction is likely to follow, and nothing more.”²⁴ The concept of law is a concept which is understood and frequently used by the participants of a legal system. For Hart, therefore, the theorist who views the law from within gains a deeper understanding of the practice:

What the external point of view...cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society...For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.²⁵

Like Weber, Hart’s approach is dualist. He is interested in engaging with the motives and values of legal participants, but is nevertheless acutely aware of the necessity of remaining sufficiently disengaged from the practice in order to provide a relatively objective portrayal of the legal system.

Shapiro suggests that Hart’s focus on critical reflection forges an indissoluble bond between the hermeneutic perspective and the perspective of the law-abiding citizen.²⁶ That is, rather than advocating a *general* hermeneutic approach to jurisprudence, Hart is emphasizing the indispensability of the *law-abiding* perspective in any theory of law. After all, Hart’s criticism of Holmes would not succeed if he were merely advocating a general hermeneutic jurisprudence. Hart’s dissatisfaction with Holmes’ theory of law, as investigated from the perspective of the “bad man,” centers on the fact that such an explanation is incoherent: it cannot itself account for the sanctions which the bad man is trying to avoid. General hermeneutics *would* allow the “bad man” theory to stand because Holmes’ bad man is unmistakably a *participant* in the legal system: he is simply a participant who does not possess the practical attitude of rule acceptance. Therefore, Hart’s conception of the internal perspective appears to be narrower than a simple vindication of the hermeneutic method.

This suggestion strikes a chord, particularly when we note Hart’s dismissal of the non-law-abiding perspective as nothing more than an “external” perspective on law. However, rather than arbitrarily selecting this attitude of rule acceptance, Hart is choosing the perspective which best explains the

²⁴ HART, *id.* at 90.

²⁵ *Id.* Emphasis original.

²⁶ See generally SCOTT SHAPIRO, *What is the Internal Point of View?*, 75 FORDHAM L. REV. 1157 (2006-2007). See also SCOTT SHAPIRO, *On Hart’s Way Out*, 4 LEGAL THEORY 469 (1998); SCOTT SHAPIRO, *Law, Morality and the Guidance of Conduct*, 6 LEGAL THEORY 127 (2000). Jules Coleman agrees with this analysis. See JULES COLEMAN, *Methodology*, in COLEMAN & SHAPIRO eds., THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 339-340, fn. 38 (2004). For an earlier version of this material, see JULES COLEMAN, THE PRACTICE OF PRINCIPLE 179-217 (2001).

features of law which are intuitive to those living under the system, features on which there exists consensus,²⁷ such as norms, sanctions, dispute resolution, and so on. Insofar as the law-abiding citizen elucidates these features in a coherent fashion, it is the perspective to be preferred. Theories of law constructed from the bad man's perspective, focussing narrowly on sanctions, cannot account for the very existence of sanctions: if all citizens obeyed the law for fear of sanction, a circular account of law would ensue. There would be no means by which we could explain a judge's or a legislator's behaviour in creating law; to argue that law is created for fear of sanction arising out of that very law is an interminable and incoherent argument.

Further, theories focussing narrowly on adjudication vis-à-vis the perspective of the judge cannot explain the normative nature of law in everyday life.²⁸ For Hart, the law-abiding citizen, considering law as a system of primary and secondary rules, provides the most coherent account of what we intuitively consider the many facets of law.

Despite this narrow view, Hart remains a staunch defender of hermeneutics as a central part of the jurisprudential endeavour.²⁹ It is this general approach which allows him to *locate* the features which are significant and important about law and therefore which leads him to select one perspective over another. Without general hermeneutics, this process would not have been possible to begin with.

Hermeneutics has been an important feature of legal sociology since Hart. There has been widespread consensus on its worth for a social scientific analysis of law, particularly within analytic legal philosophy. Indeed, Postema notes that "virtually unchallenged is the view that jurisprudence is fundamentally interpretative or 'hermeneutic.'"³⁰ Nevertheless, a number of controversies have arisen as a direct result of this methodological development. Notable among these is the question whether and how value neutrality in theory construction is even possible. I will now turn to this debate.

²⁷ I will outline in Part V of this paper that assumptions of consensus and cognitive uniformity by the theorist will often amount to theoretical fictions. For the moment it is adequate to note that this is generally what the theorist considers herself to be doing.

²⁸ Ronald Dworkin's theory of law is an appropriate example in this context of a theory of law focussing on the internal perspective of adjudicators rather than citizens.

²⁹ See generally H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 13 (1983). See also BRIAN BIX, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory* 52 S.M.U. L. REV. 167 (1999) (for a discussion of the role played by Hart in legal theory's hermeneutic shift).

³⁰ GERALD POSTEMA, *Jurisprudence as Practical Philosophy* 4 LEGAL THEORY 329, 329 (1998). Postema points out that one notable exception to this trend is the philosophy of Michael Moore.

III. A DEFENCE OF MORAL NEUTRALITY

Due to the general commitment by many legal philosophers to hermeneutics, questions have been posed as to the continuing possibility of value neutrality within analytic legal positivism. If the theorist chooses to examine the concept of law from the perspective of the legal participant, to what extent can she remain morally neutral in explicating the content of the concept? I argue that hermeneutics does not require the jurisperit to commit herself to a given moral position in order to describe the concept of law. However, I argue that complete value neutrality is impossible and therefore the legal theorist who wishes to objectively discover the nature of law will face substantial difficulties. One of the central tasks of legal positivism is to provide a theory of law which describes the legal system as it *is* in a value neutral manner - separate from theories of law seeking to provide guidance on how the system *ought* to function – partly in order to overcome some of the difficulties in discovering what law is. Austin describes the position as such:

The existence of the law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is another enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.³¹

There are two arguments for the position that a hermeneutic approach to jurisprudence undermines this claim to value neutrality. The first is proposed by Finnis, and slightly differently by Perry, and is based on the fact that the selection which is made by the theorist between internal perspectives in describing the law is a moral choice. The second attack is posed by Dworkin, and is echoed by Oberdiek and Patterson, who argue that all interpretation is value-laden and that interpretation of a normative practice must therefore be normative. I will examine the merits and flaws of both positions below.

A. Moral Neutrality in Theory Construction Is Possible

Finnis is acutely aware of the methodological difficulties facing legal philosophy. He notes that descriptive theorists arrive at different theories of the legal system, despite the fact that they each analyse the same data:

It is obvious, then, that the differences in description derive from differences of opinion, amongst the descriptive theorists, about what is

³¹ AUSTIN, *supra*, at 184.

important and *significant* in the field of data and experience with which they are all equally and thoroughly familiar.³²

Finnis agrees that hermeneutics is the only method by which one can truly understand law.³³ However, internal perspectives in law are generally normative in nature. Participants view their own behaviour in a moral light: they *ought* to respect authority, they *should* obey the law, they *have a moral obligation* to respect the rights of others, and so on. According to Finnis, therefore, in selecting one perspective over another, it is difficult for the theorist to justify her choice except on moral grounds. Theorists, rather than selecting a perspective arbitrarily, should select it according to the tenets of practical reasonableness, that is, by “understanding what is really good for human persons...”³⁴ For Finnis, then, the theorist has no option but to incorporate moral argument into her exposition of the legal system.

Perry does not stand far from Finnis on this issue. Perry makes the argument that:

Jurisprudence requires a conceptual framework. The difficulty is that the data can plausibly be conceptualized in more than one way, and choosing among conceptualizations seems to require the attribution to law of a point or function. This in turn involves not just evaluative considerations, but also moral argument.³⁵

The objective of philosophy, for Perry, is to clarify the way we conceptualize our practice. Therefore, in order to explain why a citizen respects a legal authority, the theorist must portray the respectability of the authority, thereby, “showing that it is justified.”³⁶ Perry thus interprets Hart as saying that law is morally justified because it is capable of guiding conduct in a way that is socially beneficial. In short, if there are two competing accounts of the legal material, Perry is of the view that the theorist must choose between them on moral grounds.

³² JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 9 (1980). Emphasis original.

³³ Finnis notes that the theorist must “assess importance or significance in similarities and differences within his subject-matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject-matter.” JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, 12 (Oxford: Clarendon Press, 1980).

³⁴ *Id.* at 3.

³⁵ STEPHEN PERRY, *Interpretation and Methodology in Legal Theory*, in Andrei Marmor eds., *LAW AND INTERPRETATION* 123 (1997).

³⁶ STEPHEN PERRY, *Hart’s Methodological Positivism*, in Jules Coleman eds., *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 347 (2001). See also STEPHEN PERRY, *Holmes v. Hart: the Bad Man in Legal Theory*, in *THE PATH OF LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES JUNIOR* (1988); STEPHEN PERRY, *Hart on Social Rules and the Foundation of Law: Liberating the Internal Point of View* 75 *FORDHAM L. REV.* 1171 (2006).

There is no doubt that competing accounts of the positive material will arise. To borrow Nietzsche's words, it is possible "to conceive a reality that can be resolved into a plurality of fictions relative to multiple standpoints."³⁷ I will use an example to demonstrate this point. Take the concept of war: war is a social practice which is understood by participants in many different ways. For instance, one set of participants might equate the practice with the morally bankrupt, meaningless destruction of life and property, which ought to be avoided at all costs. Another set of participants might view it as a morally necessary method of dispute resolution, resulting in the protection of basic human values. Both conceptualizations are plausible. Due to the fact that both are also moral in nature, Perry would argue that selection of one over the other can be nothing more than an intuitive agreement with one camp, and is thus a selection based on morality. If the theorist views war as morally necessary through the attitude of the second internal perspective, by Perry's lights, she must show how the necessity of war is justified according to her basic moral values.

Ultimately, this argument is not supportable. Finnis and Perry make a sound argument to the effect that a choice as between competing normative conceptualizations of the practice must be made. However, they do not explain why it is only *normative* conceptualizations which are competing: the *external* attitude, that is, the citizen who views law in a predictive manner, can still provide a description of law, even if that description captures less of what we consider the intuitive features of law.

Furthermore, Finnis is correct to note that evaluation as to what is *significant* and *important* about the subject matter under examination must be made. However, requiring that such evaluation be moral in nature is an unnecessary logical leap: it is certainly *possible* to make the choice based on moral considerations, but it is also possible to decide *without* referring to such considerations.

Leiter's distinction between epistemic and moral values is useful in this context.³⁸ For Leiter, epistemic values outline the "truth-conducive desiderata" in theory construction, values such as "evidentiary adequacy, simplicity, minimum mutilation of well-established theoretical frameworks and methods..., explanatory consilience, and so forth."³⁹ Conversely, moral values

³⁷ FRIEDRICH NIETZSCHE, as cited by Mary Hesse. See MARY HESSE, *Habermas' Consensus Theory of Truth* 2 PROCEEDINGS OF THE BIENNIAL MEETING OF THE PHILOSOPHY OF SCIENCE ASSOCIATION 373, 375 (1978).

³⁸ BRIAN LEITER, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence* 48 AM. J. JURIS. 17, 34-35 (2003).

³⁹ *Id.* Perry also makes reference to such meta-theoretical criteria, providing the examples of a theory's "predictive power, coherence, range of phenomena explained, degree of (2010) J. JURIS 208

determine how one ought to live one's life as a matter of practical reasonableness, and are not a necessary element of the descriptive process. The distinction is critical because epistemic values allow the theorist to select one theoretical description over another without sacrificing moral neutrality.

In relation to the example of war provided above, the promise of theoretical consistency as a meta-theoretical or epistemic value may allow the theorist to choose the second conceptualization of the practice – the attitude that war is a morally necessary practice – as the more accurate one. As noted above, the theorist selects the features of law which she believes to be relevant to those participating in the legal system.⁴⁰ To the extent that her intuition coincides with that of those internal to the system, the feature of law will be retained as part of the theory. If there is widespread disagreement among participants as to which features are relevant, the theorist will have to prioritize aspects on her own terms. However, even this measure does not require her to make moral choices. Choices as to significance will be defined by a person's history and system of belief, much of which contains moral content. This is precisely why different people can arrive at different theories of a social practice based on the same material evidence. However, while values are never entirely separate from the critical process, a choice as to significance does not automatically become a positive endorsement. Indeed, our value system will often lead us to choose aspects of the material which are morally repugnant as significant for this very reason. For many of us, murder is a significant feature of the Nazi system because it stands out as important; and it strikes us as important because we understand it to have a crucially negative effect on society. In many ways, the terms 'value' and 'morality' are ambiguous: complete value-freedom is impossible. However, Perry and Finnis go too far: they argue that morality in the form of practical reasoning must be involved. Ultimately, a choice as to significance, while aided by the embedded moral perspective of the theorist, is not equivalent to practical reasoning: it by no means represents endorsement or justification of the practice under surveillance. Perhaps choices as to significance and positive endorsements can be placed at ends of the same scale, but they nevertheless lie at *opposite* ends of that scale, to the extent that it would be wrong to equate them when criticizing a theory of law.

