

Conceptual Investigation and the Ontology of Law

Thomas Adams
DPhil, Law

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Abstract

An important question for general jurisprudence concerns method: what is the right way to form a philosophical understanding of law? Exploration of this question has, in one form or another, featured as a constant part of the work of those within the discipline, and many different answers have been given. The aim of this thesis is to argue that a controversial conception of philosophical method – as an investigation into our rule-bound conceptual practices and uses of language – is the appropriate means of understanding the nature of law. The first three chapters establish the initial connection between conceptual or linguistic analysis and the ability to gain insight into the social reality of law. I argue, in chapter one, that institutional concepts have a linguistic basis and, in chapters two and three, that legal systems are borne out of the shared use of certain basic concepts on the part of those who make up their law applying institutions, i.e. the courts. To understand the rules according to which such concepts are deployed, I suggest, is to understand the essential structure of legal practice. An assumption of that argument is tested in chapter four by considering Ronald Dworkin's famous claim that certain forms of disagreement between lawyers and judges are incompatible with a picture of law dependent upon their agreement in the use of basic legal concepts. Chapter five takes up the question of whether the account of social ontology contained in the thesis is compatible with the fact

of philosophical disagreement about the nature of law. Finally, chapters six and seven discuss alternate models of theoretical success in general jurisprudence, the first inspired by externalist views of linguistic and mental contents, and the second dependent upon a naturalistic conception of philosophy.

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Introduction

In the preface to *The Concept of Law* H.L.A. Hart described his famous work as an 'essay in analytic jurisprudence', an investigation into 'the general framework of legal thought'.¹ To this end he made clear that he had 'raised questions which may well be said to be about the meanings of words'.² Questions, for example, about the differences between the use of the words 'obliged' and 'obligated', about 'how the statement that a rule is a valid rule differs from a prediction of the behavior of officials' and what was meant by the claim that 'a social group observes a rule'.³ Hart wanted to elucidate the principles that lay behind the making of such statements, the rules that constrain our ordinary uses of language. And from this process emerged important aspects of his jurisprudence: his objections to Austin's crude reductionism, to the excesses of American Legal Realism and his claim about the centrality of social rules to the existence of law. Hart worked with words and concepts but his object of attention was neither language nor the 'framework of thought' with which we approach law. He wanted to make a contribution to our understanding of the nature of a powerful and pervasive social institution – law itself, not merely our concepts or terms – and no legal theorist should want less. One question, then, is whether the suggested

¹ H. L. A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012) vi

² *Ibid* vi

³ *Ibid* vi

means, a focus on the 'meanings of words' and the analysis of the concepts that feature in 'legal thought', are suitable to the ends of the general theory of law.

Whilst Hart himself, inspired in particular by the philosophical outlook of the later Wittgenstein, took conceptual investigation to be the central aspect of jurisprudential theorizing, his has, as time has progressed, become a lonelier voice.⁴ The 'linguistic turn', under which Wittgenstein's approach is commonly bracketed, is now widely thought of as a brief moment in the history of the discipline, a time when it was strikingly and wrongly thought that the answers to all or most philosophical questions were to be found by carefully scrutinizing the way in which certain important concepts manifest themselves in natural language.⁵ Forms of skepticism, both about the regulative priority of ordinary discourse for the purposes of understanding important political concepts, and about the worth of the philosophical method as a means of comprehending the reality of law, are now commonplace.

⁴ See, in particular, H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) ch 1 but contrast introduction

⁵ See, for an interpretation of this kind Timothy Williamson, *The Philosophy of Philosophy* (Blackwell Publishing 2007) chs 1 and 2. See also Brian Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007) intro. Criticism of the 'linguistic turn' in philosophy is to be found in Ernest Gellner, *Words And Things : An Examination Of, And An Attack On, Linguistic Philosophy* (Routledge 2005)

In the work of John Finnis, for example, we find critical discussion of the possibilities for a legal philosophy that takes as its concern our ordinary uses of language. These, he argues, are too diverse and disordered to form a sensible basis for the theory of law, a theory that, at any rate, aspires to 'more than a conjunction of lexicography with local history...'.⁶ It is Ronald Dworkin, however, who made the issue of conceptual interpretation a central one for the discipline: his later work reads, in part, as a sustained criticism of an approach to jurisprudence that views the question of the nature of law as being settled by our linguistic practices, the rules for the use of concepts manifest in the thought and actions of lawyers, judges and others with legal competence.⁷ Law, he argued, is a domain of disagreement: we disagree deeply about the state of the law – about the rights guaranteed by the constitution, about the grounding of contractual liability, etc. – and our disagreement about law extends to the very concepts that form its basis. Lawyers and judges, Dworkin suggests, do not share in an understanding, for example, of the criteria for the use of the concept of a legal right, but urge as part of their practices competing and contested ideas of the concept's political purpose. As such, he concludes, philosophers of law, 'cannot expose the

⁶ John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 4

⁷ See, in particular, Ronald Dworkin, *Law's Empire* (Belknap Press of Harvard University Press 1986) chs 1, 2 and 3. Ronald Dworkin, *Justice In Robes* (Belknap Press of Harvard University Press 2006) intro, chs 6, 7 and 8. Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) ch 8

common criteria or ground rules lawyers follow for pinning legal labels onto facts, for there are no such rules.’⁸ Instead, they must impose order upon our varying conceptions of law. The theorist must provide an interpretation of our concepts that does not merely report the disparities inherent in legal argument but which shows them in their best, viz. most politically appealing, light. The theory of law begins with our ordinary practices, Dworkin suggests, but it aspires to more than they contain.

Dworkin’s arguments go to the form that a philosophical theory of law, one that takes as its central concern the cognition of legal concepts, must take. Others, however, have raised questions not about the particular form of conceptual understanding appropriate to law, but about the very idea that the philosophical approach will be sufficient to the task of understanding the nature of the institution. Law, the proponent of this form of argument suggests, exists as an independent aspect of social reality – it has a reality beyond our thoughts and theories – and the most reliable guide we have to understanding the world in which we find ourselves placed is not philosophy but science. It is the methods of the latter discipline rather than the former that the jurisprudential naturalist urges as appropriate to the theory of law.⁹

⁸ Dworkin, *Law's Empire* 90

⁹ Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 2

Modern naturalism owes itself to a diverse array of thinkers, including John Dewey, Ernest Nagel, Sidney Hook and Roy Wood Sellars, but it is in the hands of W.V.O. Quine that its central theses find their most forceful articulation.¹⁰ Quine, as it is well known, argued against the view that philosophy could claim for itself a distinct domain of inquiry – there existed no real distinction, he argued, between conceptual and *a posteriori*, scientific truths – and by implication against the view that philosophy, as traditionally conceived, had methodological independence from the natural sciences. This argument, set against the vindictory history of the scientific method – its clear predictive and then ontological successes – led Quine to the view that philosophy ought to proceed, if at all, only as an aspect of scientific inquiry.

Brian Leiter has done more than anyone else to urge Quine's conception as appropriate for legal theory.¹¹ He rejects the view that a philosophical investigation into the structure of our concepts, without more, will enable us to better understand the nature of law and seeks instead an account of the institution that depends upon the application of scientific, or socio-scientific, methods.¹² By Leiter's lights this requires either that we

¹⁰ See, most importantly W. V. Quine, 'Main Trends in Recent Philosophy: Two Dogmas of Empiricism' (1951) 60 *The Philosophical Review* 20. For a general overview see David Papineau, 'Naturalism' <plato.stanford.edu/entries/naturalism/> accessed 14 November 2014

¹¹ See Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* introduction, chs 1, 2, 4 and 6.

¹² *Ibid* 2

abandon traditionally conceptual questions in jurisprudence – questions about the concepts of right, obligation and legal system, for example – in favor of scientific viz. causal accounts of legal behavior, or else rely only on those conceptions or images of law that ‘fall out of [i.e. are vindicated by] successful scientific practice’.¹³ The view that our language and concepts contain, unmediated by *a posteriori* forms of inquiry, an accurate picture of law appears, in his view, as a lasting symptom of a pre-scientific conception of understanding. It is a type of nostalgia.

The aim of this thesis is to argue for a conceptual approach to jurisprudence, one that prizes reflection on our social practices and uses of language as the appropriate means of understanding the reality of law. It is the use of basic legal concepts by lawyers, judges and others with legal competence, I will suggest, that provides the benchmark for the general theory of law; to understand the rules according to which such concepts manifest in the language of those with a life in the law is to understand the force of the institution whenever and wherever it is felt. It is to understand the nature of law. Hart, I will argue, was correct to focus his philosophical attention on ‘the framework of thought’ with which lawyers, judges and others approach their role, and to ask questions about the ‘meanings of

¹³ The former type of account he attributes to the American Legal Realists, concerned, as they were, with the causes of judicial decisions. The other interpretation is developed by Leiter himself. See *ibid* chs 1, 2 and postscript to part one for the former and chs 4, 6 and postscript to part two for the latter.

words' as a way of deepening our understanding of law.¹⁴ Such a method is not a relic of a brief period, but the right way to approach the subject.

Synopsis

The thesis begins with a question about language. If we are to understand the general theory of law as an investigation into a range of basic concepts such as the concept of law, legal right, authority, etc., what role might such an approach be thought to give linguistic usage as part of the analysis? The chapter begins by considering two possible connections between law and language: need a conceptual jurisprudence rely upon arguments explicitly oriented at our uses of language, or, as is sometimes suggested of a linguistic approach, need it have as its central concern the definition of certain crucial terms, including the word 'law'?¹⁵ Neither approach, I will argue, proves promising. Nonetheless, a fundamental connection between the investigation into legal concepts and language exists. This is so, it is suggested, because the institutional concepts with which the theory of law is centrally concerned have a basis in language. Linguistic representation being part of the nature of such concepts, it follows that an investigation into their uses is inevitably an investigation into language.

¹⁴ Hart, *The Concept of Law* vi

¹⁵ The latter interpretation of a linguistic approach to legal philosophy is found in Joseph Raz, *Ethics In The Public Domain : Essays In The Morality Of Law And Politics* (Clarendon Press 1994) ch 8

Chapter two and chapter three make the connection between the analysis of legal concepts and our understanding of the nature of law. The central question is about the relationship between such concepts and the reality to which they refer: how are we to trust that they will provide an accurate representation, or image, of the domain? Confidence is warranted, I will argue, for the reason that the use of such concepts forms the essential part of the institutional practices that underwrite the existence of law. Our concepts, then, do not exist as an interpretation of law, one that may be more or less accurate, but feature as its basis. Chapter two begins by highlighting the fundamental contribution that institutions, in particular the courts, make to our understanding of the force of law, the nature of its jurisdiction specific requirements on action. I then argue, with Hart, that the identifying mark of the courts is to be found in the fact that they adhere to a particular kind of rule-following practice that is embodied in their activities of recognizing and applying the law.¹⁶ The chapter closes by suggesting that the ability to participate in such a practice depends upon a capacity with regard to the use of basic legal concepts. To understand the rules for the use of such concepts, then, is to understand the structure under which legal institutions must operate.