Once the relevant features of the system are chosen, they are then collated, and the internal perspective which best elucidates these generally agreed features is prioritized. The first account of war above could be criticized on

explanatory unity, and the theory's simplicity or elegance." See STEPHEN PERRY, *Hart's Methodological Positivism*, *supra*, at 314.

⁴⁰ Description of a normative attitude may be done in a value-free way, an argument which I will explore in more detail in Section B. This particular argument turns on the possibility of *selecting* one moral position over another.

the basis that meaningless destruction does not account for the fact that war is often a highly organized, strategically sophisticated endeavour. Whichever perspective has the potential to yield a theoretically consistent account is the perspective to be prioritized. It should be noted that this is a moot point: one could validly argue for either of the perspectives in the war debate, but the persuasiveness of the theory will rest on its intuitive correctness. Whether or not the perspective is morally preferable, it is selected primarily on meta-theoretical grounds. There is no doubting that meta-theoretical considerations are still value-laden: determining what constitutes a *good* description requires evaluative reflection. Personal values are likely to color any type of selection, be it selection as to importance and significance, or selection as to which epistemic values are to be prioritized in theory construction. However, this is a very different evaluative process to one which results in the endorsement or otherwise of the practice under examination. Deciding which conceptualization fits more comfortably with the practice under observation lies worlds apart from deciding which conceptualization of the practice is *morally* preferable. It is high time for legal theory to take heed of this distinction, in order to allow the debate to move forward.

I will now turn to the critique which is presented against legal positivism on the basis that the interpretative nature of human thought does not admit of moral neutrality in theory construction.

B. Moral Neutrality in the Interpretation of a Normative Practice is Possible

Dworkin is one of positivism's most persistent critics.⁴¹ He insists on the interpretative nature of law and legal theory. In order to understand law, Dworkin argues, one must recognize its purpose, and therefore harbour a political justification for it. For Dworkin:

General theories of law...are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice.⁴²

According to Dworkin, the purpose of law is justification of state coercion and thus any explanation of the law must be justificatory.⁴³ The ascription of

⁴¹ See generally RONALD DWORKIN, *The Model of Rules* 35 UNI. CHICAGO L. REV. 14 (1967); RONALD DWORKIN, *Hard Cases* 88 HARV. L. REV. 1057 (1975); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

⁴² DWORKIN, *LAW'S EMPIRE*, *supra*, at 90.

⁴³ Dworkin notes that "[l]aw insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as license or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified." Dworkin, *LAW'S EMPIRE*, *supra*, at 93.

this purpose to law is generally accepted as intuitively incorrect, and primarily results from the fact that Dworkin, without justification, prioritizes the perspective of the judiciary in his account of law. Legal philosophy, for him, is not dissimilar to adjudication, since both activities entail the presentation of positive material in its best light.

However, jurisprudence is much more than merely adjudication. Adjudication is concerned primarily with the positive materials in identifying *the law*. Legal sociology, on the other hand, is primarily concerned with providing an account of law as a whole, including (especially) the behaviour of citizens in relation to *law*. This distinction, which was apparently overlooked by Dworkin, is a critical one because it determines the scope and effect of the material under examination.

Whereas judges generally *do* perceive the law in a purposive and justificatory manner, citizens often view it in terms of its regulatory effect. For many citizens it is a method of social guidance rather than a predictive game of sanction-avoidance. Raz correctly believes that Dworkin's philosophy of law is:

[A] theory of adjudication rather than a theory of (the nature of) law. Dworkin's failure to allow that the two are not the same is one reason for the failure of his conception of the tasks and method of jurisprudence.⁴⁴

Furthermore, it is clear that neither adjudication nor legal theory always strives to present data in its best light.⁴⁵ For Dworkin, the more justified the theory of law, the more true it is, and therefore what law *ought to be* is ultimately what it *is*.⁴⁶ He forges no distinction between the actual and the desirable.

However, equating what is and what ought be is an error: there are countless cases where the participant's desired conception of law differs from the reality of the legal system. Ofer Raban cogently argues against the possibility of equating desirability with truth.⁴⁷ He soundly argues that:

⁴⁴ JOSEPH RAZ, *Two Views on the Nature of the Theory of Law: A Partial Comparison*, in Coleman eds., HART'S POSTSCRIPT, *supra*, at 37.

⁴⁵ For a general refutation of Dworkin's "best light" requirement, see ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY Chapter 3 (2d ed., 2005).

⁴⁶ This is a logical follow-on the notion that law is justified state coercion: if, according to Dworkin, this is the case, then unjustified state coercion is not law. Therefore, this amounts to equating what *is* and what *ought to be*.

⁴⁷ OFER RABAN, *Dworkin's 'Best Light' Requirement and the Proper Methodology of Legal Theory* 23 OXFORD J. LEG. STUD. 243 (2003).

An interpretation may claim to be the most desirable conception of law without also claiming to be a true conception...And, obviously, an interpretation may claim to be a true conception of law without being the most desirable.⁴⁸

Dworkin criticizes positivism on the ground that it maintains a strict division between the interpreter and the legal material. Dworkin disregards this fact-value distinction: for Dworkin the role of the philosopher is to reconstruct the meaning embodied in the positive material. Interpreting a practice and justifying it become the same process, and therefore personal morality is essential to the discovery of meaning.⁴⁹ While one of Dworkin's greatest contributions to legal philosophy is his argument for the evaluative nature of interpretation, the relationship which he forms between interpretation and justification is untenable.⁵⁰

Before exploring this argument in more detail, it is important to note that Oberdiek and Patterson make a similar claim.⁵¹ They argue that all interpretation requires some amount of evaluation and thus any interpretation of a moral entity is necessarily a moral investigation. For them, the rule of law is specifically moral in nature, and therefore moral argument is necessary to explicate its content.⁵² They claim that "[t]he rule of law always adds something of value to the societies that possess it"⁵³ and that "the formal fairness demanded by the rule of law expresses a view about the moral status of a people, namely, that persons are worthy of being treated in non-arbitrary ways."⁵⁴ This argument takes a different angle to Perry and Finnis, who were sceptical of the possibility of value neutral *selection*. Instead, Oberdiek and Patterson, like Dworkin, take issue with the possibility of neutrally describing a normative concept at all. However, this argument is flawed in two ways. Firstly, the fact that there is moral merit inherent in the rule of law is contestable. Secondly, and more importantly, even if the rule of law adds something of value to society, it can nevertheless be described without being morally endorsed or rejected.

⁴⁸ *Id.* at 259.

⁴⁹ I have argued elsewhere that this proposition stands in direct conflict with Dworkin's argument for the pre-existence of law. See generally DONNA LYONS, *Dworkin and Judicial Discretion: A Critical Analysis of the Pre-Existence Thesis* 11 T.C.L.R. 1 (2008).

⁵⁰ Dworkin suggests that the theorist should impose a "purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong." Dworkin, *LAW'S EMPIRE*, *supra*, at 52.

⁵¹ JOHN OBERDIEK & DENNIS PATTERSON, *Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology*, in Ross Harrison eds., *CURRENT LEGAL ISSUES: LAW AND PHILOSOPHY* (2007).

⁵² Oberdiek & Patterson argue, for these purposes, that the rule of law is central to the concept of law.

⁵³ OBERDIEK & PATTERSON, *supra*, at 12-13.

⁵⁴ *Id.* at 14.

I will analyse this latter point in refuting both Dworkin and Oberdiek and Patterson. Before doing so, it must be conceded that theory construction is never *entirely* presumptionless.

Popper's view is instructive in this regard.⁵⁵ According to Popper, the scientific endeavor does not begin with observations and subsequently infer a general theory based on those observations. Instead, scientists propose a theory and then compare its predictions with observations about the physical world, attempting to uncover whether the original theory withstands the positive evidence. If the theory fails in this regard, it is *falsified*. On the other hand, if the evidence squares with the theory, the latter is retained, not as proven truth, but as unrefuted hypothesis. A single refutation will prove fatal, but no amount of supporting evidence will prove the theory's truth. Therefore, Popper maintains that science is speculative: that it is not so much that we know A is true, as we know all other hypotheses are false. The only (but important) difference between science and other forms of belief is that the former is authoritatively falsifiable. This important contention was taken up by Kuhn, who argues that scientific thought is defined by paradigms, systems of belief shared by a given set of people at any moment in the history of science.⁵⁶ Paradigms are accepted methods of inquiry, yielding what is considered authoritative knowledge for those within the system of belief. However, when evidence emerges giving rise to anomalies within the paradigm, a shift is likely to occur, whereby the old paradigm is replaced by a new one, and thus a new system of thought replaces the falsified one. According to Kuhn, the paradigms are incommensurable, that is, it is impossible to compare them from within the conceptual framework of one system. Therefore, scientific thought, and knowledge in general, is not authoritatively true, but rather, based on presumptions which alter considerably over time.

Legal theory, in this sense, requires that theorists have certain presumptions when embarking on theory construction. A theorist must select features of the legal system which she considers significant and important. She must adhere to the epistemic values of theory construction. She must decide which aspects of law require explanation and which do not. Some amount of evaluation is a *sine qua non* of legal theory: if selection were not possible, descriptions would be lengthy, incoherent, unworkable and largely futile. Dickson correctly notes that jurisprudence:

⁵⁵ KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (2d ed., 1968). *See also*, KARL POPPER, ALL LIFE IS PROBLEM SOLVING (1999) (for the expression and expansion of these and similar views). For a critical exposition of Popper's thought, see A.F. CHALMERS, WHAT IS THIS THING CALLED SCIENCE? (3d ed., 1999).

⁵⁶ THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed., 1996).

[D]oes much more than merely report on the views about the law held by those subject to it, attempting as it does to systematise, clarify, sieve for importance and relevance and incorporate them into a cogent and persuasive account of the nature of law.⁵⁷

However, as I will go on to discuss below, while theory construction is inevitably value-laden, it does not require the theorist to *endorse* the values under investigation. Our interpretation of a value requires us to have an understanding of that value, but it is possible to describe the value in a manner which does not constitute an express endorsement or rejection of it. In short, an understanding of self-conception does not lead to value-complicity. Coleman is correct in claiming that a characterization of the self-conception of legal participants would emphasize the characteristic of law as justification-centered.⁵⁸ However, while we must take into account the justificatory manner in which citizens conceive of their own behaviour, “this does not mean that we must *credit* those self-understandings in the context of trying to understand what the practice is.”⁵⁹

I will use a second example to demonstrate this critique. The Mafia wields authority through the vigorous exercise of violence. For those operating within the Mafia system, the organization is not criminal, but rather, acts as a role model and as a protective force in society. The Mafiosi are considered ‘men of honor’ and the omertà is the code by which they operate. This is the Code of Honor. The Code maintains that justice, honor and vengeance fall within the realm of men and not the state. Honor requires that secrecy of, and respect for, the Mafia be preserved through silence, and that a breach of the Code of Honor will incur retribution from the organization. The Mafia thus constitutes a normative social system with the value of honor at its very core. Let us, for the purposes of this example, presume that honor is a moral concept and that it adds value to the society in which it operates, according to those within its scope: in this case, the community ruled by the Mafia. Does this mean that a description of its content cannot be undertaken without employing moral argument? There is a certain level of understanding that is undoubtedly required: the theorist must understand what it is to feel honor, and to live according to its tenets. Somebody who has never encountered the concept will admittedly be unable to carry out an accurate description of it – that person will only be able to observe regularities of behaviour in an Austinian sense, resulting in a rather thin description of the practice. However, the person who does *understand* what it means to feel honor will be in an appropriate position to describe the value. The observer must also be able to

⁵⁷ JULIE DICKSON, *EVALUATION AND LEGAL THEORY* 43 (2001).

⁵⁸ COLEMAN, *METHODOLOGY*, *supra*, at 324.

⁵⁹ *Id.* at 326.

understand that the value has a moral aspect: this recognition is essential to understanding the pivotal role that it plays in such a society. Nevertheless, it does not require the observer to endorse the moral aspect.⁶⁰ Using Raz's concept of the detached legal statement, we can understand and describe the viewpoint accurately without any endorsement or rejection of its moral merit.⁶¹ In Raz's terms, the meat-eater can quite effortlessly inform the vegetarian that she should not eat a meat-based broth, whether or not the former agrees with the philosophy of vegetarianism.⁶² The meat-eater need only understand the value of vegetarianism in the abstract: she need not find it an appealing moral position. Therefore, the observer may have to understand the purpose or point of the practice, but this does not lead to the requirement that a moral justification for this point is provided. In the Mafia context, one might find the Code of Honor utterly reprehensible, but still be capable of describing its relative worth for those who value it. There are no comprehensively neutral descriptions, but the theorist's awareness of her role as such allows her to consciously reduce the evaluative aspect of her description. In the last analysis, if all members of the Mafia system consider the concept of honor as worthy and valuable, she is perfectly capable of referring to this fact and describing it, without assenting to it or endorsing it.

The moral neutrality debate is thus resolvable. Neither the Perry-Finnis critique, nor the Dworkin-Oberdiek-Patterson critique, undermines the possibility of morally neutral theory construction. Nevertheless, the theorist will always bring her own presumptions into the jurisprudential sphere, thereby influencing her analysis. While embedded presumptions do not necessarily constitute (moral) justification, they nevertheless render claims to objectivity fallible. The theorist who purports to yield necessary truths about the nature of law based on a presumption-laden inquiry will not withstand

⁶⁰ Indeed, many people external to the Mafia system have strong moral objections to the concept of honour in this context. One example is Terranova, an Italian Magistrate who ruled that "[t]he myth of a courageous and generous 'man of honor' must be destroyed, because a Mafioso is just the opposite" and who, incidentally, was murdered for his words in 1979.

⁶¹ It should be noted that Raz, an exclusive legal positivist and one of the most rigorous proponents of the separation thesis in modern times, remains committed to hermeneutic methodology. He agrees that "[i]t is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves." See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 221 (1994). Raz also agrees with Hart to the effect that "[d]escription may still be description, even when what is described is an evaluation." See H.L.A. HART, *THE CONCEPT OF LAW*, *supra*, at 244.

⁶² JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 175 (1999). For other examples of this notion, see JOSEPH RAZ, *THE AUTHORITY OF LAW*, 156-157 (2002).

close scrutiny.⁶³ I will examine this in more detail below in the context of philosophical concepts and intuitions.

IV. PHILOSOPHICAL CONCEPTS

A serious challenge for the analytic legal positivist in present day jurisprudence is her defence of the claim to essentiality⁶⁴ on the basis of conceptual analysis. The commitment of the legal theorist to hermeneutics means that she is required to analyse *concepts* which are understood by participants within the social system. A scientific, predictive approach is neither appropriate nor satisfactory for this type of analysis, since social constructs are inherently changeable and unpredictable. However, if it is the folk concept which is being examined by the theorist, questions arise as to the strength of conceptual analysis as a methodology, since the theorist's presumptions will always influence her interpretation of societal concepts.

Hermeneutic analytical positivist theories of law are generally constructed thus: the theorist reflects on what she considers to be the central features of law. To the extent that such features reflect the way in which the concept of law is intuitively understood by those living under the system, these features will form part of the theory. The theorist then chooses an internal perspective in accordance with the central aspects of law in order to elucidate the concept more fully. The theory which is constructed therefrom will be more or less successful depending on its intuitive correctness to those operating within the system. This, at least, is what theorist considers herself to be doing. The reality, I will argue, is quite another matter.

To my mind, there are two important stages in this process, namely (i) the delineation of the ambit of the theory based on participant intuition, and (ii) the success of the theory based on participant intuition. In other words, what is *significant* about law, and what ultimately makes a theory *true*,⁶⁵ are both factors which depend for their existence on the intuitions of internal participants about the concept.

⁶³ According to the OXFORD COMPANION TO PHILOSOPHY, logical necessity is that which “follows from the laws of logic alone.” Necessary truth, therefore, is truth which is, by nature, necessary.

⁶⁴ According to the CAMBRIDGE DICTIONARY OF PHILOSOPHY, “[a] property is essential to an entity if, necessarily, the entity cannot exist without being an instance of the property.”

⁶⁵ In reality, this denotes theory-success rather than truth. Although theorists are quick to make claims to truth based on intuition, I will argue in Part V that the possibility of such truth is in fact impossible.

What if the possibility of exploring the intuitions of participants via conceptual analysis were to fall away? Would truth based on armchair philosophy be possible?⁶⁶ I will initially review the debate surrounding concepts in current philosophy. I will subsequently conclude that reliance on intuitions remains a central aspect of the philosophical endeavor, and I will suggest that the analytic project is thereby subject to substantial criticism as a result.

A. What are Concepts?

Concepts are situated at the center of analytic jurisprudence.⁶⁷ Bix notes that “[a] concept is a category of thought by which we divide up the world.”⁶⁸ Coleman also points out that “[t]he aim of Conceptual Analysis is to uncover interesting and informative truths about the concepts we employ to make the world rationally intelligible to us.”⁶⁹ More specifically, the *concept* constitutes the possible situations which are referred to by a particular term.⁷⁰ However, rather than simply referring to all those instances where a word is used, (law, after all, can refer to a whole host of different entities) we distil our concept based on an implicit coherence between the terms used in a certain context. Therefore, jurists recognize that there is something consistent in the way we term law in relation to the state, in contrast, for example, to the way it is used in relation to the laws of mathematics. Conceptual analysis is the method by which the theorist uncovers the properties which are common to all subjects in a given set, in order to reduce these properties to more fundamental terms.⁷¹ For Jackson, the main defender of conceptual methodology in recent times, “conceptual analysis is the very business of

⁶⁶ According to the CAMBRIDGE DICTIONARY OF PHILOSOPHY, truth is “the quality of those propositions that accord with reality, specifying what is in fact the case.”

⁶⁷ Since analytic jurisprudence is, by definition, concerned with the elucidation of legal concepts, by their very nature they lie at the center of the jurisprudential enterprise. The CAMBRIDGE DICTIONARY OF PHILOSOPHY states thus: “analytic philosophers have tried to analyse the concept of propositions. This is conceptual analysis.”

⁶⁸ BRIAN BIX, *Raz, Authority, and Conceptual Analysis* 50 AM. J. JURIS. 311, 315 (2005).

⁶⁹ COLEMAN, *Methodology, supra*, at 344.

⁷⁰ *See also*, CAMBRIDGE DICTIONARY OF PHILOSOPHY: “a concept may be understood as a principle of classification, something that can guide us in determining whether an entity belongs in a given class or does not...[concepts are] general words (adjectives, common nouns, verbs) or uses of such words, an entity’s belonging to a certain class being determined by the applicability to the entity of the appropriate word.” Schroeter also notes that “[the philosophical analyst] thinks that our implicit understanding of what it is a concept represents *determines the reference* of the concept.” *See* LAURA SCHROETER, 85 *Pacific Philosophical Quarterly* 425, 426 (2004)

⁷¹ *See*, Roderiguez-Blanco notes that “[t]he goal of conceptual analysis is to describe or define concepts in terms of other concepts or perhaps to say certain things in one vocabulary in terms of a more fundamental vocabulary...” VERONICA RODERIGUEZ-BLANCO, A DEFENCE OF HART’S SEMANTICS AS NONAMBITIOUS CONCEPTUAL ANALYSIS 9 *Legal Theory*, 99, 102 (2003).

addressing when and whether a story told in one vocabulary is made true by one told in some allegedly more fundamental vocabulary.”⁷² Moreover, Farrell points out that “in general conceptual analysis of *X* is an attempt to provide a theory about what ‘makes’ something an *X*, by breaking the concept down into its more fundamental categories.”⁷³ In relation to legal theory, the method investigates whether the expression ‘law’ can be reduced to more fundamental terms. Hart undertook this project by reducing law to primary and secondary rules, Raz by reducing law to authority.

The concept, created as such, must also “survive the method of possible cases,”⁷⁴ that is, present an account of the term which coheres with our intuitions. The “possible worlds,” or “possible cases,” approach, described in more detail below, relies on intuitions for determining the concept’s scope. This is the most important facet of conceptual analysis: because the methodology attempts to examine the use of our terms, recourse to intuition about their appropriate use is essential. It is the folk concept which is elucidated in the case of law. My point is that you won’t ever get to the bottom of a social concept without taking account of how that concept is perceived by its participants. Law, as a social practice, is meaningless from a totally external perspective. Jackson suggests that when we seek to understand a concept, we are addressing that issue *according to our ordinary conception* of it.⁷⁵ In this sense, we determine our “ordinary conception” by analysing our intuition about various cases. This in turn gives rise to *our* theory, and “[t]o the extent that our intuitions coincide with the folk, they reveal the folk theory.”⁷⁶ The factual content of the subject may, according to this picture, be mind-independent, but due to the variation in terms among people, the only way to explicate the content of that factual material is to systematically analyse those terms against our intuitions.

I will begin this discussion by exploring the famous attack launched by Quine on the project of conceptual analysis generally, before investigating the fallible nature of intuitions in philosophy specifically.

B. Quine’s Critique of Conceptual Analysis

In one of his most famous publications, *Two Dogmas of Empiricism*,⁷⁷ Quine rejects the analytic-synthetic distinction, as introduced by Kant over 150 years

⁷² FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS 28 (2000).

⁷³ IAN P. FARRELL, *H.L.A. Hart and the Methodology of Jurisprudence* 84 TEX. L. REV. 983, 998 (2006).

⁷⁴ JACKSON, *supra*, at 19.

⁷⁵ *Id.* at 31.

⁷⁶ *Id.* at 32.

⁷⁷ WILLARD VAN ORMAN QUINE, TWO DOGMAS OF EMPIRICISM 60 PHIL. REV. 20 (1951).
(2010) J. JURIS 218

previously.⁷⁸ The analytic-synthetic distinction is central to conceptual analysis. An analytic statement is one which is considered true solely by virtue of its meaning, such as, “all bachelors are unmarried.” It is definitionally true. For Quine, we can only acquire knowledge of the world through experience of it, rather than relying on armchair philosophy: we cannot *know* that all bachelors are unmarried without direct experience of this phenomenon. Therefore, pre-Quine, it was widely acceptable in analytic philosophy to speak of truth by virtue of meaning alone. However, Quine argues that truth by definition alone is inadequate as part of the philosophical undertaking. In fact nothing definitive can be said about particular propositions in themselves; moreover, our belief system as an *entirety* (as well as its constituent elements) is subject to the “tribunal of experience” and any particular statement can be coerced into truth so long as sufficient changes are made to the belief system as a whole.⁷⁹ In short, there is no necessary distinction between conceptual truth and contingent truth. This is Quine’s famous argument regarding confirmation holism. In other words, if evidence is brought to light which would appear to contradict a proposition, that evidence is not fatal to the proposition’s status: instead, the statement can remain true so long as alterations are made elsewhere within the system of belief.⁸⁰ Therefore, both analytic and synthetic claims are revisable in light of conflicting evidence. As a logical corollary, then, analytic statements do not individually avoid the tribunal of experience, and thus cannot be deemed to be *necessarily* true.

For Quine, empirically confirming or infirming a statement defines its meaning. Therefore, the statement that “all bachelors are unmarried” cannot have meaning – such an investigation would simply result in circular argumentation, which is clearly undesirable. Knowledge of the world can only be *a posteriori*, *contra* Kant, and therefore concepts have no meaning in and of themselves, and can shed no light on the material world. I will now turn to the importance of the rejection of the analytic-synthetic distinction for conceptual analysis post-Quine.