¹⁶ See, in particular, Hart, *The Concept of Law* chs 5 and 6

That claim – about the relationship between legal concepts and the institutional basis of law – is defended more fully in chapter three where I consider and reject Joseph Raz’s argument that law may exist in societies that do not have the concept. Raz’s suggestion is that the concept of law forms a contingent part of our self-identification, an aspect of the way we happen to conceptualize or conceive of social reality, and not a necessary aspect of a society ruled by law. This claim, I will argue, undervalues the essential role of legal concepts in giving meaning to the activities of the courts and the fact that the actions of their agents, in maintaining a legal system, depend upon a general form of conceptual competence. The relation between the existence of law and the possession of basic legal concepts is not contingent but necessary.

Chapter four considers Ronald Dworkin’s famous claim concerning the argumentative nature of legal practice, his contention being that lawyers and judges, in disagreeing about the state of the law in particular jurisdictions, operate with different rules or ‘criteria’ for the use of legal concepts.¹⁷ Their arguments about the law betray, on this interpretation, a picture of conceptual disagreement. Any theory that holds jurisprudence to be responsive to a set of rules which structure legal practice is, Dworkin claims, invalidated by the very object it aims to interpret. I suggest, contrary to Dworkin’s view, that disagreement within legal practice fails to engender disagreement about the basic concepts with which the theory of law is concerned. Indeed, it is

¹⁷ See Dworkin, *Law's Empire* chs 1, 2 and 3

suggested that the intelligibility of disagreement as *legal disagreement* depends upon the fact that it involves the use of concepts shared in precisely the sense that Dworkin denies.

In chapter five I move to address an important epistemic question faced by the account. If, as I have suggested, general jurisprudence responds to the criteria for the use of concepts possessed by judges, lawyers and others with legal competence – the basic aspects of their language – the question arises as to why the ability to provide a philosophical account of the domain is marred by difficulty. If theory is controlled by standards that structure our common practices then we might expect that the answers to the central questions of jurisprudence should not elude us. But important truths concerning the nature of law are opaque to us, and it is disagreement, not agreement, that marks the discipline. The chapter begins by considering two models which seek to explain this difficulty; the first of which suggests that our use of legal concepts involves deference to those who do possess a sound understanding of law and the second of which holds, by analogy with the Freudian picture of mind, that we understand the rules for the use of legal concepts unconsciously or implicitly, whereas a theoretical account requires explicit understanding. After giving reasons to doubt the explanatory capacity of both models, I develop an alternate explanation. Drawing upon Gilbert Ryle's famous argument for the distinction between 'knowing how' and 'knowing that', I defend the view that concept possession is a form of practical ability, distinct in kind from the ability to form a theoretical

understanding of our conceptual geography.¹⁸ Because the former neither includes nor entails the latter, the formation of a philosophical account of legal concepts requires exertion, and it is quite possible that we will go wrong in our attempts.

Having defended a picture which first ties legal concepts to language, and then the comprehension of such concepts to our understanding of the nature of law, I turn in chapters six and seven to consider alternate conceptions of jurisprudential inquiry. Chapter six discusses a controversial theory of legal concepts: externalism.¹⁹ Externalists hold that the nature of our concepts, or meaning of our words, is such that the best understanding of them may exceed the capacities of those who competently use them and the rules they go by. So the most attractive theory of legal concepts may outstrip that which is evidenced by the practices of institutional agents. An understanding of the criteria by which they operate, forms, for the externalist, the beginning but not the end of inquiry. The chapter begins by considering two of the leading arguments for externalism in the philosophical literature – the first developed by Hilary Putnam and the second by Tyler Burge – before

¹⁸ See Gilbert Ryle, 'Knowing How And Knowing That' (1945) 20 Proceedings of the Aristotelian Society 1

¹⁹ This theory is defended in the literature, under various names, in Nicos Stavropoulos, *Objectivity in Law* (Clarendon Press 1996), Michael S Moore, 'A Natural Law Theory of Interpretation' (1985) 58 Southern California Law Review 277 and David O. Brink, 'Legal Theory, Legal Interpretation, And Judicial Review' (1988) 17 Philosophy and Public Affairs 105

going on to criticize the specific form of the theory which has been developed by legal philosophers: that which ties conceptual interpretation to a modern form of natural law.²⁰ Such a conception, I suggest, denies both the fundamental connection between language, intentionality and the reach of our concepts, as well as undervaluing the contribution of institutional action to our understanding of law.

In the final chapter of the thesis I consider the possibilities for a scientific approach to jurisprudence, taking as a test case Brian Leiter's recent argument for 'replacement naturalism' in the context of adjudication.²¹ Leiter's claim is that we ought to reject as plausible the philosophical attempt to understand the concept of justification in law, and replace it with a *posteriori* explanation of the causes of legal outcomes. Motivated by realist considerations concerning legal indeterminacy, he argues that we should give up on an account which focuses on the relationship between law and justified judicial decisions in favor of a predictive theory which details the psychological causes of such decisions. The argument, I suggest, fails in its attempt to supersede traditionally philosophical questions concerning law.

²⁰ See Hilary Putnam, 'Meaning and Reference' (1973) *The Journal of Philosophy* 699 and Tyler Burge, 'Individualism And The Mental' in Peter A. French, Theodore Edward Uehling and Howard K. Wettstein (eds), *Midwest Studies in Philosophy Vol 4* (University of Minnesota Press 1979) for the original arguments.

²¹ See Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* ch 1 and the postscript to part one.

First, the issue of law's indeterminacy is a conceptual matter. Second, and more importantly, admitting legal indeterminacy does not imply the failure of the philosophical approach. It marks, instead, a limit on the application of the concept of justification in law, a limit that should be explicated as part of a sound philosophical account. Leiter's argument is against a bad kind of theory, and leaves scope for a better non-naturalistic account.

Limitations

The thesis seeks to defend a particular method as right for general jurisprudence. To the extent that its claims touch upon the way in which philosophical questions concerning the nature of law ought to be approached, and it attempts to include them all, the argument is an immodest one. There are, however, two important ways in which the claims of the thesis are limited. These should be spelled out, both in order to give a better sense of the intended import of the overall argument as well as to suggest how its aims might be achievable.

The first and most important way in which the argument is constrained has to do with the force of the central methodological claim. I do not intend to suggest, by defending a conceptual or linguistic approach to jurisprudence, a radical change in the practice of legal philosophy or to promote a form of theorizing performed only by a select few. It is true that the type of theory that I will seek to defend found its most explicit support in the

mid twentieth century, and that the priority given to ordinary language, and to our practices of using concepts, by those reflecting on the nature of the philosophical method has now declined. But this does not mean that attention to language, and sensitivity to the rules and principles according to which we deploy our concepts, has not featured, always, as a fundamental aspect of philosophy in practice. For a start, many contemporary legal theorists declare explicit allegiance to methods of conceptual investigation and analysis compatible, in broad outline, with that defended in this thesis.²² So the form of inquiry has continued support. More importantly, there is a fundamental distinction between what people do and what they say they do; many theorists explicitly hostile to the view that legal philosophy ought to proceed by considering our everyday uses of concepts can be seen, on closer inspection, to marshal arguments of this form. It is worth spending some time on the point and discussing an example.

When Dworkin famously objected to what he took to be Hart's account of social rules, a conception that required a shared practice of conforming behavior as a condition on the existence of a rule, he did so by pointing to the

²² See, for example, Joseph Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* (Oxford University Press 2009) chs 1, 2, and 3, Scott Shapiro, *Legality* (Belknap Press of Harvard University Press 2011) 13-22, Ian P. Farrell, 'H.L.A. Hart and the Methodology of Jurisprudence' (2006) 84 *Texas Law Review* 983, Brian Bix, 'Radbruch's Formula and Conceptual Analysis' 56 *The American Journal of Jurisprudence* 45 and Kenneth E. Himma, 'Conceptual Analysis, the Naturalistic Turn, and Legal Philosophy' SSRN eLibrary <<http://ssrn.com/paper=727445>> accessed 14 April 2011

case of a lone vegetarian who stands in opposition to the common practice of meat eating.²³ Such a critic might urge, Dworkin suggests, that a moral rule exists which prohibits the taking of animal life for the purposes of our pleasure. Clearly, however, 'no social [practice] exists to this effect... indeed that is [the vegetarian's] complaint.'²⁴ Here Dworkin must be seen as making an argument about the ordinary concept of a rule, for its success depends upon the way in which we would describe the vegetarian's claims. Is the sense in which they assert the existence of a rule inconsistent with another sense in which the term might be used which denies such a description as accurate? Or is the vegetarian's claim best understood, perhaps, not as urging the existence of a social rule to the effect that meat eating ought not to occur, but as suggesting elliptically that we have good reason to adopt such a rule? Each of these questions, and many more we could raise concerning Dworkin's argument, depends for its answer upon the careful scrutiny of our concepts and an awareness of the senses of our terms as used in different contexts. Even those officially opposed, then, may deploy in practice arguments of the kind here prized. Indeed, if I am correct that the conceptual method, as here understood, lies at the heart of good jurisprudential argument then this will be so even when those who make such arguments refuse the description.²⁵

²³ Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1978) 52-53

²⁴ *Ibid* 52

²⁵ Brian Leiter too, even though he clearly opposes conceptual methodology as appropriate for philosophy, cannot rid himself of the habit. See Brian

The second important limitation on the scope of the thesis may be put in the following way: whilst its object of discussion is general jurisprudence, it would be wrong to say the thesis has the general theory of law as its subject. What is said about substantive controversies in the philosophy of law is said in order to secure the major methodological conclusion of the thesis and should be received in such a light. Nothing here approaches a ‘theory’ of law, and many arguments upon which I rely have received criticisms in the literature not here addressed. This, of course, should not be taken to imply substantive neutrality.²⁶ Indeed, it would be impossible to argue for a particular understanding of legal theory in isolation from a view about the nature of law. One cannot form a conception of the nature and limits of philosophical inquiry without doing philosophy, and the same is true of jurisprudence. Nonetheless, these issues are approached from the perspective of method.

Leiter, *Why Tolerate Religion?* (Princeton University Press 2013) ch 2 for what can only be described as a conceptual account of religious belief.

²⁶ It should be obvious, for example, that the influence of Hart’s jurisprudence is felt throughout the thesis, and in particular in the crucial second chapter.

Chapter One: Language, Linguistic Philosophy and the Law

Introduction

Lawyers and judges have a professional interest in language. In the United States, issues of great political controversy are settled on the basis of interpretive argument concerning the constitution. Questions concerning the autonomy of the individual in relation to their own body, their education and the political process are determined on the basis of judicial fidelity, or at least avowed fidelity, to a historical document.¹ The theories of constitutional interpretation that have been constructed and improved in law schools – originalist, textualist, purposive, etc. – are, despite their many differences, theories which admit that their primary object, or concern, is the interpretation of a text. The question to which they give divergent answers is *how* to interpret.

In other systems of law that do not have a written constitution in this sense, adherence to the importance of language is shown in a less obvious

¹ Or, perhaps more accurately, to the constitution and interpretative history surrounding the document.

manner, but it remains fundamental.² Judgment in all jurisdictions, if it is to be legally respectable, must show due respect to statute and precedent, as well as to other sources of law, and these either have a basis in, or depend in some other way, upon the use of language.³ This point is frequently overlooked. It is said, for example, that whilst it is true that law which accrues as a result of the enactment of legislation, regulation etc., has a basis in language – as text – other forms are less obviously made using the same tool. The most obvious candidates are the common law and custom, which counts as a source of law in many jurisdictions. Judge-made and customary rules arise over time, it is argued. They are the creatures of collaboration and action, not decision and communication. The claim is that in situations such as these there are no particular communicative acts that encapsulate the legal norms that result either from the long history of precedent or from customary

² The difference between constitutional arrangements of the type that characterizes the US, and uncodified constitutions such as that which governs the UK is in fact not well put by the contrast between ‘written’ and ‘unwritten’. The UK constitution has written elements, such as the Human Rights Act, and the US has unwritten elements, such as the Supreme Court’s past opinions. The difference is, more accurately, one of relative codification. See, on the matter of ‘written’ and ‘unwritten’ constitutions, John Gardner, *Law as a Leap of Faith : Essays on Law in General* (Oxford University Press 2012) ch 4

³ For an interesting critique of this type of view see Mark Greenberg, ‘Legislation As Communication?’ in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011)

practices, and that as a result, here, language does not play a fundamental role.⁴

The argument depends upon too limited a conception of the importance of language. For whilst it is true that in cases such as these there exists no single canonical formulation of the relevant legal standards, this does not mean that the rules are not made through the use of language. A court treating a certain behavior as criminal and thereby creating a precedent, for example, depends upon it making judgment to such effect, and doing so is a linguistic act.⁵ Custom arises similarly. Whilst it is true that the existence of a customary rule does not depend upon an explicit ruling by any particular body as to the content of the relevant norm, such rules arise through negotiation and acceptance is manifested through a range of linguistic acts including salutation and criticism. The way to think about the use of language here is as if it is a hammer being used to chip away at a block to reveal a statute of a certain shape, rather than as itself an inscription, already present on the marble.

⁴ So, for example, Timothy Endicott notes, in relation to the common law, that: 'murder may be a criminal offence... not because any person or institution uttered a ruling that it should be so, but because the institutions of the legal system customarily treat murder as an offence.' See Timothy Endicott, 'Law and Language' <<http://plato.stanford.edu/entries/law-language/>> accessed 5th September 2011

⁵ Could a court judgment be delivered by means other than the use of spoken words? It could, of course, but it is important to remember that not all languages have their basis in speech. A sign language is, after all, a language.

A separate and no less controversial question concerns the relevance of language, not for the lawyer and judge but for the legal philosopher. If our concern as theorists is to develop an understanding of law the social institution, of the basic framework of legal thought and action, to what extent ought we to consider ourselves hostages to the language that we use when interacting with the institution, or that we use to describe it? Are questions about the nature of law most helpfully thought of, for example, as questions about the meaning of words, such as 'right', 'obligation' and 'law'? And if not, ought an analysis of language to be thought of in some other way as playing a foundational role in relation to the development of the theory of law? The recent history of jurisprudence is, in part, a history of different answers to these questions.

John Austin, writing in the late nineteenth century, and much influenced by Jeremy Bentham, said that he meant 'by General Jurisprudence, the science concerned with the exposition of the principles, notions and distinctions which are common to systems of law'.⁶ Some of the more important of such notions were those of duty, right, liberty and their 'various relations... to Law, Sovereignty, and Independent Political Society'.⁷ Austin thought that it was only by accurately determining the meaning of certain

⁶ John Austin, *The Province of Jurisprudence Determined ; and, The Uses of The Study of Jurisprudence* (Hackett Publishing 1998) 367

⁷ *Ibid* 367

terms that they 'must necessarily employ' that theorists would avoid 'a tissue of uncertain talk' in their 'speculations' about law.⁸ So he undertook to analyze these terms and to show their interconnections as a way of uncovering the general structure of mature legal systems. In doing so, Austin sought not only to reveal the meaning of the words that he took as the subject of his study, but also to improve upon common usage. He said, for example, that all laws 'properly so called' were dictated by a legally unlimited sovereign, a supreme law maker, and that constitutional law, as a potential limitation on the power of the sovereign, was not really law at all; it ought to be thought of as a form of 'positive morality' only.⁹

Little of Austin's regulative dogmatism survived H.L.A. Hart's celebrated critique.¹⁰ Hart too, though, displayed an interest in the importance of language for understanding law. He claimed, for example, of Wittgenstein and J.L. Austin, two philosophers famous for their professional concern with language, that:

much of what they had to say about the forms of language, the character of general concepts, and of rules determining the structure of language, has important implications for jurisprudence and the philosophy of law.¹¹

⁸ Ibid 369-370

⁹ Ibid 253-255

¹⁰ See, in particular, Hart, *The Concept of Law* chs 2, 3 and 4

¹¹ Hart, *Essays in Jurisprudence and Philosophy* 274

Hart took his own work, also, to display such a focus; in the preface to *The Concept of Law* he stated that 'at many points, I have raised questions which may well be said to be about the meanings of words...'.¹² Unlike Austin and Bentham before him, however, Hart did not mean his insights to transform common usage. He sought an improved understanding of certain ordinary uses of language, and of the concepts that compose it, hoping thereby to provide answers to a range of jurisprudential questions. Here is how Hart viewed the relation:

...the suggestion that inquiries into the meanings of words merely throws light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expression and of the way in which these depend upon a social context...¹³

Hart asked, for example, about how the ordinary use of the term 'obligation' differs from the use of the term 'obliged' as a way of coming to an improved understanding of legal obligation, and pointed out various characteristics of general terms such as 'law' and 'legal system' as a way of setting aside a number of worries concerning cases at the borderline of these concepts.¹⁴

¹² Hart, *The Concept of Law* vi

¹³ Ibid vi

¹⁴ See, respectively, ibid 82-91 and 3-4

It has been controversial ever since whether Hart was right in this commitment and whether his important claims about the nature of law either depend upon, or else can be salvaged from, the perceived limitations of his view on the importance of linguistic analysis.¹⁵ The long history of fascination with the use of legal terms, and with definition and language in legal philosophy, has come in many quarters to seem antiquated. Hart's own commitments are commonly viewed as a creature of the context in which he wrote, the 1950s and early 1960s being the heyday of the 'linguistic turn' in philosophy, a period in which a range of philosophers took their task, most fundamentally, to involve the analysis of language.¹⁶ This trend did not last and it is common now to distance Hart's work, as much as is possible, from

¹⁵ The extent of Hart's linguistic commitments, theoretical and actual, is the subject of a substantial secondary literature. Several pieces stand out. See Nicos Stavropoulos, 'Hart's Semantics' in Jules L. Coleman (ed), *Hart's Postscript : Essays on the Postscript to "The Concept of Law"* (Oxford University Press 2001), Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* ch 3, Dworkin, *Law's Empire* chs 1-3, Timothy Endicott, 'Law and Language' in Jules L. Coleman, Scott Shapiro and Kenneth Einar Himma (eds), *The Oxford Handbook Of Jurisprudence And Philosophy Of Law* (Oxford University Press 2002), and Hart, *The Concept of Law* new introduction by Leslie Green

¹⁶ It is worth noting that what is often considered under the banner of linguistic philosophy is quite disparate. Wittgenstein, whose work remains influential, considered the task of the philosopher in relation to language quite differently than did J.L. Austin, for example. For the former, language was in a sense both the cause of and solution to our philosophical problems, whereas for the latter, it embodied a series of distinctions useful, but certainly not the last word on philosophical questions. Compare Ludwig Wittgenstein, *Philosophical Investigations* (Rev. 4th edn, Wiley-Blackwell 2009) esp s 90-98 and J.L. Austin, 'A Plea For Excuses' (1956) 57 *Proceedings of the Aristotelian Society* 17-12

its trappings.¹⁷ Leslie Green says, for example, that whilst 'it cannot be denied that linguistic philosophy colors the rhetoric of [Hart's scholarship] a good historian of ideas needs to look beyond style to substance...'.¹⁸

Indeed, it is easy to see why Hart's methodological claims about the importance of social concepts and language are minimized or written off. The central questions of legal theory, questions about, for example, the relation between law and morality, the nature of legal rights and of legal systems are not in any obvious sense linguistic and we would not answer them, it is often noted, by consulting the dictionary or by quizzing competent speakers. The ambitions of the theory of law – the formation of a sound understanding of a pervasive political institution – appear more impressive and so too, one would have thought, should be its methods.¹⁹ Deference to language seems in

¹⁷ Brian Leiter notes, the rise in the later 1960s of 'appropriate skepticism' about 'why the linguistic practices of the masses... should be thought to contain nuggets of wisdom, let alone truths about the real world.' See Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy 2*

¹⁸ See Hart, *The Concept of Law* new introduction xlvii

¹⁹ Julie Dickson provides an interpretation of the central aims of analytic jurisprudence:

Analytical jurisprudence is concerned with explaining the nature of law by attempting to isolate and explain those features that make law what it is. A successful theory of law of this type is a theory which consists of propositions about law which (1) are necessarily true, and (2) adequately explain the nature of law...

See Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) 17

many contexts both unnecessary and potentially misleading. Provided, as Joseph Raz says, that '...in one's deliberations about the nature of law and its central institutions one uses language without mistake, there is little... language can do to advance one's understanding'.²⁰ Concern for the linguistic domain takes, on this natural view, a backseat; it is a way of castigating the incompetent.²¹

It is the central argument of this thesis that legal concepts, concepts that find their expression in natural language, form the fundamental object of the theory of law as an investigation into the basic structure of the institution. This makes conceptual investigation, an activity responsive in the last to the rules that structure the ordinary use of such concepts, the fundamental task of the legal theorist. The first step in that argument involves showing the way in which an investigation into legal concepts is best described as an investigation into language, and thereby to both refine and expose the limits of the conception of analysis being suggested. The aim is to clarify the sense in which insight into institutional concepts is properly afforded by the study of language or, more strongly, to show why language is indispensable for this role. The separate task of succeeding chapters is to show why an

²⁰ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 53.