C. Conceptual Analysis after Quine

Jackson is entirely conscious of the Quinean criticism in this regard. He therefore distinguishes between modest and immodest conceptual analysis. The immodest version draws conclusions based on conceptual intuitions

⁷⁸ See IMMANUEL KANT, *CRITIQUE OF PURE REASON* (1998). At 6-7, Kant notes:

In all judgments in which the relation of a subject to the predicate is thought...this relation is possible in two different ways. Either the predicate *B* belongs to the subject *A* as something that is (covertly) contained in this concept *A*; or *B* lies entirely outside the concept *A*, though to be sure it stands in connection with it.

In the first case, I call the judgment analytic, in the second synthetic.

⁷⁹ WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, 60 *PHIL. REV.* 20, 38 (1951).

⁸⁰ See, *supra*, note 70.

(both individual and collective) about the intrinsic nature of the material world. This is dangerous, according to Jackson, because it “gives intuitions about possibilities too big a place in determining what the world is like.”⁸¹ A conceptual project of this type would accord intuitions a central status: if folk intuitions indicated that plants did not require sunlight for growth, this would form an important part of the concept of plant life. This type of analysis leaves no room for critical interaction with folk intuitions.

The more modest version does not accord intuitions such a status. This version “is not being given a role in determining the fundamental nature of our world; it is, rather, being given a central role in determining what to say in less fundamental terms given an account of the world stated in more fundamental terms.”⁸² Therefore, the analysis merely describes our concept of the world, not the world in itself. Jackson claims that this modest approach agrees in practice, “while dissenting in theory” from the Quinean critique.⁸³ This is so because the modest version does not purport to describe the material world in a representative manner, and thus does not rely on empirical evidence for its validity. All that it claims to do is to describe our *concept* of the world: the way we interpret the world, regardless of what lies without.

Jackson appears to adhere to the ‘Kripke counter-approach’ to conceptual analysis, which is an attempt at saving conceptual analysis from the threat of Quine. In response to Quine, Jackson notes that “[t]he possible worlds approach is one way of responding to this challenge.”⁸⁴ In this context, Kripke has attempted to rescue analytic philosophy by constructing an idea of necessity that is not based on conceptual truth.⁸⁵ He substitutes an account of conceptual meaning with an account of metaphysical meaning with his idea of “possible worlds.” Kripke has thereby constructed the notion that there are many possible worlds, and the necessity of meaning is tested against these worlds. Under the process of rigid designation, a naming event occurs where we attach a name to an entity. Once we have attached the name, anything we later find out about the substance is necessarily true, because it is true in every possible world where the naming event took place. Fodor exemplifies this well:

[T]here are worlds that are just like ours except that there’s nobody in them, and worlds just like ours except that everybody is in them except President Bush...Notice, however, that there is no (possible) world in which $2+2=5$; and none in which bachelors are

⁸¹ JACKSON, *supra*, at 43-44.

⁸² *Id.* at 44.

⁸³ *Id.*

⁸⁴ *Id.* at 46.

⁸⁵ SAUL KRIPKE, NAMING AND NECESSITY (1980).

married...Here we seem to have a non-conceptual notion of necessity.⁸⁶

However, if conceptual analysis is gone, reliance on intuition remains. Fodor refers to Hilary Putnam's twin-earth dilemma in this regard. If one were to discover a substance which was identical to water in every way but was made of a different substance, (for example, made of XYZ rather than H₂O) would our intuitions guide us in concluding that it is water? According to Putnam, our intuition would say that it is not water, and that it is necessarily and *a priori* not water, because it is not water in *every possible world*. Even if all of our intuitions were in agreement on this matter, Fodor questions whether intuitions can yield truth at all: "some story is needed about what makes such intuitions true (or false) about what possible worlds there are and, as far as I can see, the only candidates are facts about concepts."⁸⁷ Therefore, Quine's criticisms still stand.

Jackson offers his modest approach as a nod to Quine, and while he endorses the Kripkean response as a method of providing *a priori* truths for conceptual analysis, these *a priori* truths will only be true of the concept, not of the world itself.⁸⁸ Nevertheless, I will not here concern myself with the extent to which Quine undermines Jackson's project, or indeed, the extent to which Kripke undermines Quine's project. Instead, what is here argued is that an appeal to intuitions in analytic philosophy remains unavoidable and it is this appeal which renders analyticity fallible. In this context, Bix pointedly asks: "[i]s conceptual analysis of law, in the end, merely a quasi-sociological investigation into one's community's linguistic intuitions?"⁸⁹ The answer to this appears to be a resounding yes. I will argue in Part V that an appeal to intuitions renders the jurisprudential endeavour fallible, and therefore undermines any claims which it makes to essentiality in explicating the nature of law.

V. INTUITIONS IN PHILOSOPHY

Sosa points to the fact that "[p]hilosophy has perennially relied on what seems intuitively right to the reflective mind."⁹⁰ An intuition is a judgment which is not made on the basis of some kind of explicit reasoning process which a person can consciously observe. Intuitions are fundamentally important in the analysis of social concepts, and are thus central to the hermeneutic method.

⁸⁶ JERRY FODOR, *Water's Water Everywhere*, 26 LONDON REV. BOOKS Oct. 21, 2004, at 18.

⁸⁷ *Id.* at 18.

⁸⁸ JACKSON, *supra*, at 49.

⁸⁹ BRIAN BIX, *Joseph Raz and Conceptual Analysis* 60-65 UNI. MINN. LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES 11.

⁹⁰ ERNEST SOSA, *Intuitions and Truth*, in P. Greenough & M.P. Lynch ed., TRUTH AND REALISM 208 (2006).

As noted above, hermeneutic concepts differ from natural kind concepts in that they influence the way in which we understand ourselves, and in the way that the hermeneutic function fixes the concept's extension.⁹¹ A theory of law must therefore account for the intuitions of those partaking in a social practice if it is to be a successful social theory. I will examine the role of intuition in conceptual analysis, and will proceed to analyse the methodology of intuition in the contexts of reflective equilibrium and cognitive diversity.

A. Intuitions and Folk Theory

It is generally accepted that insofar as a theorist's intuition coincide with the intuitions of the folk within a social practice, the folk theory of that concept is revealed. For Jackson, this means that the "general coincidence in intuitive responses to the Gettier examples reveals something about the folk theory of knowledge in the sense of revealing what governs folk ascriptions of knowledge."⁹² The Gettier counter-examples are a series of problems which question the traditional definition of knowledge as justified true belief.⁹³ One of the counter-examples reads thus: Smith is justified in believing the false proposition that (i) Jones owns a Ford. On the basis of (i), Smith infers, and is thus justified in believing, that (ii) either Jones owns a Ford or that Brown is in Barcelona. As it happens, Brown is in Barcelona, and so (ii) is true. Therefore, although Smith is justified in believing (ii), he does not *know* (ii). These are cases where a person has a justified true belief that *x* but does not know *x*. There has been overwhelming agreement as to the results given in the counter-examples and thus they were initially seen to offer a new insight into the folk theory by virtue of general intuition. However, it will be seen from the discussion below that the Gettier counter-examples do nothing more than testify to the fact that intuitions about knowledge differ from person to person, and from region to region, a fact which is detrimental to the methodology of reliance on intuitions in arriving at folk theory.

Jackson argues that in order to reveal the folk theory, all one has to do is extend, or project one's own intuition about possible cases onto the intuitions of others: "often we know that our own case is typical and so can generalize from it to others."⁹⁴ That is, we can generalize our own intuitions to that of the folk since we share the same folk theory. However, faithfulness to the intuitions of the folk is subject to two provisos. First, Jackson argues that if our audience happens to be theoretical physicists, and the subject is phrased in

⁹¹ FARRELL, *supra*, at 1002. Natural kind concepts are those concepts whose extension is fixed by whatever scientific generalizations employ the concept. Further, their boundaries will not be defined by the attitudes people have towards them.

⁹² JACKSON, *supra*, at 32.

⁹³ EDMUND GETTIER, *Is Justified True Belief Knowledge?* 23 ANALYSIS 112 (1963).

⁹⁴ JACKSON, *supra*, at 37.

terms of theoretical physics, “it would be the intuitions and stipulations of this special subset of the folk that would hold centre stage.”⁹⁵ Second, we should be prepared to make sensible adjustments to folk concepts where this is required. A limited massaging of the intuitions of the folk is thus acceptable. This can be done, according to Jackson, due to the objective nature of folk theory:

I take it that it is part of current folk morality that convergence will or would occur. We have some kind of commitment to the idea that moral disagreements can be resolved by sufficient critical reflection – which is why we bother to engage in moral debate. To that extent, some sort of objectivism is part of current folk morality.⁹⁶

This statement is indicative of the reflective nature of Jackson’s conceptual analysis. The objectivism mentioned is in fact simply the result of conscious reflection about possible cases via theoretical reflection. Therefore, it becomes necessary to examine whether objectivism can in fact be achieved through cognitive reflection, and if it cannot, whether presumptions to this effect are detrimental to the conceptual methodology.

B. The Importance of Intuitions for Reflective Equilibrium

Reflective equilibrium is a method of engaging in controlled thought-experiments, initiated by Goodman and made popular in more recent times by Rawls.⁹⁷ Because concepts are entities which are not immediately available to us, engaged reflection is seen to be necessary for their explication. The method of reflective equilibrium is “widely used to characterize a system of principles and judgments that have been brought into coherence with one another...”⁹⁸ Therefore, a set of observations about the concept is made, and a theory is constructed to account for those observations. Where there is recalcitrant data, it may be dismissed as faulty or irrelevant. However, where recalcitrant data is impossible to dismiss, the theory will have to be altered. Revisions are thus subjectively carried out, according to the intuitions of the theorist. The theory is tested against intuitions about cases which are imagined, and the resultant intuition about that case will then play a firm role in theory construction. The theory will subsequently be used to make predictions about cases on which intuition has not been consulted, “or on cases that were not part of the intuitive base from which the theory was

⁹⁵ *Id.* at 46-47.

⁹⁶ *Id.* at 137.

⁹⁷ See generally, JOHN RAWLS, *A Theory of Justice* (2nd ed., Harvard University Press, 1971); NELSON GOODMAN, *Fact, Fiction and Forecast* (Harvard University Press, 1955).

⁹⁸ STEPHEN STICH, *Reflective Equilibrium, Analytic Epistemology and the Problem of Cognitive Diversity*, in DePaul & Ramsey eds., *RETHINKING INTUITION: THE PSYCHOLOGY OF INTUITION AND ITS ROLE IN PHILOSOPHICAL INQUIRY* 97 (1998).

generated.”⁹⁹ Intuitions therefore have a central role to play in the analysis. Cummins thus notes:

If we want to criticize reflective equilibrium, then, we are squarely reduced to asking what authority the intuitions themselves have; to asking, that is, whether intuition can play the role observation plays in science.¹⁰⁰

Cummins argues that in science, conflicting propositions must be explained away in some objective fashion, in order to maintain its credibility as a discipline. For example, if there is a disagreement as to whether the night sky rotates clockwise or anti-clockwise, there would have to be a method for resolving the dispute; agreeing to disagree would simply not be satisfactory under the circumstances. On the other hand, reflective theory cannot resolve disputes that arise about the evidence in question, in the main because it is common for theorists to presume that there is intuitive agreement, and this gives rise to a selection effect, substantially weakening the theory. Cummins concludes that the methodology is epistemologically useless, untrustworthy, inaccurate and biased.

There are degrees of reflective equilibrium employed by philosophers of the social sciences. Although many philosophers will not explicitly adhere to the method, testing intuitions and bringing results of such tests into coherence is a common feature of current analytic philosophy. Hintikka argues that true reflective equilibrium is in fact difficult to come by: “the vast majority of appeals to intuitions by contemporary philosophers cannot be conceived as controlled thought experiments nor be justified by recasting them as such.”¹⁰¹ Regardless of degree, however, the method is a flawed one. In attempting to achieve intuitive consensus, the theorist moves uneasily between the consensus of the populous in ideal deliberative conditions and *de facto* consensus. Stich is critical of this approach, noting that “one influential proposal for solving the problem of cognitive diversity, a proposal that invokes the notion of reflective equilibrium, will not work.”¹⁰² Reflective equilibrium is an inherently subjective method of analysis and therefore cannot give rise to general and necessary truths about the nature of a social practice. Even if an assumption of cognitive uniformity is true, the theory does not itself harbor truth: once new evidence comes to light the theory must be redrawn to accord with the empirical data and therefore nothing essential can be revealed as a result of the process.