²¹ Criticisms of legal theory qua linguistic analysis can be found in Finnis, *Natural Law and Natural Rights* 1-4, Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 1-3 and Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 47-58

understanding of law, the social object, depends fundamentally on an understanding of the conceptual or linguistic capacities of those actors who maintain the institution. The aim then is to move first from language to concepts and then, in subsequent chapters, from concepts to the institutional reality of law, at each stage showing how understanding is afforded whilst moving between domains.²²

In this first chapter, then, I set out to explain what it is for jurisprudence to be concerned with the conceptual or linguistic, and clear up a number of confusions concerning the importance of language for theory. In the first section, I discuss the claim that argument in the linguistic mode – i.e. argument about ‘what we would say’ in certain legally important situations –

²² It is important to see that these questions – about the importance of language for our understanding of social concepts, and about the importance of conceptual insight for understanding law – have not always been treated as composite, although I will argue that they form a whole. Joseph Raz, for example, holds that the theory of law owes itself to our concepts – ‘a theory about the nature of law’ he says ‘attempts to elucidate a concept, the concept of law’ – but that he strongly denies the plausibility of reducing this task to an investigation into language. And Brian Leiter, having previously been a critic of both linguistic and conceptual possibilities for jurisprudence, now thinks that legal theory may concern itself with what he calls ‘hermeneutic concepts’ i.e. concepts which figure in our self understanding, including the concept of law. He thinks this a legitimate possibility, however, only insofar as such insights are required by *a posteriori* social-scientific studies, and not because *a priori* investigation into language use allows for direct insight into the nature of law. See Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 53 and Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* ch 6 esp 175-181 for the old view and the postscript to part two for the new view.

forms the central contribution of the study of language to jurisprudence. Finding this mode of argument dispensable, the chapter seeks to provide independent support for the view that argument in legal philosophy is oriented towards language. In the second section, I consider the question of whether jurisprudence should be conceived of as an attempt to provide the definitions of certain fundamental legal terms as well as Joseph Raz's argument against such a view. The theory of law, he says, is not reducible to an attempt to define the meaning of the word 'law', or any other term 'closely associated with the concerns of legal philosophers' for the reason that these terms also have non-legal meanings.²³ As such, Raz concludes, legal philosophy has no real stake in semantics. Raz is right about words: most, if not all, interesting legal terms do also have important non-legal meanings and so a good legal theorist must be able to distinguish between their legal and non-legal uses. But these distinctions are embodied *in language*, and it requires a linguistic analysis to understand them. Raz's argument, I will say, does not support his conclusion. In the third section I set out and provide support for Wittgenstein's argument for the fundamental relation between language and institutional concepts, his view being that you cannot have such concepts without having language. Linguistic representation being part of the nature of legal concepts, it follows that an investigation into their structure is inevitably an investigation into language.

²³ Raz, *Ethics In The Public Domain : Essays In The Morality Of Law And Politics* 195-198

What We Would Say – Argument in the Linguistic Mode

In the preface to *The Concept of Law*, Hart cites with approval the claim of his colleague, J.L. Austin, that in legal theory, we may use ‘a sharpened awareness of words to sharpen our perception of... the phenomena’.²⁴ Austin, it is no exaggeration to say, was obsessed with the minutiae of language. He suggested that the philosophical understanding of a range of subjects could be achieved by coming to an awareness of the technical aspects of linguistic usage; this was Austin’s major methodological principle. In his famous paper on excuses, for example, he recommended that philosophers begin their inquiries by paying serious attention to the dictionary, and to the definitions given therein of a range of related words:

Two methods suggest themselves, both a little tedious, but repaying. One is to read the book through, listing all the words that seem relevant; this does not take as long as many suppose. The other is to start with a widdish selection of obviously relevant terms, and to consult the dictionary under each...²⁵

Hart did not share Austin’s love for the dictionary, and he did not think that definitions, at least in their standard form (*per genus et differentiam*), would prove useful in settling the fundamental questions of jurisprudence: ‘when we recall the character of the... main issues which [underlie] the recurrent

²⁴ The claim appears in Austin, ‘A Plea For Excuses’ 8

²⁵ Ibid 12

question “what is law?”” Hart said ‘nothing concise enough to be a definition could provide a satisfactory answer to it’.²⁶

Although Hart distanced himself from the specifics of Austin’s approach, a more relaxed version of Austin’s methodological principle finds endorsement in his work. Hart suggested that legal philosophers should pay close attention to the forms of statement we are willing to make in relation to law, to what we would and would not say in various situations. Law, he said, ‘cannot be understood without an appreciation of certain kinds of crucial distinctions between... different kinds of statements’.²⁷ So whilst Hart did not think that a cataloguing of various dictionary definitions would be useful for jurisprudence, he did think a sound understanding of linguistic permissibility, i.e. the conditions which license, or fail to license, various descriptive statements, to be of general importance for the theory of law. So here we have a suggestion as to one way in which language might be thought to matter for jurisprudence, as an aspect of method: at least certain questions

²⁶ Hart, *The Concept of Law* 13-17. Although for criticism of Hart’s views on definition P. M. S. Hacker, ‘Definition in Jurisprudence’ (1969) 19 *The Philosophical Quarterly* 343

²⁷ He noted of his own work:

I have considered: how ‘being obliged’ differs from ‘having an obligation’; how the statement that a rule is a valid rule differs from a prediction of the behavior of officials; what is meant by the assertion that a social group observes a rule and how this differs from and resembles the assertion that its members habitually do certain things.

Hart, *The Concept of Law* vi

of legal theory *ought* to be stated as questions about what people will and will not say in particular situations. Call this the linguistic mode of argument.²⁸

But Hart's endorsement of the possibility raises a puzzle for the reader because, looking at his work, one finds relatively few examples of arguments which might be taken to be unequivocally oriented at the use of language in this way. As Green notes 'what is most striking, given its vintage and provenance, is how little linguistic analysis there is in *The Concept of Law*'.²⁹ Hart's topic is the nature of law; his most important and controversial claims – that law is an institution which arises out of a contingent, institutionalized form of social practice; that all legal systems guarantee certain minimal goods for at least some of their members, some of the time, whilst also exposing their subjects to unique forms of moral risk; and that the judicial role, essential to the existence of law, is an office whose members exercise political power not only in the administration but, necessarily too, in the creation of law – are not in any obvious sense insights about possibilities for description.³⁰

²⁸ It is important to note that Hart himself never endorsed such a strong principle, saying instead that the questions he raised *could* be thought of as being concerned with the meaning of words, not that they *must*.

²⁹ See Hart, *The Concept of Law* new introduction xlvii

³⁰ For an excellent summary of Hart's central theses see Green's introduction to *ibid*

There are, however, exceptions and we might consider them in order to determine whether the methodological principle – that questions of legal theory are best phrased as questions about what we would say in particular situations – has force. The most famous invocation of linguistic usage in Hart's work comes as part of his criticism of Austin and Bentham's theory of legal obligation, theirs being a coercive theory. According to such a conception, and simplifying for the purposes of exposition, one can be said to be under an obligation to perform some action (ϕ) just in case one is commanded to ϕ , and that order is backed by the threat of a sanction.³¹ Hart explained the theory by way of the following analogy:

A orders B to hand over his money and threatens to shoot him if he does not comply. According to the theory of coercive orders this situation illustrates the notion of obligation or duty in general. Legal obligation is to be found in this situation writ large.³²

Obligation, on this view, stems from the circumstances of intimidation, the probability of sanction in the case of default and the corresponding pressure for compliance.

³¹ See, on theories of this type and the justifiability of Hart's attribution to Bentham, P. M. S. Hacker, 'Sanction Theories Of Duty' in A. W. Brian Simpson (ed), *Oxford Essays In Jurisprudence (Second Series)* (Clarendon Press 1973)

³² See Hart, *The Concept of Law* 82

What mistake did Hart identify in such a conception? He suggested that it failed to capture the way in which we use the word 'obligation' in ordinary contexts. His claim is that whilst we would say of a person subject to the 'gunman's threat' that they would be *obliged* to hand over their money, we would not properly describe them as being under an *obligation* to do so:

The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that *B*, if he obeyed, was 'obliged' to hand over his money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that *B* 'had an obligation' or a 'duty' to hand over the money. There is a difference... between the assertion that someone *was obliged* to do something and the assertion that he *had an obligation* to do it.³³

The gunman situation, because it only generates the former description, is inapt to be generalized so as to license the latter. Why does this matter? It matters, Hart thought, because our rule-constrained use of the relevant words

³³ Ibid 82. For doubts about Hart's analysis of this aspect of linguistic usage see Edgar Page, 'On Being Obligated' (1973) LXXXII *Mind* 283. Page's central claim is that the phrase 'to be obliged' has two different senses, one that does and one that does not imply obligation. If we are to say of a skipper, for example, that they were obliged to change course because of the weather we would not say that they acted because under an obligation to do so. However, we may say of the very same person that they were obliged to pay their crew a certain amount because of a contract previously signed, and we would not be wrong to describe this circumstance by substituting the concept of obligation. The former statement, relative to the interests and objectives of the subject, does not involve the notion of obligation, whereas the latter, relative to a system of rules, does. The point is well taken and Hart would do well to modify his claim so as to say that the phrase 'being obliged' need not imply obligation, and to note that the gunman case involves the use of the phrase in this sense, although there are certain other uses which do license the transition. His argument, with that minor amendment, stands.

makes explicit the conceptual aspects inherent in the situation, and consequently the concepts that may or may not be used in its description. The constituents of the gunman situation do not fall under the concept of obligation, he said; an explanation of the type must have a different basis.³⁴

Hart was surely right that both Austin and Bentham produced distorted theories of legal obligation, and that the concept cannot be understood in the crude terms mandated by their particular outlook.³⁵ But it also seems evident that Hart's explicit invocation of linguistic usage is, itself, unnecessary for the purposes of his argument. Why not simply claim that a coercive order is neither necessary nor sufficient for obligation or, even more directly, that the circumstances of intimidation featured in the gunman situation do not give rise to obligations? For whilst we certainly *can* put Hart's argument in the linguistic mode, as being concerned with what we would and would not say about the gunman, we might equally as well claim directly that the situation is insufficient for obligation and nothing seems to be lost in doing so. It is hard, in other words, to see here why Hart needs language here, why he would want to describe his argument as being concerned with the 'meaning of words', especially given that its intended import is not so

³⁴ For Hart's own understanding of the notion of obligation see 85-91 and H. L. A. Hart, *Essays on Bentham : Studies In Jurisprudence And Political Theory* (Clarendon Press 1982) ch 6

³⁵ For an excellent analysis of Bentham's outlook on language, and its effect on his theory of obligation see Endicott, 'Law and Language'

confined. Hart wanted to say that a sanction based theory was not just false to the language of obligation, but false to the nature of obligation.

Is there any reason to think that Hart's use of the linguistic mode was necessary? Timothy Endicott has recently suggested that there might be. He reads the invocation of 'linguistic form' as a significant part of the argument, especially given Hart's own explanation of obligation:

The linguistic form of the argument was important to Hart... his focus on the use of the *word* 'obligation' is no accident. He did not point out the way we use that word merely as an oblique way of appealing to our shared wisdom as to what obligation *is*. It was actually important to him to point out how we use the word 'obligation'. His explanation of the normativity of law relies on a view of the use of such words to display an attitude.³⁶

What was the form of Hart's theory and why might one be led to think of the use of the word 'obligation' and other 'such words' important to understanding it? Hart's explanation of obligation grounds the notion in the concept of a social rule, a 'situation which,' he says, 'contributes to the meaning of the statement that a person has an obligation in two ways'.³⁷ First, Hart says the existence of such rules forms the normal context for the assertion that someone has a legal obligation. For example, my legal duty to drive carefully presupposes a valid rule to that effect. Second, 'the distinctive function of such statement [sic] is to apply such a general rule to a particular

³⁶ Endicott, 'Law and Language'

³⁷ Hart, *The Concept of Law* 85.

person by calling attention to the fact that his case falls under it'.³⁸ Obligation, on this view, is a function of the existence of a rule, and acceptance of such a rule, Hart notes, is marked by a range of linguistic behaviors that find their 'characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong''.³⁹

Does this view make the linguistic mode of presentation necessary for Hart's argument? It does not. Whatever faults there are in his theory of obligation, Hart does not make the mistake of saying that obligation *consists* in the use of normative language. Hart knew that law is created through the use of language, but he did not hold that that which is created, the rights and obligations that comprise the law, are themselves linguistic objects.⁴⁰ His claim was instead that the use of 'normative terminology' in the context of law typically provides evidence that people accept a social rule of which obligation is a function.⁴¹ Indeed, we can rephrase the general elements of his

³⁸ Ibid 85

³⁹ Ibid 57

⁴⁰ See, on the former point, Hart, *Essays in Jurisprudence and Philosophy* 275-276

⁴¹ For criticism of Hart's reflections on social rules, and his associated analysis of obligation see Dworkin, *Taking Rights Seriously* 48-58 and Joseph Raz, *Practical Reason and Norms* (2nd edn, Princeton University Press 1990) 49-58. It is striking how both theorists read Hart's linguistic considerations as going to the nature of social rules as opposed to providing an explanation of the standard marks of the existence of such a rule within a community. Hart was clear enough: his explanation was in terms of the differences in behavior between people who accept a rule mandating some course of action, and a convergent habit of behavior that ranges over the same course of action. It is

theory without any mention of what people do with words: obligation, in law, is the effect of a mandatory rule. So whilst Endicott is right when he says that '[Hart's] explanation of the difference between non-normative and normative assertions... was... that the latter sort of assertion is used to display a distinctive sort of attitude', he is wrong to conclude that this makes the linguistic mode of presentation fundamental to Hart's theory.⁴² The use of normative language, the assertion that someone has an 'obligation' to perform some action as opposed to being merely 'obliged' to act a certain way, for example, even if backed by a particular attitude, is not what obligation consists in and Hart knew as much. His explanation was most fundamentally in terms of the concept of a rule, which provides the context for the use of the language of obligation and other such linguistic clues. Endicott's interpretation seems to invert the relative priority of these elements and to mistake that which Hart considers to be a sign of the fact that someone is under an obligation for a constitutive aspect thereof.

The view that Hart's explanation of obligation turns on the use of language to express an attitude finds support, albeit in different way, in the

not about what a rule is. See Hart, *The Concept of Law* 55-57. On the interpretation of Hart see Kevin Toh, 'Four Neglected Prescriptions of Hartian Legal Philosophy' (2014) 33 *Law and Philosophy* 689

⁴² Endicott, 'Law and Language'

recent work of Kevin Toh.⁴³ His surprising claim is that ‘Hart’s analysis of internal legal statements’, i.e. statements of the law in some jurisdiction, is ‘expressivist or non-cognitivist’, such that the claim that a particular individual has a legal obligation is analyzed as the manifestation of an attitude or conative mental state, rather than as an assertion that a particular rule-governed state of affairs obtains in relation to them.⁴⁴ To say that x has an obligation to ϕ is, in other words, to express an attitude towards them – an attitude that Toh characterizes as one of ‘rule acceptance’ – and not to assert that anything is the case.⁴⁵ A bizarre consequence of Toh’s understanding is that, strictly speaking, such statements, being conative as opposed to cognitive, are not truth evaluable. How might someone arrive at such a theory? The interpretation mistakes that which is assumed by someone making a claim about the law for that which they express. As Hart noted, the statement that a particular person is under a legal obligation to perform some action *presupposes*, but does not express the acceptance of, a rule to that effect. It is again a misplaced focus on the uses of language in Hart’s theory of obligation that has enabled such a picture to take hold.

Not only does the linguistic form of argument seem unnecessary, then, in relation to Hart’s treatment of legal obligation, but the same claim can be

⁴³ See Kevin Toh, ‘Hart’s Expressivism And His Benthamite Project’ (2005) 11 *Legal Theory* 75.

⁴⁴ *Ibid* 78-81

⁴⁵ *Ibid* 77

made of Hart's other invocations of linguistic usage – they too seem to involve a form of argument which is expendable, and do not themselves suggest a central role for ordinary language in argument. In response, for example, to the crude form of rule skepticism commonly associated with the more extreme of the American Legal Realists – a theory which identifies the claim that a particular individual has a legal right with the claim that a judicial decision in their favor is likely, this being, on such a view, what it is for an individual to have such a right – Hart noted 'how the statement that [an individual has a right in law] differs from a prediction of the behavior of officials'.⁴⁶ His claim was that a situation in which someone has a legal right need not, and in many cases does not, license the description of the situation as being one in which it is likely that an official will decide in their favor. But he also put that argument more fully in a way that did not require resort to questions about what we would and would not say. A judicial decision in one's favor is not necessary for the possession of a legal right – many legal rights go unenforced, for example – nor is it sufficient, for the possibility of judicial mistake as to the existing rights of parties looms over the whole of the law.

⁴⁶ Hart, *The Concept of Law* vi. For a different interpretation of the American realists see Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* chs 1 and 2. The import of Leiter's reading of the realists for methodology in jurisprudence is considered in chapter seven.

Hart also produced other arguments against the crude realist view. The skeptic's conception, he noted, fails completely to deliver an analysis of the use of the concept of legal right on the lips of a judge, for a judge's assertion that a particular individual has a right cannot be a prediction that they will likely find in favor of the individual. By declaring the rights of the parties, they make their decision.⁴⁷ Hart also noted that the theory misconstrues the grammar of rights claims outside of the courtroom:

[I]t is surely an observable fact of social life that individuals do not confine themselves to the external point of view, recording and predicting the decisions of courts... legal rules function as such in social life: they are used as rules not as descriptions of habits or predictions.⁴⁸

These arguments about the use of legal concepts, again, are not put in terms of how we would describe situations, but are about the place of rules in social life - as normative standards for the appraisal of conduct and not descriptions of behaviors or assertions of likelihood in terms of action.

Argument in the linguistic mode seems expendable. We can rephrase Hart's arguments concerning what we would and would not say in particular situations in a way that does not require this method of presentation without losing anything important: what is said about language can be said more directly about concepts and institutions. This observation has been thought by

⁴⁷ See, on this point, Hart, *The Concept of Law* 136-141

⁴⁸ Ibid 138

many to tend in favor of the thesis that analysis in legal philosophy is not intimately concerned with language. But it does not foreclose the possibility. What we would need to show, in order to vindicate the claim that conceptual investigation has a basis in language, is that argument in legal philosophy, although it need not be put in the linguistic mode, is ultimately oriented to language, that its claims, although they need not be phrased as being about the uses of words, are in fact aimed at clarifying linguistic meaning. But we need some independent reason for thinking that this is so, for the claim cannot rest on the contingencies of argumentative style used by Hart or anyone else.

Word as Object – Raz on Definition

One possibility is this: that jurisprudence might be thought of as being concerned with the better understanding of certain canonical legal words. On this view, legal philosophy in its general mode may be thought of as reducible to the attempt to understand the meaning of the word 'law', and perhaps also some other words closely associated with the institution such as 'right', 'obligation' and 'authority'. We can call this the definitional approach. It is, Joseph Raz says, the method adopted by those who take 'inquiry concerning the nature of law to be an attempt to define the meaning of the word 'law'' and he takes such a conception to form the crucial aspect of legal theory

conceived of as a linguistic investigation.⁴⁹ It is clear to see why, if right, such a view would vindicate a strong association between general jurisprudence and an investigation into language. We would be able to provide linguistic glosses of all central questions in jurisprudence: the question about the nature of legal rights, for example, being about the proper use of the word 'right', and the questions about the relationship between law and coercion answered by analysis of the use, or uses, of the word 'law'.

Before going on to consider the justifiability of a view of this type we should say something briefly about the apparent history of the definitional approach and where it may be thought to have had influence. It is clear, for example, that John Austin thought linguistic classification essential to his task in clarifying the basic aspects of jurisprudence, and many passages of his famous work tend in favor of Raz's interpretation of him as the most obvious exponent of the approach.⁵⁰ Consider the following statement that Austin gives of his theory, and of its relation to linguistic usage:

Of the laws or rules set by men to men, some are established by *political* superiors, sovereign and subject: by persons exercising supreme and subordinate *government*, in independent nations, or independent political societies. The aggregate of the rules thus established or some aggregate forming a portion of that aggregate, is the appropriate matter of jurisprudence, general or particular. To the aggregate of rules thus established, or to some

⁴⁹ Raz, *Ethics In The Public Domain : Essays In The Morality Of Law And Politics* 179-180

⁵⁰ *Ibid* 179

aggregate forming a portion of that aggregate, the term *law*, as used simply and strictly, is exclusively applied.⁵¹

Here, Austin describes his theory of law – as the command of a legally unlimited sovereign – as providing the meaning, and hence securing the proper referent, of the term ‘law’ used ‘simply and strictly’.⁵²

Subsequent theorists have not admitted to a definitional approach.

Hart, as we have already noted, distanced himself from the claim that his theory should be thought of as providing an understanding of the meaning of the word ‘law’, or any other associated term. Nonetheless, his most famous critic, Ronald Dworkin, initially interpreted him as holding such a view, baptizing Hart along with Austin as a ‘semantic’ theorist of law.⁵³ That claim

⁵¹ Austin, *The Province of Jurisprudence Determined*; and, *The Uses of The Study of Jurisprudence* 11

⁵² I will say something later in this section about whether this is the right description of Austin’s program.

⁵³ See Dworkin, *Law's Empire* 31-35. For criticism see Ruth Gavison, ‘Comment’ in Ruth Gavison and H. L. A. Hart (eds), *Issues in Contemporary Legal Philosophy: The Influence Of H L A Hart* (Clarendon Press 1987) and Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* ch 3 esp 53-76. Hart himself rejected the interpretation in the posthumously published postscript to *The Concept of Law*:

Though in the first chapter of *Law's Empire* I am classed with Austin as a semantic theorist and so as deriving a plain-fact positivist theory of law from the meaning of the word ‘law’, and suffering from the semantic sting, in fact nothing in my book or in anything else I have written supports such an account of my theory. Thus, my doctrine that developed municipal legal systems contain a rule of recognition specifying the criteria for the identification of the laws which courts have to apply may be mistaken, but I nowhere base this doctrine on the

about Hart's work, which came in the end only to distract from Dworkin's real target – a view on which sharing legal concepts depended on sharing criteria for their use – was subsequently revoked.⁵⁴ Nonetheless, the belief, at least in certain quarters, that crude definition forms the central aspect of modern jurisprudence perseveres. As late as 1996, Richard Posner sought to argue, against what he took to be the positions of both Hart and Dworkin, that 'trying to define 'law' is futile, distracting, and illustrative of the impoverishment of traditional legal theory'.⁵⁵ So whilst very few theorists would admit their theories as attempts at definition in Raz's sense, the belief that much of analytic jurisprudence occurs under such a description is widespread.