⁹⁹ ROBERT CUMMINS, *Reflection on Reflective Equilibrium*, in DePaul & Ramsey eds., *RETHINKING INTUITION*, *supra*, at 114.

¹⁰⁰ *Id.* at 115.

¹⁰¹ JAAKKO HINTIKKA, *The Emperor's New Intuitions* 96 J. PHIL. 127, 147 (1999).

¹⁰² STICH, *supra*, at 95.

I will now proceed to the hotly contested notion of cognitive diversity.

C. Cognitive Diversity

It is argued here that presumptions of cognitive uniformity are generally hasty and blind. Cognitive diversity is a very real phenomenon in society and is an issue which is significantly overlooked in current jurisprudential thought. Folk theory, as employed by conceptual analysts, is not a grand narrative of attitudes in society and ultimately must be differentiated to accommodate for distinctions in societal attitudes.

Weinberg, Stich and Nichols have made important developments in this regard.¹⁰³ Their research indicates that the Gettier counter-examples report nothing more than specific facts about the intuitions of subgroups in society. The research reveals that different people in different socio-economic classes and ethnic groups have systematically different intuitions about particular cases.

In a thought-experiment, Weinberg et al. found that intuitions in fact do not maintain uniformity from culture to culture. One problem posed during their research read thus:

Bob has a friend, Jill, who has driven a Buick for many years. Bob therefore thinks that Jill drives an American car. He is not aware, however, that her Buick has recently been stolen, and he is also not aware that Jill has replaced it with a Pontiac, which is a different kind of American car. Does Bob really know that Jill drives an American car, or does he only believe it?¹⁰⁴

75% of subjects with a European background answered that Bob “only believes,” with 25% stating that Bob “really knows.” However, interestingly, members of other cultural backgrounds had dramatically different intuitions. 57% of people whose cultural background was East Asian and 61% of subjects whose cultural background was Indian or Pakistani answered that Bob “really knows.”¹⁰⁵

Stich also refers to the work of Richard Nisbett, who has “shown that there are large and systematic differences between East Asians and Westerners on a long list of cognitive processes including perception, attention and memory.”

¹⁰³ Leiter refers to this research in his discussion of naturalism. See LEITER, *supra*, at 47.

¹⁰⁴ JONATHAN M. WEINBERG, et al., *Normativity and Epistemic Intuitions* 29 PHIL. TOPICS 429, 441-448 (2001).

¹⁰⁵ *Id.*

Furthermore, Stich refers to a series of cases, including those presented by Jonathan Haidt et al., in which significantly different moral intuitions arose as between different socio-economic classes in society.¹⁰⁶

On a similar note, Wisniewski argues that studies proving what seem like legitimate intuitive responses to draw are actually found to be wrong in many cases. He thus warns: “[i]t is clear that researchers must be very careful about relying on their own intuitions in formulating theories of thought and behaviour. Experimental methods are absolutely essential for determining the validity of such intuitions.”¹⁰⁷

Gopnik and Schwitzgebel have also done important work in this area. They argue that 20th century physics, for example, has “notoriously shown the inaccuracy of our everyday intuitions about the nature of space and time...”¹⁰⁸ For them, lay intuitions are often used as a foundation for a theory, which is then applied to other domains by analogy and they argue that philosophers who do this, “have notoriously violated the intuitions of folk psychology.”¹⁰⁹

Although it will often be possible to predict the intuitions of others when their mentalities are well known to us, this will not always be successful, particularly where the subjects of the analysis originate from different ethnic or socio-economic backgrounds. Habermas, in outlining his theory of deliberative democracy, gives the example of parents of children from different cultural groups not arriving at parent-teaching meetings. While it might be tempting to conclude that they are simply not interested in taking part in the meeting, it is possible that an examination of their *own* intuitions would reveal very different motivations for not arriving, such as an unwillingness to be judged by members of the foreign culture, or financial constraints in obtaining transport. For Habermas, this is a warning against the superimposition of preconceptions from the theorist to her subjects. On a practical level, where that superimposition occurs, the voices of philosophical subjects would be lost on the theorist and thus communication at this most basic level can alter the development of the theory tremendously.

In sum, folk intuitions cannot be said to be universal, even where they are employed for the modest purpose of describing our concept alone. Leiter argues that there is little reason to believe that such cognitive diversity would not also apply to the concept of law. Indeed, he notes that the Oxfordian

¹⁰⁶ WEINBERG et al., *supra*, at Section 3.

¹⁰⁷ EDWARD J. WISNIEWSKI, *The Psychology of Intuition*, in DePaul and Ramsey eds., *RETHINKING INTUITION*, *supra*.

¹⁰⁸ ALISON GOPNIK & ERIC SCHWITZGEBEL, *Whose Concepts are They, Anyway? The Role of Philosophical Intuition in Empirical Psychology*, in DePaul & Ramsey eds., *supra*, at 78.

¹⁰⁹ *Id.*, at 83.

jurisprudential world has dominated the scene for over 50 years and that this is likely to have a selection effect on the relevant weight accorded to different intuitions in analysing law.¹¹⁰

If intuitions are ethnically and socio-economically situated, therefore, it is unsatisfactory for the theorist to arbitrarily impose her own intuitions onto the intuitions of members of society, as is the case in analytic legal philosophy in general. Ultimately, this process will not demonstrate the truth of the folk theory. As noted above, intuitions are an essential part of (i) delineating what is significant and important about features of the legal system, and (ii) demonstrating the truth of a given theory of a concept of law. During the process of theory construction, the philosopher's apparent reference to folk intuitions in delineating her subject matter, and the same reference in testing the success of her theory, can be nothing more than a blind guess, based on highly subjective considerations. The theorist can thus either carry out opinion polls to discover the intuitions of those within its subject matter,¹¹¹ and assert the truth of the resultant theory as geographically and temporally limited, or the theorist can do what she has always done – remain in her armchair – and accept the very fallible nature of her results.

D. Conceptual Analysis, Intuitions and Positivism

I will now examine the fate of legal positivism in light of the foregoing discussion.¹¹² A majority of analytic legal positivists seeks to provide an account of law which explicates its *essential* features: features which arise necessarily in every legal system. Austin notes that analytic jurisprudence strives for “the essence or nature which is common to all laws that are properly so called.”¹¹³ I will examine the positivist school in relation to the theories of Hart and Raz in particular.

Let us recap on Hart's self-proclaimed goal in legal theory:

My aim in this book was to provide a theory of law 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...My account is *descriptive* in that it is morally neutral and has no justificatory aims...¹¹⁴

¹¹⁰ LEITER, *supra*, at 48-49.

¹¹¹ This would more properly become a sociological inquiry rather than an analytic one.

¹¹² While my focus will be on positivism in this regard, the following discussion is relevant for all legal philosophy which relies on conceptual analysis and intuitions as part of its philosophical armoury.

¹¹³ AUSTIN, *supra*, at 11.

¹¹⁴ HART, CONCEPT OF LAW, *supra*, at 239-240. Emphasis original.

The second tenet of this claim, namely, the possibility of description for legal theory, has been examined in Part III. What is relevant for my present purpose is to explore the possibility of *general* jurisprudence.

Hart seeks to describe the institution of law in a universal fashion. He is undoubtedly engaging in conceptual analysis in his undertaking, whether of a modest or an immodest nature.¹¹⁵ He is seeking to explicate the *concept* of law, something which he considers to give rise to universal truths about the nature of law. My goal here is to point out that positivism cannot yield general truths by virtue of its use of conceptual analysis and its consequent use of intuition-pumping. This will be demonstrated below.

Raz is also concerned with general jurisprudence: he notes that a theory of law is “a set of systematically related *true* propositions about the nature of law.”¹¹⁶ Raz’s primary objective is to provide an account of law which highlights its *essential* features, those features which differentiate it from other social institutions. “At its most fundamental, legal philosophy is an inquiry into the nature of law, and the fundamental features of legal institutions and practices.”¹¹⁷ He is of the view that legal theory has universal application, “that it – when successful – provides an account of the nature of law, wherever and whenever it is to be found.”¹¹⁸ However, Raz is quick to differentiate between the *concept* of an entity and its *nature*: concepts are a “philosophical creation”¹¹⁹ and constitute “how we conceive aspects of the world, and lie between words and their meaning, in which they are expressed, on the one side, and the nature of things to which they apply on the other.”¹²⁰ For Raz, legal theories are theories of the concept of law.¹²¹ Nevertheless, “[a]n explanation of a

¹¹⁵ A number of commentators have emphasized the modest nature of Hart’s conceptual analysis. *Eg.* VERONICA RODERIGUEZ-BLANCO, *A Defence of Hart’s Semantics as Nonambitious Conceptual Analysis*, *supra*; *See also* FARRELL, *supra*, at 998. On the other hand, Coleman implies that Hart’s is a form of immodest conceptual analysis. *See generally* COLEMAN, *METHODOLOGY*, *supra*.

¹¹⁶ JOSEPH RAZ, *Can There Be a Theory of Law*, in Martin P. Golding & William A. Edmundson eds., *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 324 (2005). Emphasis added.

¹¹⁷ RAZ, *TWO VIEWS*, *supra*, at 3.

¹¹⁸ RAZ, *Can There Be a Theory of Law*, *supra*, at 340. For a critique of this article, *see* ROBERT ALEXY, *On Two Juxtapositions: Concept and Nature, Law and Philosophy: Some Comments on Joseph Raz’s “Can There Be a Theory of Law”* 20 *RATIO JURIS* 162 (2007). Alexy agrees with the possibility of the universality of the nature of law but takes issue with Raz’s description of the concept as exclusively parochial and with his contention that legal philosophy cannot be part of the law.

¹¹⁹ RAZ, *Can There Be a Theory of Law*, *supra*, at 324.

¹²⁰ *Id.* at 325.

¹²¹ Raz also describes adjudication by virtue of the *concept* of adjudication rather than explicating its nature. He notes that his observations “are meant to be faithful to the accepted theory of the practice rather than to the practice itself.” *See* JOSEPH RAZ, *THE AUTHORITY OF LAW*, *supra*, at 181.

concept involves explaining the feature through which it applies to its object or property, but also explaining more broadly the *nature* of the object or property that it is a concept of.”¹²² Concepts may be similar, but not identical to, law’s nature, and it is an analysis of the latter which is the main task of jurisprudence. For Raz, any successful theory of law both explains the law and contains propositions that are *necessarily* true about it. Thus, “the essential properties of the law are universal characteristics of law.”¹²³ According to Raz, the fact that law has an essential nature does not imply that it cannot change over time, it simply means that when what was once law has sufficiently changed, it will enter a transition and will no longer be law thereafter. Our concepts are thus parochial and subject to change, whereas the nature of law is universal. However, where there are different concepts of law in existence at any given time, it is *our* concept which is fundamental: “it is our concept of law which calls the shots: other concepts are concepts of law if and only if they are related in appropriate ways to our concepts.”¹²⁴ Therefore, according to Raz, there can be societies which do not share our concept of law but who still ‘have’ law. However, the lurking question throughout Raz’s discussion is this: if the nature of law and the concept of law can be differentiated, one yielding universal truths and the other offering parochial narratives, how is that we are to explicate the *nature* of law? If Raz’s central claim is to insist on the possibility of universal and objective legal foundations, how does he suppose we go about this task? He ends on a modest note:

That does not establish that a theory of law is in principle possible, or that if it is possible it can achieve objective knowledge...To positively establish the possibility of a theory of law we need to examine the nature of explanation and of objectivity.¹²⁵

Therefore, objectivity does not arise out of an analysis based on concepts. Although Raz purports to be discovering the nature of law through the use of conceptual analysis, he cannot sustain the position that anything mind-independent or objective is in fact revealed through this methodology. Stavropoulos explains objectivity well:

In a classic approach, a domain is objective in case the existence and character of the objects that populate the domain is independent of the mind, that is, of thoughts, beliefs, desires, and other aspects of the mental. This approach puts the emphasis on the world, and treats the standing of our thoughts or beliefs about these objects as derivative. It says that our thoughts or beliefs about these objects are capable of

¹²² RAZ, TWO VIEWS, *supra*, at 8. Emphasis added.

¹²³ RAZ, *Can There Be a Theory of Law*, *supra*, at 328.

¹²⁴ *Id.* at 332.

¹²⁵ *Id.* at 340.

being objective in virtue of the fact that reality contains the objects that it does...¹²⁶

Of course, mind-independence is notoriously difficult to define. I will assume for our sake that objective truths hold independently of our thoughts and beliefs. Therefore, there is a logical space, to use Stavropoulos' terms, between how we understand things and how they actually are. The goal of positivism is to uncover aspects of the law which are mind-independent and therefore not limited temporally or geographically. Even if the law has some universal nature, I argue that this essential core cannot be explicated by employing conceptual analysis. Unlike science, there is no standard of reference by which the social practice of law can be measured. Statements about concepts cannot be verified or falsified directly, unlike statements about the objects of natural sciences. There may be certain practices within the legal system which can be enumerated, but the question: "what is the concept of law" will never produce answers that reveal law's nature if conceptual analysis is at the heart of the theorist's methodology. If beliefs regarding law are 'false,' there is no way for the theorist to correct them, except to use her own system of beliefs as a standard, which cannot give rise to objective results.

Nevertheless, positivism seeks to lay bare truths about the *nature* of law based on its elucidation of the concept of law. There is no doubt that Hart seeks to explicate the *concept* of law; his primary work goes by that very name. On the other hand, while Raz is aware of the limits of conceptual analysis, he does not avoid the charge of limiting himself to results which are local. His account of authority is an account of the *concept* of authority; his account of law is an account of the *concept* of law. He does not adequately explain how an analysis of the concept of law can lead us to an understanding of the nature of law. Thus it is my claim that concepts cannot take us any closer to an entity's nature: if anything, they will only distort its nature. On the one hand Raz is a fierce advocate of essentialism,¹²⁷ on the other, he accepts the fact that a methodology for discovering the objective nature of law yet has to be developed.¹²⁸ In the meantime, he remains satisfied to employ conceptual analysis. This, admittedly, is modest conceptual analysis but it does not exempt him from error since, as noted above, even modest conceptual analysis cannot offer truths which are essential in character.

Conceptual analysis, as employed by both Hart and Raz, clearly requires a dependence on the intuitions of legal subjects. The limited nature of its results must thus be accepted. Hart relies on the convergence of the use of language

¹²⁶ NICOS STAVROPOULOS, *Objectivity*, in Martin P. Golding & William A. Edmundson eds., THE BLACKWELL GUIDE, *supra*, at 315.

¹²⁷ *See, supra*, note 114.

¹²⁸ *See, supra*, note 116.

of his subjects, but this assumes the fact that there *is* convergence. The discussion of the Gettier counter-examples above highlights the fact that not all people at all in times in all places will agree on linguistic definitions. Particularly when it comes to legal practice, there is no precise definition of many terms and even if there is general consensus, there will always be peripheral dissenters – which then requires the theorist to prioritise the majority of linguistic users according to his intuition of which category of users is correct. This assumption is nothing more than a superimposition of Hart’s intuitions onto those who are the subject of his inquiry. Raz’s description of authority falls into the same error.

There may be characteristics which are essential to law, in the sense that law must harbor them in order for it to be law, but any investigation into this essential nature based on concepts requires a subjective analysis which is limited to the attitudes of a subset of the participants within the legal system. In addition to this, even a modest claim to be describing the *concept* of law alone, and not its universal nature, is a fallible enterprise based on the preceding discussion about intuitions.

Williamson cogently argues that we “should face the fact that evidence is always liable to be contested in philosophy, and stop using talk of intuition to disguise this unpleasant fact from ourselves.”¹²⁹ He correctly points out the anomaly that positivism prides itself on its rigor, and yet remains satisfied to rely on a methodology which has no epistemic foundation whatsoever. Obviously all methodologies fall into this very trap – but the point is that positivism (unlike many schools of jurisprudence) continues to reject this criticism in going about its task – and I think it’s very important that positivists begin to take heed of it instead of ploughing on in denial. Based on the foregoing, there is little to say that the positivist’s findings are anything more than an account of the theorist’s subjective reflections, verified by an uncertain number of subjects within the legal community. Therefore, if positivism’s claim to essentiality does not hold, it is important to examine how the future of the jurisprudential endeavor is to proceed.

VI. THE FUTURE OF LEGAL THEORY

Can armchair jurisprudence be abandoned on the basis that it does not yield necessary truth? The response to this proposal has been diverse. I will begin by examining three prominent positions which have been advanced as alternatives to traditional analytic positivism in this regard.

A. A Postmodernist Approach

¹²⁹ TIMOTHY WILLIAMSON, *Philosophical ‘Intuitions’ and Scepticism about Judgement* 58 DIALECTICA 109, 109 (2004).

The postmodernist school of thought is acutely aware of the problem of essentiality, or lack thereof, facing legal theory today. Despite its inherent ability to evade definition, it is generally agreed that postmodernism is skeptical of the analytic agenda of achieving grand theory in the form of structured, inter-subjective truths. The postmodernist approach to theory has been introduced into jurisprudence most prominently by Balkin.

Balkin argues that reality is changed through interpretation. While there may be mind-independent entities, such entities are not comprehensible or explicable in their independent form. Therefore, universal characteristics are not discoverable through any of our current philosophical mechanisms. As a result, Balkin vehemently opposes the possibility of grand theory in jurisprudence. Instead of constantly striving for it, he suggests an alternative: an approach embracing cognitive diversity by exploring the subject in all its forms. He therefore proposes, “to understand the nature of law we must understand the nature of legal understanding.”¹³⁰

According to Balkin, as we interpret entities, the subject’s horizons fuse with those of the entity, and, once interpreted, both the subject and the entity are respectively changed. When examining something like the nature of coherence in law, therefore, it is important that the theorist focuses on the legal subject *as well as* the legal object. Legal concepts such as coherence are not, according to Balkin, pre-existent but instead are the result of judgments made by the legal subject when reflecting on law. Therefore, legal theorists should develop a “jurisprudence of the subject,”¹³¹ one which recognizes that questions about the nature of law must be concerned “with the ideological, sociological and psychological features of our understanding of the legal system.”¹³² He notes that:

These cultural norms and frameworks of understanding are not simply superimposed on an individual’s preexisting beliefs; they constitute her and form part of what makes her an individual. Subjectivity is what the individual subject brings to the act of understanding; it is what allows her to construct the object of her interpretation so that she can understand it.¹³³

¹³⁰ JACK M. BALKIN, *Understanding Legal Understanding* 105 YALE L. J. 103, 106 (1993-1994). Balkin seems to use “nature” here to refer to legal *characteristics* rather than the *essential* properties of law.

¹³¹ *Id.* at 107.

¹³² *Id.*

¹³³ *Id.*

Balkin's objective in this regard is to view the subject¹³⁴ and object¹³⁵ of legal interpretation as equal partners in the construction of the legal system. For him, subjectivity is not necessarily individuality, since shared ideologies can give rise to shared outward understanding. He likens ideology to "cultural software,"¹³⁶ a copy of which is given to each of us, so that where our copies are similar, we will experience a type of shared understanding. Embedded cultural ideology means that "the beholder is not fully in control of what she sees."¹³⁷ She can only make judgments *through* her ideology and cannot choose the terms of her ideology or social construction.

Balkin's objection to theorizing which ignores the legal subject revolves around the issue of projection: the ideology of the theorist who ignores the legal subject is consequently superimposed onto that of the subject, not only making the subject's influence on the legal concept seem invisible, but also misdescribing the legal concept.

For Balkin, legal understanding is a purposive activity, and there are as many possible descriptions of law as there are purposes. Judgments of legal coherence arise out of one particular form of understanding, which Balkin terms *rational reconstruction*. This is the attempt to see reason in legal materials, to see them as a plausible and sensible means of human regulation. Such judgments rest upon our psychological needs: our need to make sense of the world and to preserve our belief in our own coherence.

However, rational reconstruction is only one form of understanding, and Balkin duly points out that there are many internal participants, as well as many different purposes attributed to law by each relevant subgroup. The biggest problem with analytic theorists, then, is their tendency to categorize according to one or other subgroup, and to brand this subjective subdivision as a general and objective theory of law:

By forgetting the different purposes of understanding and the socially situated nature of understanding, they may elevate a particular form of understanding, useful as it may be in a particular context and for a particular purpose, to a universal status.¹³⁸

Despite Balkin's reluctance to generalize the diverse nature of internal perspectives and purposes of actors in law, he nevertheless adopts a critical

¹³⁴ In this context, consistent with Balkin's use of the terms, "subject" refers to the interpreter and "object" refers to the object of study.

¹³⁵ *Id.*

¹³⁶ *Id.* at 108.

¹³⁷ *Id.*

¹³⁸ *Id.* at 136.

perspective towards the attitudes of the participants in the legal system.¹³⁹ In the end, the theorist's own ideology will always be imposed onto the subject with this type of critical approach, and Balkin thus finds himself in the same position which he wishes to escape, thereby avoiding the problem of cognitive diversity rather than solving it. Intuition is an important feature of Balkin's approach: he is an armchair theorist after all. Intuition, while fallible, therefore appears to be utterly unavoidable, even for the postmodernist. Although postmodernism claims to be sceptical about any kind of blind assertions of truth,¹⁴⁰ Lynch correctly notes that "[w]hen engaging in inquiry, no matter how carefully, *something* is always being taken for granted as immediately obvious."¹⁴¹ Even at our most sceptical, we cannot question everything at once. *Something* must remain fixed, and in the end, that something will be intuition. Williamson argues that "[a]t some point we are entitled to hold on to what we know, and apply it," even if what we 'know' is objectively fallible. For him, even though "[o]ur fallibility about our evidence is unavoidable; we have no alternative but to muddle through as best we can." A despondent conclusion, perhaps, but one which seeks to avoid the disadvantages of postmodernism, a method which appears to amount to an endless search for something that remains forever beyond our grasp.

This discussion highlights an important point of concern for all theorists: the extent to which we are willing to take certain facts for granted in order to begin from a stable philosophical foundation, and to thereby work our way up. If nothing is taken for granted, a postmodernist approach ensues, and infinite questioning is at large. Although this project is insightful on the basis that it does not create any elaborate fictions of truth or necessity, and instead embraces the impossibility of truth in all its forms, progress cannot be made with such an approach. Postmodernism may have no qualms about this, but many people do. In the end, it seems that a choice must be made between the search for universal and objective truth and the desire for progress in a pragmatic sense. Even if *pomo* is a more accurate depiction of the state of the universe, it hinders progress, and so a choice between accuracy/truth and pragmatics/progress must be made.

If the postmodernist method is honest on the one hand, it is counter-productive for theory building on the other. Even if we were accept that what *pomo* discovers is closer to truth than what other theorists discover, we care about formalizations, at least if we believe in the possibility of and desire to

¹³⁹ Balkin argues thus: "I believe that we must ground jurisprudence in a critical perspective, one that employs ideological critique to reflect on our internal experience of law." *See* BALKIN, *supra*, at 110.

¹⁴⁰ It should be noted that modernism also adopts this position.

¹⁴¹ MICHAEL P. LYNCH, *Trusting Intuitions*, in P. Greenough & M.P. Lynch eds., TRUTH AND REALISM, *supra*, at 236.

attain progress. If the objective of theory is to categorize reality in order that coherence may be developed through application by analogy, postmodernism cannot contribute to this goal. Of course, this is well understood by the postmodernist, who does not consider progress or pragmatism worthy aims, but rather, seeks only understanding of the world in its purest form. Nevertheless, for the many theorists who do value progress, postmodernism in its extreme form simply will not do.

An important obstacle which theorists such as Balkin face is that of infinite regression – if everything is socially constructed, there is no stopping place for evaluation and thus no end point for theory: theory becomes nothing more than a series of infinite ponderings. Again, infinite regression is a feature of theory which is embraced by the postmodernist, who does not consider finality a plausible objective. Postmodernism has highlighted the fallibility of general claims to truth, a conclusion which the author agrees with based on the foregoing discussion about theoretical reliance on intuitionism. However, if we wish to avoid the consequent infinite regress which the postmodernist movement encourages, we must ask ourselves which path our philosophical task must take. I argue here that law is a practice which is best described from a pragmatic point of view, a discussion I return to in Section D. In the meantime, I will examine a position which stands in stark contrast to postmodernism: naturalization.