The question, then, is whether such an approach is attractive. The objections are both obvious and decisive. Raz explains:

mistaken idea that it is part of the meaning of the word 'law' that there should be such a rule of recognition in all legal systems...

Hart, *The Concept of Law* 246. For a view sympathetic to Dworkin's position see Stavropoulos, 'Hart's Semantics'

⁵⁴ For Dworkin's reformulation of his argument see Dworkin, *Justice In Robes* 225-226. The reformulated argument is discussed in chapter 4.

⁵⁵ Richard A. Posner, *Law And Legal Theory In England And America* (Clarendon Press 1996) vii and ch 1. Given that Dworkin, in particular, makes the rejection of a conception of legal theory as being concerned in any important way with linguistic usage a central aspect of his developed work, the accusation is indeed a startling one.

[Those who adopted the 'definitional approach'] encountered the overwhelming problem that [the word 'law'] is used in a multiplicity of non-legal contexts. We have laws of nature and scientific laws, laws of God and of thought, of logic and language, etc. Clearly the explanation of 'law' has to account for its use in all these contexts, and equally clearly any explanation which is so wide and general can be of very little use to legal philosophers.⁵⁶

Legal theorists, Raz notes, have little interest in the way the term 'law' is used in these disparate contexts, and a catalogue of such uses will not advance us in our jurisprudential inquiries. We will not profit in the formation of the theory of law, he suggests, by providing an explanation of the laws of science or religion. And whilst that claim is probably too strong – it may be that helpful analogies and dis-analogies can be formed which will deepen our understanding of law in the jurisprudential sense – it is clear that these aspects do not form part of the *subject* of legal theory. So a study of the general use of the word would be, in this sense, over-inclusive.⁵⁷

Another problem presents itself: focusing on surface aspects of linguistic usage – the situations in which we use, for example, the word 'law'

⁵⁶ Raz, *Ethics In The Public Domain : Essays In The Morality Of Law And Politics* 180. See also Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 29-30, 53-54; Finnis, *Natural Law and Natural Rights* 6; and Endicott, 'Law and Language'. Dworkin notes that use of the term may vary even within legal contexts. See Dworkin, *Law's Empire* 104-108

⁵⁷ The claim not only applies the word 'law' but also to a range of other words standardly used in legal contexts; for many purportedly purely legal terms we may find a range of non-legal uses, the analysis of which will fail to assist in theoretical reflection.

- may hinder inquiry by misleading us into believing that certain fundamental connections exist between disparate social situations when the evidence does not warrant such a conclusion. Given that the word 'law' is utilized in a variety of non-legal contexts to denote various forms of relationship, there exists a possibility that, if not careful, we may be tempted by false analogies between divergent situations, or that we may be lead by similarities in the forms of our words to apply a theory appropriate in one case to another in which it is not. Hart noted, for example, such an interpretation of Natural Law doctrine in Mill's reply to Montesquieu. Mill held Montesquieu's theory of Natural Law to have rested upon 'a simple ambiguity in the word 'law'', under which 'true' or 'valid' laws governing human conduct are assimilated with the laws of nature, as both 'imminent' in natural order and subject to a teleological interpretation.⁵⁸ On a view of this type, 'natural laws' for human conduct are conceived of as 'true principles for right conduct, rationally discoverable'.⁵⁹ Scientific laws, which are also subject to a process of discovery, are understood as regulating, for example, the movements of the stars. The obvious fact that the stars cannot fail in their

⁵⁸ See Hart, *The Concept of Law* 186-193. Concerns of this type, about the dangers which may be had in assimilating the 'surface grammar' of expressions, are discussed in Gordon P. Baker and P. M. S. Hacker, *Wittgenstein: Understanding and Meaning. Part I, Essays* (2nd, extensively rev. edn, Blackwell Pub. 2005) 325-326. They note how 'the uses of expressions cannot be taken at a glance, and their surface grammar is deceptive. Form does not reflect use, and expressions with very different uses may share a common appearance in surface grammar.'

⁵⁹ Hart, *The Concept of Law* 186

duties, whereas we may and often do, shows the extent of the dis-analogy.

Hart explains Mill's argument:

[Scientific laws] which may be discovered by observation and reasoning, may be called 'descriptive' and it is for the scientist to discover them; [human laws] cannot be so established, for they are not statements or descriptions of facts, but are 'prescriptions' or demands that men shall behave in certain ways... So, on this view, belief in Natural Law is reducible to a very simple fallacy: a failure to perceive the very different senses which... law-impregnated words bear. It is as if the believer has failed to perceive the very different meaning of such words in 'You are bound to report for military service' and 'It is bound to freeze if the wind goes round to the north.'⁶⁰

To be disposed to such an interpretation of natural law, on the basis of similarities in the forms of vocabulary used in legal and scientific contexts, is to be blinded rather than enlightened by language.⁶¹ Maybe no one ever held such a crude view, but possibilities of this type are encouraged by a definitional approach understood in the sense in which Raz conceives of it.

One final point: the relation between legal and social concepts, and the particular forms of language used to express them, is contingent. Whilst it is true, for example, that in certain contexts we use the word 'law' to refer to the

⁶⁰ Ibid 187. For a modern version of Natural Law which does not itself depend directly on such analogies see Finnis, *Natural Law and Natural Rights* and, in particular, on teleological conceptions of nature, 52-53. It is worth noting, though, that the final chapter of Finnis' book does suggest the possibility of a unitary explanation of the conditions of intelligibility for natural order and human law. See *ibid* ch 13

⁶¹ The same assimilation is noted in Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange 1999) 8-11

complex type of institutional regulation that forms the subject of general jurisprudence, the situation may have been otherwise. The forms of language used to describe legal arrangements and to make and express the demands of law need not remain fixed.⁶² The particulars of our legal vocabulary, including the phrases 'right', 'obligation' and 'law', are expendable. Variation in linguistic form, moreover, is not just an intra-communal possibility but also an inter-communal actuality. In different communities, reference is made, for example, to 'droit' and 'recht'.⁶³ Whether these words properly map our use of the term 'law' is a difficult question of translation, but the importance of the institution remains a constant across these varying contexts. It is not simply that we could well have had law without having the very word 'law', but that many actual communities do. To tether oneself to the surface aspects of linguistic usage, as a focus on defining the word 'law' would have us do, appears to make one's subject an arbitrary and shifting concern.

These points – about the over-inclusiveness of a focus on word meaning, its potential to encourage shallow forms of analysis and the contingent relation between words and concepts – are so obvious that they may lead one to consider whether anyone ought to be imputed with the position that Raz describes. Even John Austin, who is held up as the chief

⁶² Indeed, we can understand certain movements in legal academia, such as the Global Administrative Law school, as advocating future changes in usage.

⁶³ See, on this point, Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 27-28

example of a proponent of the definitional approach, was keenly aware of the problems associated with the multiple senses of the word 'law'. He said, for example, that:

Under [a general definition of law] are included, and without impropriety, several species. It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and intricacy has been infused into the science of jurisprudence by their being confounded or not clearly distinguished.⁶⁴

Here, Austin notes both the need to distinguish between various 'species' of law, some relevant and some not to jurisprudential inquiry, and the specific danger that certain other uses of the word may lead us into error when attempting to form a theory of law.

Now it might well be said that such sensitivity to divergence in use is hard to square with Austin's apparent dogmatism displayed elsewhere including, for example, his invocation of 'proper' and 'improper' uses of the word 'law' and his annexation of the term in its 'strict sense' to law as the command of the sovereign.⁶⁵ To an extent this is true. Elements of inconsistency are removed, however, if one reads certain of his definitional dictates, not as an attempt to discipline ordinary usage – to tell us when we can and cannot properly use the word 'law', for that is no legal theorist's job –

⁶⁴ Austin, *The Province of Jurisprudence Determined ; and, The Uses of The Study of Jurisprudence* 10

⁶⁵ *Ibid* 11

but to select from amongst various usages of the term the sense relevant to jurisprudential inquiry.⁶⁶

But we may distance ourselves from the niceties of this interpretive question. The crucial issue is this: what is implied by the fact that legal theory should not take as its object the disparate uses of the word 'law' in ordinary discourse? Raz's own conclusion is that 'the question about the nature of law' does not call for 'significant help from semantics', by which he means inquiry into the proper and improper uses of language.⁶⁷ The theory of law, Raz says, 'identifies and explains the concepts involved in legal actions, and explains the nature of law given that legal actions have that character' in a way which he takes not to depend, except perhaps in exceptional circumstances, upon linguistic analysis.⁶⁸

Setting aside the details of Raz's positive conception of jurisprudence, we may wonder whether his argument secures the conclusion that the theory

⁶⁶ The same cannot be said of his annexation of constitutional law to the realm of positive morality, a result of his austere theory.

⁶⁷ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 53. Confusingly, Raz also uses the term 'philosophy of language' to refer to investigation into the meaning of legal terms. But the philosophy of language is not concerned with the meaning of particular words. Its concern is with the general features of language, such as how words have meaning, or secure reference. It is important to keep separate the philosophy of language and linguistic analysis as a method for philosophy.

⁶⁸ Ibid 2. Although, cf. chapter 3 for doubts about the extent to which Raz properly endorses this thesis about legal concepts.

of law has no positive stake in 'semantics', i.e. the investigation of linguistic usage, for there is a paradoxical element involved. Raz claims that the term 'law' has a range of non-legal meanings not relevant to the theorist, i.e. uses which do not denote legal concepts. But these are themselves linguistic insights, insights about the different uses of terms in legal and non-legal contexts. The assertion that a word has associated with it multiple meanings, some directly relevant and some not to legal theory, depends upon the existence of such distinctions *in language*, i.e. there being different rules for the use of the same word in legal and non-legal settings.⁶⁹ So, for example, Raz notes that the word 'law' 'applies to many things, scientific laws, mathematical laws, divine laws, and others...' not relevant to the philosophy of law.⁷⁰ The natural explanation of the difference is that the laws of science and mathematics are not laws in the same sense as the laws of the United Kingdom, or the United States, i.e. that the word has a different meaning in each context. Raz's argument appears to depend upon the very resource he wishes to escape from.

⁶⁹ This point is noticed by, for example, Timothy Endicott, who, when discussing the linguistic aspects of Hart's influence on legal theory, notes as one of his central concerns the 'context principle', this being the view that 'the meaning of an utterance depends in a variety of ways on context: on the situation of the speaker and of any listener.' See Endicott, 'Law and Language' 946-950

⁷⁰ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 53

The above argument is predicated on the assumption that the distinction between the uses of words within legal contexts and outside is marked in language. Could it be that the relevant distinctions are non-linguistic? Is it possible, in other words, that the differing use of the term 'law' in legal and non-legal contexts does not depend upon the word having different meanings attached to it, but one meaning of which the jurisprudential form is an instance, demarcated in some other way? Raz suggests that this might be the case. He says of the term 'law', for example, that its meaning may be 'univocal', and 'susceptible of a general explanation', which ranges across the subjects of its use.⁷¹ Such an argument not only fails to note the central connection between meaning and use, but also involves the stretching of definition beyond reasonable bounds to assimilate, for example, the use of the word 'law' in the scientific context and in politics.⁷² Consider, in this regard, Raz's own candidate explanation of the possibility that 'law' has a 'univocal' sense – 'laws', he says, may be 'general rules of some permanence, or general rules giving rise to a degree of necessity ("given the law, it must be thus and thus")'.⁷³ But this attempt fails for the same reason that the natural lawyer's attempt to assimilate physical and social norms does. The sense in which, for example, scientific laws are 'necessary', i.e. inevitable given the general nature of the physical universe, differs so widely from the sense in

⁷¹ Ibid 54

⁷² See Wittgenstein, *Philosophical Investigations* s 43

⁷³ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 54

which conduct under human law is made non-optional or 'necessary' from a practical point of view, that such a general definition is rendered senseless. The word 'law', expressed in institutional and scientific contexts, has a different meaning and it takes linguistic analysis to make the distinction.

Now it might be thought that this is only a minor point, that Raz's argument depends upon language only to the extent necessary to establish the conclusion that certain uses of words are associated in the right way with the social concepts 'involved in legal action', i.e. those which form the proper subject of the theory of law, and not with the further task of analyzing these aspects of social order.⁷⁴ Language would be seen here as the means of distinguishing the proper subject of jurisprudence from other considerations, but not as the ultimate object of analysis. On this view, after having first distinguished relevant and irrelevant uses of language, appeal may be made directly to legal concepts as the subject of understanding in a way that does not depend upon 'semantics'. But this position is itself unstable. By making clear the uses of legal terms relevant to the theory of law, we are thereby presented with the relevant concepts *as signified in language*.⁷⁵ To be told that

⁷⁴ Ibid 2

⁷⁵ Raz admits the possibility, but fails to recognize its import for his argument concerning the relevance of 'semantic' investigation to the theory of law:

Perhaps the explanation of the meaning of the word 'law' consists in a list of all the different kinds of law to which the word applies, the laws studied by jurisprudence being among them, and jurisprudence studies that part of the meaning of the word. Alternatively, perhaps the

linguistic analysis may be used to show that words have multiple senses, but not to understand the senses of these terms, involves the failure to note that the rules which distinguish one concept from another also provide our concepts with their uses. Both the drawing of crucial distinctions and the resultant analysis of legal concepts is, in this sense, a continuous exercise; language appears to be involved all the way.

But perhaps the objection can be rephrased: if, as Raz says, the legal theorist is concerned finally with the analysis of legal concepts, as opposed to the words commonly used to denote such concepts, why not simply admit a direct concern for the conceptual as opposed to the linguistic? In other words, if our concern is not with, for example, the words 'law' and 'right', but with the concepts of law and legal right and how they function in thought and action, why not say that legal theory is a conceptual investigation and that language plays no essential role? The claim involves an important half-truth. For whilst, as I will argue in subsequent chapters, it is true that legal theory is concerned at the most basic level with an understanding of the rules for the use of legal concepts, such concepts are themselves essentially linguistic i.e. it is in their nature to be expressed in language. This means that the theory of law is both finally concerned with legal concepts, and not the words that

word has different, albeit cognate, meanings, and jurisprudence explains one of them.

See *ibid* 54

denote them, whilst also being a linguistic investigation. In the next section I seek to explain this duality.

The Indispensability of Language

Many take the contingent connection between particular words and concepts – the fact that our concepts may be realized in divergent forms of language – to suggest also that the general relation between language and social concepts is itself contingent. Given that, for example, the concept of legal obligation may find use within a particular linguistic community in the absence of the word ‘obligation’ or, indeed, any singular term that references the concept in their language, it is suggested that the concept itself, the sense of the word, can be conceived of in pure terms, i.e. as a kind of representation in thought which is not linguistic. But the argument is fallacious. The fact that a particular concept may receive many different forms of signification is a claim about the relation between *particulars*. It does not go to the question about the *general* relation between social concepts and language. The fact that legal concepts may have different forms of symbolic representation does not, in other words, show that they need not have any such form. Indeed, there are good reasons to think that the general connection between language and institutional concepts is necessary, and not contingent.

Wittgenstein made this point most famously. He noted, for example, how complex forms of thought appear to be inevitably connected to language.

The relationship between them, he said, 'comes out in that what has been said inwardly can be communicated outwardly'.⁷⁶ His claim is not that conceptual thought occurs in a way that is *translatable* into language, but that the processes of thought and action associated with abstract concepts necessarily occur *in* language:

One can say things in one's imagination very distinctly, when one reproduces the intonation of one's sentences by humming (with closed lips). But the curious thing is precisely that one then hears the talk in one's imagination and does not merely feel the skeleton of it, so to speak, in one's larynx.⁷⁷

The point is about phenomenology. It is that abstract thought occurs, as it were, *as if spoken*. The connection is noticed, for example, at the point of learning. One learns to 'calculate in [one's] head', Wittgenstein notes, only 'by learning to calculate'.⁷⁸ The process is not, in each case, accomplished via a separate medium, one pre-linguistic and the other linguistic. A method of signification is as necessary in each case, and it has the same form. Counting in one's head and counting out loud differ of course, but not because one involves the use of signs to denote the relevant operations and the other does not, but because one involves a performance whereas the other does not. And what is true in the mathematical case is true more generally. Thought and

⁷⁶ Wittgenstein, *Philosophical Investigations* 302, p 231

⁷⁷ Ibid 305 p 232.

⁷⁸ See *ibid* 304 p 232

speech do not have different *forms*. Our concepts, even if manifest in thought as opposed to being openly expressed in language, have a linguistic basis.

Now, it might be thought that this is too quick. Can abstract and conceptual forms of thought not occur in the mind as pictures, or images, for example, as opposed to in a language? One can certainly bring to mind memories or imagine scenes and objects in this way. But wherever pictures, properly speaking, are the constituents of thought, the thought itself is not abstract and conceptual but concrete and particular. Having an image of a triangle in mind, for example, is not the same as thinking using the general concept of a triangle, for the picture will cover only one incidence of an infinite number of possibilities. To think conceptually, i.e. to use general concepts in a way that ranges over possibilities, a method of signification, i.e. a language, is needed, and that cannot itself consist in having in mind an example of the kind signified. Linguistic representation, then, forms the basis of conceptual thought and action.

John Searle has more recently highlighted this aspect of our self-conception as it occurs in the institutional context. 'Intuitively', he says, 'I think it is fairly obvious that the kind of thought processes we are considering in [relation to] institutional reality require some means of... expression'.⁷⁹ He

⁷⁹ John R. Searle, 'Language and Society'
<<http://socrates.berkeley.edu/~jsearle/ReplytoMcGinnLongDec21.pdf>>
accessed 5 June 2014 3

asks us to consider any particular thought relating to institutions; for example, about the current composition of government or the relation between returns on capital and earnings:

First, think it in words. Now, think it without words; just think the pure concepts, I do not have any idea what I would do except think the same words but in an abbreviated form. All the same, you need some sort of symbolism.⁸⁰

And what is true of institutional thought generally is true *a fortiori* for law.

The very thought that, for example, 'Jones has a legal right to the land' or that the 'the rule in *Rylands v Fletcher* forms a part of the law of torts', because involving various abstract concepts, occurs in language and one cannot think the same without using words. This aspect of the individual case generalizes.

Searle explains:

If an anthropologist tells us that he has discovered a tribe that has the complete gamut of institutions they have marriage, divorce, government with a separation of powers, money and banking complete with loans and interest rates but they have no language whatever, we know that this is incoherent.⁸¹

'All of those phenomena' he concludes 'require linguistic means of representation for their very existence.'⁸²

⁸⁰ Ibid 4-5

⁸¹ Ibid 4

⁸² Ibid 4

It is important to be clear about the precise nature of the thesis concerning language being described here. The claim is that linguistic means of representation are necessary for the possession of institutional or legal concepts, not that such concepts may only be conceived of relative to a community of speakers, for example. It is not that a widespread public language is a requirement of institutional thought, but that such thought occurs on a linguistic basis and is therefore communicable. The difference is an important one for more radical arguments, arguments which have been taken to suggest that linguistic meaning or abstract thought is in some sense dependent on the existence of an actual speech community have sometimes been made in Wittgenstein's name. These form no part of the claim here being made.⁸³

Is it possible that our failure to conceive of social concepts and institutions apart from language indicates a cognitive limitation on our part as opposed to showing a fundamental connection between such concepts and linguistic means of representation? In other words, is the connection that we perceive between language and institutional concepts dependent upon limitations in our mental capacities, such that we might be able to conceive of some other species able to maintain institutions and entertain legal concepts

⁸³ See, for the most interesting development of the communitarian argument, Saul A. Kripke, *Wittgenstein On Rules And Private Language : An Elementary Exposition* (Harvard University Press 1982). See, in response, Gordon P. Baker and P. M. S. Hacker, 'On Misunderstanding Wittgenstein: Kripke's Private Language Argument' (1984) 58 *Synthese* 407

apart from language? The objection depends on an impossible attribution. The fact that we cannot conceive of institutional concepts apart from language is a general claim about possibilities, not a claim relativized to human capacities which leaves open the prospect of it being transcended by other forms of life.

We can explain this point by way of comparison: the fact that it is, in a certain sense, impossible to imagine humans running as fast as the most impressive hunting animals does not mean that we cannot conceive of other species doing so. Our inability to picture ourselves travelling so fast by our own means of propulsion does not involve the denial of the possibility outright. We are able to conceive of the option, but unable to attribute it to ourselves given current physical limitations. By way of contrast, the claim I am making about legal concepts is general in scope. It is not simply that we cannot conceive of *ourselves* as using such concepts apart from language, but that we cannot conceive of such thoughts apart from linguistic forms of representation under any set of conditions. The objection involves the attribution to others of a mode of thought or action of which we have no way of making sense, not merely one that we know to be impossible for us, but which we can envisage as possible for others.

These considerations show that the attempt at understanding legal concepts, as the basic constituents of legal thought and action, cannot occur apart from an investigation into language. Such concepts are, of necessity, expressed linguistically, whether they are communicated, considered as an

object of thought or used in a more practical sense. In each case, their basis is in language, although the particular form of linguistic expression that these concepts have, and the uses to which we put them, may of course vary. We may, for example, assert our rights to particular property, a judge may declare the entitlements of the parties in a case before them or we might come to consider the rights culture of our political community in a more abstract sense. Each of these activities will involve the same concept put to different uses, and perhaps expressed in different ways, but always on a linguistic basis.

Does the fact that the uses of the concept that a legal right may vary put lie to the thesis that meaning is to be closely associated with use? It does not, because the different uses of the concept depend upon it being embedded in sentences with different forms – declarative, performative, etc. Moreover, to understand the concept of a legal right is to understand that it may be used in these various ways. If one fails to understand, for example, that a legal right can be created by institutional action of the right kind, i.e. by the use of the concept against a background of institutional rules, then one fails in one's comprehension of the concept. To understand the rules for a concept's use is to understand the various social acts of which it may figure as a part.