B. Jurisprudence Naturalized

Quine's critique of analytic philosophy has prompted theorists to adopt a naturalistic approach to philosophy generally. Consequently, Brian Leiter has introduced naturalism into legal theory.

I will begin by reviewing Quine's naturalistic position. The problem with reconstructive science, according to Quine, is that the theory is built up from a series of observations which themselves depend on subjective input.¹⁴² Leiter notes in this context:

The naturalist, following Quine, rejects the idea that there could be a “first philosophy,” a philosophical solution to problems that proceeds a priori, that is, prior to any experience. Instead, the philosophical naturalist demands continuity with the natural and social sciences...¹⁴³

¹⁴² WILLARD VAN ORMAN QUINE, *Epistemology Naturalized*, in W.V.O. QUINE, *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* (1969). I have touched on this issue above in Part III in the context of both Popper and Kuhn.

¹⁴³ BRIAN LEITER, *Rethinking Legal Realism: Towards a Naturalized Jurisprudence* 76(2) *TEX. L. REV.* 288, 289 (1997).

According to Quine, although psychology itself is not an entirely objective methodology, results which can be obtained by examining the output of environmental stimuli will find uniformity in a shared external world. The naturalization of epistemology is concerned with relating controlled input of information to the subsequent output, thereby understanding more profoundly the relationship between material evidence and the theory developed as a result of that evidence. For Quine, therefore, it is “[b]etter to discover how science is in fact developed and learned than to fabricate a fictitious structure to a similar effect.”¹⁴⁴

Based on the failure of concepts and intuitions in philosophy, Leiter also takes refuge in naturalized jurisprudence as the only methodology which he considers reliable. Leiter argues that the science of human cognition ought to replace armchair psychology. Epistemology should be naturalized as a more progressive way of theorizing about the world. Neither moral nor epistemic norms are foundational, and cannot be explicated from the armchair. Rather, “normative theorizing must be continuous with scientific theorizing.”¹⁴⁵ It is an *a posteriori* matter as to which norms in fact serve our epistemic or cognitive goals. Leiter argues:

[T]he only sound reason to prefer one metaphysical or epistemological picture over another is not because it seems intuitively obvious...but because it earns its place by facilitating successful *a posteriori* theories of the world...Philosophy, on this naturalistic story, has no special methods for investigating the world; it is simply the abstract and reflective part of empirical science.¹⁴⁶

Therefore, theories of law should only be verifiable empirically: all attempts at analytic jurisprudence should be abandoned, or at the very least, relegated to a subset of the natural sciences. There is no first philosophy; instead, philosophy is the abstract branch of empiricism.

Leiter argues that naturalization itself may not be empirically verifiable as a method of analysis. He refers to Neurath’s boat in this regard: we cannot climb out of the structure and rebuild it from without. Instead, we must choose which planks to rest upon while reconstructing the boat on pragmatic grounds. The theory, according to Leiter, is not superior for *a priori* reasons,

¹⁴⁴ W.V.O. QUINE, *Epistemology Naturalized*, *supra*, at 78.

¹⁴⁵ BRIAN LEITER, *Naturalism and Naturalized Jurisprudence*, in Brian Bix eds., *ANALYSING LAW: NEW ESSAYS IN LEGAL THEORY* 90 (1998).

¹⁴⁶ LEITER, *Beyond the Hart/Dworkin Debate*, *supra*, at 50. *See also* LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence* 76 *TEX. L. REV.* 267 (1997); LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007).

but rather, because it has “delivered the goods.” In short, it has proved successful in predicting the nature of the external world. He notes that “it sends planes into the sky, eradicates certain cancerous growths, makes possible the storage of millions of pages of data on a tiny chip, and the like.”¹⁴⁷

The argument for naturalism is an interesting attempt to avoid the limitations presented by conceptual analysis, but is ultimately a questionable approach in the context of law. Quine’s philosophy refers to the shared external understanding of concepts that exist within the observable world. Disagreements about law are never verifiable or falsifiable on empirical grounds because law is a social construct which can only comprehensibly be described via the perceptions of the participants – which means that there is no empirical yardstick for measuring the accuracy or otherwise of each perspective on the law. Thus, we may never actually reach consensus about the nature of law, and thus naturalism does not appear to apply in the same way. Indeed, Bix argues against Leiter that empirical observation is unlikely to settle contests between theorists as to the correct way of understanding legal material “as the role of empirical facts...is itself highly contested.”¹⁴⁸ He concludes: “I doubt that these discussions will (or should) soon be conquered by naturalism.”¹⁴⁹

Moreover, conceptual analysis is in all likelihood something which cannot be avoided by the theorist, even on the naturalistic story. Oberdiek and Patterson note that the naturalist must do conceptual spadework in order to go about the task of naturalism in the first place.¹⁵⁰

Furthermore, results obtained by naturalism in the context of law will not necessarily come to the aid of the legal theorist: they will not necessarily satisfy one of her central concerns, that is, to understand how legal participants understand themselves. Coleman is critical of Leiter on this point.¹⁵¹ Leiter’s argument for moving away from dependence on intuition altogether is something which removes power from the ordinary man in theory construction. This approach sacrifices the hermeneutic importance of legal practice: it entrusts science to discover the nature of constructs which are inherently reason-based. This sacrifice would be understandable where the promise of truth was in our midst; however, Leiter does not succeed in this regard. He sacrifices the richness of description associated with hermeneutic analysis for a scientific project that itself can harbor no claim to truth.

¹⁴⁷ LEITER, *Naturalizing Jurisprudence*, *supra*, at 231.

¹⁴⁸ BRIAN BIX, *Conceptual Questions and Jurisprudence* 1 LEGAL THEORY 415, 478 (1995).

¹⁴⁹ *Id.* at 479.

¹⁵⁰ *See generally*, OBERDIEK & PATTERSON, *supra*.

¹⁵¹ COLEMAN, *Methodology*, *supra*, at 343-351.

C. A Pragmatic Approach

The pragmatic line of thought arises out of the value neutrality debate, as outlined in Part III, and is particularly responsive to the possibility of objective choice as between different conceptualizations of legal material. Epistemic values are adequate tools to make such a choice, and are an important alternative to moral choice. However, though amoral in the strict sense, they do not withstand the foregoing debate about intuitions: there is no method of choosing as between different *epistemic* values except by invoking subjective intuition. They are morally neutral, but are nevertheless unable to discover infallible truths. The pragmatic approach argues that rather than choosing one epistemological picture over another on the grounds that it appears to be more intuitively correct, the epistemological choice *should* be made on moral grounds. The moral input thus becomes a *choice* rather than a requirement of theory construction.

MacCormick proposes that legal theory should be endorsed or otherwise based on its practical influence within the legal system.¹⁵² For him, the moralization of law, according to natural law theory, is dangerous and undemocratic, and a positivist conception of law *ought* therefore to be preferred. MacCormick argues that law can be described in an amoralistic fashion and further, that the choice between the moralistic and amoralistic conceptions should turn on pragmatic concerns. He notes that:

[A] conception of the nature of the content of law which preserves conscience and autonomy is morally preferable to rivals which allow of a more unrestricted moral range for the content of law...¹⁵³

MacCormick is of the view that a proper concern for legal participants is the restriction of law's moral sphere, and that we should avoid any approach which grants morality a monopoly in theory construction. He is a positivist who embraces formal legality but notes that "the reasons for upholding this thesis include fundamentally a moral principle about sovereignty of conscience."¹⁵⁴

Murphy takes a similar line. He argues that competing accounts of the legal system should be tested on their pragmatic merits, that is, their beneficial moral and political consequences.¹⁵⁵ We should thus, according to Murphy, employ practical-political argument in making the required selection between

¹⁵² NEIL MACCORMICK, *A Moralistic Case for A-Moralistic Law?* 20 VAL. UNI. L. REV. 1 (1985).

¹⁵³ *Id.* at 37-38.

¹⁵⁴ *Id.* at 39.

¹⁵⁵ LIAM MURPHY, *The Political Question of the Concept of Law*, in Jules Coleman eds., HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW, *supra*, at 371.

competing accounts. Murphy argues that Hart's theory is a morally neutral one, but that it is based on a conscious pre-theoretic political choice by Hart to remain morally neutral. He therefore notes that "the very decision not to aim to show law in its best light is one partly made....on explicitly political grounds."¹⁵⁶ After this initial selection, Hart then remains committed to value neutral description. This does not undermine his theory, but it means that in choosing which theory we prefer to adopt, we ought to refer to such background considerations. Rather than making an inference from *ought* to *is*, Murphy is simply of the view that there is serious disagreement as to what *is* and thus we are justified in making our choice based on how the legal system *should* operate. Due to the fact that "[t]he dispute about the concept of law is a political argument for control over a concept that has great ideological significance,"¹⁵⁷ the most valuable method of choosing between theories of law, rather than feigning truth, is to decide which theory is politically the most desirable way to conceive of law's domain.

Jenkins is also of the view that pragmatic concerns should dictate the outcome of an impasse in legal theory.¹⁵⁸ That is, if a choice must be made between concepts, the best way of doing so, according to Jenkins, is to choose the one which will assist our theoretical inquiries, or clarify our moral deliberations. Therefore, if an account clears up confusion then it is more adequate than one which causes confusion. According to Jenkins, theory should not be an ivory tower enterprise but rather should be of some relevance to the real-life practice of law. In a similar way, William James has warned against the possibility of "vicious abstractionism," that is, allowing theory to become so far removed from practice as to become irrelevant.¹⁵⁹ Halpin has made similar comments in this regard.¹⁶⁰ The latter describes theory that is wholly detached from practice as "an intellectual pyramid in the air"¹⁶¹ and therefore irrelevant to practitioners within the system. The proper role of legal theory is, instead, "to clarify the means by which the law expresses and attains the resolution of controversy."¹⁶² Halpin's proposition thus echoes the desire of those who seek a pragmatic legal theory, rather than the abstract ponderings of those restricted to discussion within the limits of the jurisprudential sphere. For him, the proper concern of legal theory is to inform the practice of law.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 384.

¹⁵⁸ MARICARMEN JENKINS, *Can Pragmatism Overcome the Impasse in Contemporary Legal Theory?* 15 CAN. J. L. JURIS. 85 (2002).

¹⁵⁹ WILLIAM JAMES, *Abstractionism and "Relativism"*, in James eds., PRAGMATISM AND THE MEANING OF TRUTH 301 (1978).

¹⁶⁰ ANDREW HALPIN, *Methodology in Jurisprudence: Thirty Years off the Point* 19 CAN. J. L. JURIS. 67 (2006).

¹⁶¹ *Id.* at 67.

¹⁶² *Id.* at 91.

Schauer is also a strong proponent of the pragmatic approach to legal theory. He argues that:

As long as we define all of legal philosophy, or even the ‘primary’ task of legal philosophy, as giving a philosophical account of the necessary and sufficient conditions for the existence of law in all possible legal systems, then we ignore important philosophical questions while trying to give a philosophical account of a largely sociological phenomenon.¹⁶³

For Schauer, because theories of law have an important practical effect on society,¹⁶⁴ the impact that they have is an important concern for the legal theorist. Therefore, he argues that a morally neutral account of law is ultimately preferable on a pragmatic level: to allow for a situation where law and morality are conjoined is “to run the risk of minimizing the moral space between the products that legality has given us until today and the goals we might wish an ideal legal system to accomplish.”¹⁶⁵ Schauer proposes that while snapshot explanations of the law are useful, they should not be regarded as the only option for the legal theorist. Due to the socially constructed nature of law, and due to its ever-fluctuating character, it is also very important, Schauer argues, to make prescriptions for the law, in order to inform its development as a practice. Again, he does not argue that it is impossible to *describe* the legal system, he is simply of the view that normative theory is an equally (if not more) worthy undertaking for current jurisprudence.

Interestingly, Stich also makes a similar point in this regard. He notes that our tradition, which can be traced back to Wittgenstein, rejects the idea that basic intuitive evaluations should themselves be evaluated, that our language games give us no tools with which to evaluate the intuitive judgments. However, Stich argues that it is a “disastrous mistake”¹⁶⁶ to suppose that evaluation comes to an end here, even if it does have to end at some point. He proposes that we evaluate our epistemic values according to non-epistemic values, that is, “[w]e can ask whether the cognitive states and processes endorsed by our notions of epistemic values foster happiness, or power, or accurate prediction, or reproductive success, or truth.”¹⁶⁷ Therefore, while the conceptual analyst is content to stop at intuitions in theory building, a more satisfying approach is

¹⁶³ FREDERICK SCHAUER, *Critical Notice* 24 CAN. J. PHIL. 495, 509 (1994). See also SCHAUER, *Positivism as Pariah*, in Robert P. George eds., THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM (1996); FREDERICK SCHAUER, *Positivism Through Thick and Thin*, in Brian Bix eds., ANALYSING LAW, *supra*; FREDERICK SCHAUER, *The Social Construction of the Concept of Law: A Reply to Julie Dickson* 25 OX. J. L. STUDIES 493 (2005).

¹⁶⁴ This idea will be discussed in more detail in Section D.

¹⁶⁵ FREDERICK SCHAUER, *Positivism as Pariah*, *supra*, at 46.

¹⁶⁶ STICH, *supra*, at 107.

¹⁶⁷ *Id.* at 108.

to reach beneath this foundation to uncover the basic pragmatic importance of the theory for those who interact with it.

The pragmatic approach would therefore involve citizens in new debate: one which emphasizes the practical effects of theory on society once the theory has been constructed. This is an important question for jurisprudence, and is one which is likely to provoke a more fair and engaged discourse between members of society. Each member would present his own conception of the legal system, as inspired by pragmatic concerns, while admitting the fallibility of his claims, and abandoning the fruitless search for truth. I consider this to be a sound alternative to theories which purport to create fictional accounts of the nature of law. In practice, it will allow more room for engagement and will encourage those who were hitherto inclined to uncritically accept existing theories, to examine their own position in detail, and to contribute to the discussion in a more involved manner.

D. Persisting without the Attribute of Truth

I argue here that legal theory does not have to be abandoned on the basis that it cannot reveal essential and universal characteristics about the law. Instead, I will argue that it is more satisfactory to view law as an ongoing debate, consisting merely of different and competing conceptualizations of legal facts. As long as there's no such thing as truth coming out of current legal theory, we should not continue to fool ourselves into believing that there is. Nazi legal theory is not "good" – but it is no more untrue than liberal legal theory. This form of discussion would allow participants to provide more mature and progressive reasons for accepting one theory over another – not just allowing blind assertions of truth to win them over without a second thought. There are no objectively right or wrong answers, there are merely good and bad outcomes, and it is on this basis alone that we choose. In deciding between such conceptualizations, I will therefore suggest that theorist surrender their tireless search for truth and instead adopt a pragmatic approach, which encourages participants to choose between such conceptualizations based on their overall practical merit for society.

Unfounded claims to truth can have detrimental effects on society at large. Theory has a significant effect on practice over time. Schauer correctly notes that theories "may in the long term influence social understanding of the institution itself."¹⁶⁸ Social perception will affect how the institution sees itself, and thus how it conducts itself, and who chooses to become a member of it, thereby physically changing it over time. Therefore, if the theory's purported truths are unfounded, and nevertheless accepted, the institution will most likely wield unjustified power as a result of its claims.

¹⁶⁸ SCHAUER, *Positivism as Pariah*, *supra*, at 33.

This can be seen pertinently in the case of human rights theory. Human rights are seen as universal possessions, which are not contingent on belonging to a particular state or culture. Rather, they are seen as self-evidently inherent in all of us as a direct result of our very nature as human beings. Self-evidence is not *proven* – it is presumed. However, rights commonly require justification and this justification will generally rest upon an assertion in favour of universal intuitions. However, reliance on universal intuitions is necessarily fallible, if not inevitably flawed, as described above. So, attributing self-evidence to those “facts” requires reliance on intuitions. We might agree that the intuition pointing to self-evidence really exists, and is obvious to all; but there is no reason why rights are automatically justifiably attributed to us for that reason. That is why a pragmatic approach is preferable: the *consequence* of accepting a human rights-orientated philosophy produces more valuable results in the long term. The extreme essentialist terms utilized by human rights discourse gives rise to a theory which has a powerful effect on international societal standards. The results are not necessarily positive: human rights standards have on occasion been used to wage wars, to displace traditional cultural values in foreign societies, and as basic criteria for participation in international relations. Beitz is critical of “the external measures that are intended to induce a government to comply with the doctrine’s requirements....in the extreme case, [constituting] a kind of postcolonial imperialism.”¹⁶⁹ Without such claims to truth, the theory of human rights may indeed have held less force, but at the very least, levelled engagement with it would have been possible. How and ever, mature engagement as to the actual value of human rights theory is nothing less than taboo in modern international relations, and as such, significantly reduces the possibility of democratic dialogue on the issue. The author agrees with Kennedy, therefore, to the extent that a more pragmatic attitude to human rights should be adopted by legal professionals.¹⁷⁰

Instead of encouraging absolutist standards, a theory of a social practice should be seen as ongoing dialogue between contestants with different, but equally valid conceptions of the legal system – equally true, but not equally desirable. Ultimately, there is no ‘right’ way to divide up social reality. Each participant should be encouraged to forward his own conception of the legal system, so that a levelled dialogue can ensue. Each proposition may be equally

¹⁶⁹ CHARLES R. BEITZ, *Human Rights as a Common Concern*, in Goodin & Pettit eds., CONTEMPORARY POLITICAL PHILOSOPHY 351 (2d ed., 2006).

¹⁷⁰ DAVID KENNEDY, *The International Human Rights Movement: Part of the Problem?* 15 HARV. HUM. RIGHTS. J. 101 (2002). Kennedy’s hope is that we will “develop a stronger practice of weighing the costs and benefits of their articulation, institutionalization and enforcement” (at 102) and that “[a]s a movement, one can facilitate open engagement about differing pragmatic assessments” (at 103).

fallible,¹⁷¹ but on a pragmatic basis, dialogue is nevertheless the most fair and democratic means of defining a concept which has such a direct and powerful influence on our day-to-day lives.

Gallie's notion of "essential contestability" is a useful way of describing law in this regard. He admits that "there is to-day a widespread repudiation of the idea of philosophy as a kind of 'engine' of thought, that can be laid on to eliminate conceptual confusions wherever they may arise."¹⁷² Instead, philosophy ought to recognize that there are certain concepts, "the proper use of which inevitably involves endless disputes about their proper uses on the part of their users."¹⁷³ Gallie outlines seven attributes of essentially contested concepts, in order that they may be identified by the theorist. They run as follows: (I) the concept must be appraisive in that it signifies or accredits some kind of valued achievement; (II) the concept must be of an internally complex character; (III) an explanation of its worth must make reference to the respective contributions of the rival descriptions: therefore, it must be *initially* variously describable, with no independent method of choosing between the various descriptions; (IV) the concept must be of the kind that admits of considerable modification in the light of changing circumstances, and such modification cannot be prescribed or predicted in advance; (V) each party must have some cognizance of the contested nature of the concept, and be proposing his view aggressively and defensively; (VI) the concept should derive from an original exemplar whose authority is acknowledged by all contestants; (VII) the continuous competition for acknowledgement as between contestant users of the concept, should enable the original exemplar's authority to be sustained. The final two attributes, although not strictly required for determining the essentially contested nature of a concept, can be utilized to distinguish essential contestability from the radically confused employment of a concept by its users. It should be noted that the seven criteria are not rigid: it may be the case that a certain concept will fit easily into six of them, and may still be considered essentially contestable. They can more adequately be viewed as *guidelines* for the categorization of such concepts. The benefits of categorization on this level are tangible. Gallie notes that:

One very desirable consequence of the required recognition in any proper instance of essential contestedness might therefore be expected to be a marked raising of the level of quality of arguments in the disputes of the contestant parties.¹⁷⁴

¹⁷¹ Including my own purported solutions, on this occasion.

¹⁷² W.B. GALLIE, *Essentially Contested Concepts* 56 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 167, 168 (1955-1956).

¹⁷³ *Id.* at 169.

¹⁷⁴ *Id.* at 193.

Waldron has introduced essential contestability into legal theory by examining the use of the term “Rule of Law” on all sides of the debate, recognizing that the same term is used for extremely different purposes.¹⁷⁵ Waldron points out that the rule of law has never been an uncontested term and further highlights how the rule of law can satisfactorily be placed under each of the required headings as proposed by Gallie.

Waldron, as influenced by Gallie, argues that essential contestability is not a sceptical argument about the analytic-synthetic distinction, and that, in fact, essential contestedness “presupposes that analysis can establish certain truths about the concept in question.”¹⁷⁶ Characteristics such as normativity and complexity, Waldron suggests, *are* analytic truths which are discoverable by the theorist. However, I am in disagreement with both Gallie and Waldron on this particular point: from the foregoing discussion it is clear that there is no method by which the legal theorist can uncover necessary truths about the nature of law. Even essential contestability, if viewed as describing the *nature* of law in a universal sense, cannot succeed. Nevertheless, I argue that once this part of the argument is abandoned, essential contestability remains a useful way of thinking about discussions which appear to have no clear resolution. Importantly, the admission that a dispute over the concept cannot be resolved by appealing to fundamental terms would certainly increase the quality of argumentation among participants. It would allow contestants to partake in a levelled dialogue, and encourage those who were hitherto uninvolved in the debate to thoughtfully arrive at their own position, allowing for a more democratic discussion on concepts which affect us all in such a fundamental manner. Therefore, each proposed conceptual elucidation should be self-consciously conceived as a personal contribution with an *inevitable* perspective to this ongoing dialogue, which aims at collective self-understanding but might never actually achieve consensus.

Essential contestability thus frames the debate. It allows that theory construction is unavoidably value-laden, but does not lose sight of the practical importance of legal theory for society. Once the dialogue is framed in such a manner, pragmatism may be invoked to decide between the various conceptualizations put forward: since no one theory may be *truer* than another, the most satisfactory judgment will be one based on the theory’s likely impact in practice, thereby promoting levelled engagement on issues of fundamental societal importance.

¹⁷⁵ JEREMY WALDRON, *Is the Rule of Law an Essentially Contested Concept (In Florida)?* 21 L. PHIL. 137 (2002).

¹⁷⁶ *Id.* at 152.

VII. CONCLUSION

I have argued that the descriptive debate in jurisprudence is misguided. No longer should we be discussing the possibility of *moral* neutrality in the description of a social practice, since value-complicity in a moral sense is clearly unnecessary. In spite of this, the theorist's embedded moral perspective leaves her with no option but to create a theory of law which is inherently subjective. She therefore cannot claim to harbor universal truths about the nature of law. This fact is compounded by the use of concepts in analytic legal philosophy. Conceptual analysis requires a strong reliance on intuitions, and as I have argued above, such intuitions have no epistemic foundation. They cannot yield objective truths about the world, and furthermore, where the intuition of the theorist is superimposed onto that of her subjects, the issue of cognitive diversity is ignored, thereby rendering the theoretical endeavour even more fallible.

At an intellectual level, claims to universality are unappealing because they are fallible. At a practical level, such claims are undesirable because they are likely to have a more powerful effect on society than arguments which make no such claims. Theories purporting to yield truth will often be uncritically accepted by the majority of society's members and where theories of this sort are internalized within the legal system, they are subject to rampant misuse.

If universal truth is not yet in our midst, all that we can hope for is a legal theory which takes cognizance of all sides of the debate. Therefore, hermeneutics remains an important methodology in that it allows the ordinary man to play a role in both theory construction and theory choice. However, in utilizing the hermeneutic methodology, analytic legal philosophy must sacrifice what seems to be its unceasing mission to explicate the *nature* of law. Rather than embracing fallible claims to essentiality, I have argued instead that we must engage in a dialogue about law which is both honest and progressive on this point. The most appropriate turn for legal theory to take in this context is to view law as an essentially contested concept, with pragmatics playing the role of ultimate arbitrator in theory selection. A more fair and democratic method of dispute resolution, this alternative avoids the lamentable eventuality of false claims to universality being the subject of irremissible abuse.