The problems associated with a strict definitional approach, which Raz attributes to those who maintain that legal philosophy ought to be understood as an investigation into language, fade on this conception. Our

concern is with the function and meaning of language as it relates to the legal context, and not directly with the uses of similar words and phrases in other circumstances where these uses express other concepts: so the approach is not over-inclusive.⁸⁴ Nor do we, by focusing on concepts that find their expression in language, take the surface grammar of our terms to be indicative of an important philosophical affinity between the uses of concepts in disparate situations. The emphasis is not on our words but on that which they denote.

It is important, also, to emphasize the contingent relation between particular forms of expression and the concepts that they represent. In seeking a philosophical understanding of legal concepts, the aim is to transcend the particular forms of language contingently associated with law to reveal the general structure of the concepts most closely associated with it. This observation puts lie to the concern, most forcefully asserted by Brian Leiter, that linguistic analysis is fit to reveal only 'ethnographic and local' truths about word usage, and not general, necessary, truths about law.⁸⁵ For our concern is not with the contingencies of word meaning which are, of course,

⁸⁴ Although, as noted earlier, we may of course wish to deepen our understanding of law by drawing out the similarities and differences between the uses of words such as 'rule' and 'authority' in other related domains. This process does not involve an over-broadening of subject matter, but a sensitivity to similarities and differences in disparate but related contexts.

⁸⁵ Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 177-178

culturally relative and subject to change over time. The concern is instead with the concepts that find their expression in such contingent forms. And these concepts cannot themselves be conceived as in any important way 'relative' to particular communities – other than by virtue of it being an open possibility as to whether certain societies will have such concepts – because they are identified with the rules for their use, and a difference in use will consequently indicate a difference in concept.⁸⁶ It is too strong a focus on the contingencies of notation that leads one to think otherwise.

So Wittgenstein's thesis provides support for Hart's assertion that legal philosophy can be thought of as raising 'questions which may well be said to

⁸⁶ So Wittgenstein says: 'There can be no debate whether these or other rules are the right ones for the use of a word... For without these rules the word has as yet no meaning; and if we change the rules, it now has another meaning (or none).' See Wittgenstein, *Philosophical Investigations* S549 p 147. A similar point is made by Raz:

[T]he very talk of 'changes occurring in the concept of law' shows that once such changes occur it is no longer the same concept. It is a case of a new concept replacing the old one though they happen to share the same term.

Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 28. Arguments of this form go to show that much of the supposed radical relativism demonstrated by studies in experimental philosophy – e.g. studies which show that different cultures use the word 'knowledge' or some rough equivalent differently – is merely supposed. What is actually being demonstrated in such cases is that different cultures have different concepts, not that they share a single concept that is subject to cultural variation. See, on this, Frank Jackson, 'Experimental Philosophy' <<http://ndpr.nd.edu/news/23862/?id=14828>> accessed 13 November 2011

be about the meanings of words...'.⁸⁷ If we are to accept general jurisprudence as a study of the institutional concepts most closely associated with law, then our questions will inevitably concern linguistic meaning, although they will not be questions that call for definition in Raz's sense. The claim also supports Hart's invocation of the linguistic mode of argument – assuming a sufficient sensitivity to varying contexts in which words are used – not as an effect of the time in which he wrote, but as admission, fundamentally, that a concern for legal and institutional concepts is itself a concern for language. When he trained our attention on the use of the word 'obligation' in legal contexts, for example, Hart did so not because his ultimate concern was with linguistic form, but because the concepts he wished to focus us on have a linguistic basis, and so this is where the investigation must begin.

Conclusion

In this chapter I have sought to investigate the relation between the theory of law, conceived of as a conceptual investigation, and inquiry into language. In the first section I considered the possibility that argument in the linguistic mode formed a central aspect of general jurisprudence. That form of argument, it was suggested, appears expendable and so independent support for the thesis that legal philosophy ought to be thought of as an investigation into language is required. In the second section I considered the proposal that

⁸⁷ Hart, *The Concept of Law* vi

jurisprudence be conceived of on the model of definition – as an inquiry into the general use of words commonly associated with law. The claim fails, both because legal terms have a multiplicity of non-legal uses, and for the reason that legal concepts bear only a contingent relation to the forms in which they are expressed. Neither of these arguments, however, blocks the interpretation of legal theory as an investigation into language at a more fundamental level: contextual differences in word use are marked in language and linguistic representation, as a general matter, is essential to the nature of social concepts. The theorist of law is not a slave to language, but their task, if we are to conceive of it as involving the analysis of basic legal concepts, requires a commitment thereto.

Having here attempted to clarify the relation between language and legal concepts, the issue to which I turn in the next chapter is why an understanding of such concepts may be thought of as allowing us insight into the reality of law and of legal institutions. Having law within a community is not the same as having its concept, and so the question of why conceptual understanding might be taken to afford institutional insight, i.e. insight into the nature of law, naturally arises.

Chapter Two: Concept and Object

Introduction

The argument of this thesis is that general jurisprudence consists of the attempt to understand certain fundamental legal concepts; it is a matter of forming a conception of the rules and principles that condition the varied uses of such concepts as part of our legal practices. This way of conceiving of the discipline makes urgent the issue of the relationship between conceptual truth and institutional reality, for important matters of institutional fact seem far removed from questions about the way in which we deploy concepts. The famous controversies of the philosophy of law appear firmly rooted in the object – law, the social phenomena – as opposed to the language that we use when we describe the institution, or when we otherwise participate in the use of legal concepts. Our reflections on the nature of legal authority, for example, are naturally given a *de re* as opposed to a *de dicto* reading.¹ When we ask whether submitting to political authority requires us to surrender judgment concerning the matters that it regulates or whether such an act is rationally autonomous we are naturally understood to be reflecting on the nature of authoritative institutions and their particular demands, not merely on our concept of authority or the meanings of our words.

¹ *De re* meaning, of the object and *de dicto*, of the word.

So here we have what might be thought of as a tension between the method suggested and the target of investigation. The theory of law has as its concern the institutional nature of law; we aim to better understand law as a form of social control. But conceptual inquiry seems to have us reflecting only upon the way in which we conceive of or, for want of a better word, *conceptualize* this reality. Better, surely, to consider directly the object of our attention. Indeed, given that analysis focuses our efforts on language, the question naturally arises as to its reliability as an accurate representation of the social objects with which we are concerned. Why should we trust our conceptual capacities to reveal the nature of legal institutions? By doing so are we not in danger of giving our conceptual scheme too big a role in determining what this aspect of the world is like?

Brian Leiter certainly thinks so. One of his most important criticisms of legal philosophy *qua* conceptual investigation is that we simply cannot trust our concepts to be faithful to their objects. He draws our attention to the following famous case: ‘... Kant took it to be *a priori* that space necessarily had the structure described by Euclidean geometry; subsequent physics showed his intuitions to be mistaken.’² There are two points here. The first is that the Kantian theory is wrong. The second is that we are only able to realize this fact by shifting our attention away from conceptual clarification and turning instead to the direct investigation of the phenomenon in question viz. space.

² Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 180

Now if Kant's conceptual approach led him astray, we might also consider whether conceptual investigation as a method for legal theory is likely to fare any better. Is it not also true here that our conceptual apparatus might fail to accurately represent? This is Leiter's worry.

Other theorists have also been impressed by the possibility. Frank Jackson, as part of his highly influential defense of the method of conceptual analysis, considers directly the problem of the relation between concept and object.³ There exists, according to Jackson, a going possibility that by engaging in conceptual reflection we might give the former too great a role in determining what the latter is like. His solution is to distinguish two roles for the method, immodest and modest, and to prefer the latter. Conceptual analysis is immodest when used as the primary means of making claims about the nature of reality, but it is modest when used *only* to draw conclusions about the nature of, and relations between, our concepts. In the following passage Jackson addresses his motivation:

I think that we should be suspicious of conceptual analysis in its immodest role – it gives intuitions about possibilities too big a place in determining what the world is like. However, the role for conceptual analysis that I am defending... is the modest role... Conceptual analysis is not being given a role in determining the fundamental nature of our world...⁴

³ Frank Jackson, *From Metaphysics to Ethics : A Defence of Conceptual Analysis* (Clarendon Press 1998) 42-44

⁴ Ibid 43-44

We can follow Jackson in using the example of four-dimensionalism, a philosophical theory of time, to illustrate the distinction. Four-dimensionalist theories suggest that an object's relation to the concept of time be understood on a similar basis to its situation in space. Just as we might say of a pencil that it has parts extending through space, so four-dimensionalists want to say that it has parts extending through time. There is the part now, the part at the point of creation, and so on, much like there is the part near the eraser, and the part near the tip, etc. The claim is that each element of the object in time is equally 'real' or 'existent' and is said to compose the whole (in order to engage in this debate we are supposed to forget the linguistic rule which proscribes that all things which exist do so in the present). Now, consider the following rejoinder to the theory proposed by Peter Geach:

[On the four dimensionalist view] the variation of a poker's temperature with time would simply mean that there were different temperatures at different positions along the pokers time axis. But this... would not more be a change in temperature than a variation of temperature along the pokers length would be.⁵

Geach's point is that variation in kinetic energy along the length of a poker would not constitute a *change* in temperature – here he is reminding us of the contours of the ordinary concept of change – and so, he suggests, neither would variation along a time axis. Why is this a problem for the theory? The point is that we naturally think of objects as changing over time, and four-dimensionalism will not tolerate this description. What does Jackson think we

⁵ Ibid 42

should make of the claim? On a modest reading it is supposed merely to bring out the incompatibility of our normal concept of change with the four dimensionalist theory of time and then to leave things as they stand: '[the] claim is that *if* four-dimensionalism is true, it is right to say that nothing changes in the folk sense of change.'⁶ The claim is a modest one because it does not use the argument to settle the debate, only to elicit conceptual relations.

How would the claim look if interpreted immodestly? The basic argument would be:

Premise one: Objects change over time

Premise two: Four-dimensionalism as a theory will not allow that objects change over time

Conclusion: Four-dimensionalism is false

On this view, a theory which does not permit us to ascribe change over time in the normal sense is not an adequate philosophical theory of time. Here the argument, based on the relation between the concept of time and the concept of change, is being used in an attempt to settle the debate: 'Immodest conceptual analysis... [draws] the conclusion that the four-dimensionalist picture of what the world is like is mistaken.'⁷ On the modest view,

⁶ Ibid 42 emphasis added

⁷ Ibid 43

conclusions are only drawn about the structure of our concepts. On the immodest view, this understanding is used to reject a philosophical theory.

Now Jackson's view is a popular one and it has been warmly received in the philosophy of law. Ian Farrell, for example, suggests that Hart's philosophical outlook is one that is best understood to have involved the embrace of modest as opposed to immodest forms of conceptual analysis.⁸ His general jurisprudence aims to elaborate only '...the *folk* concept of law' and apparently not to say anything substantive about the nature of the institution.⁹ On this picture, conclusions drawn by virtue of conceptual reflection in the domain of general jurisprudence would have to be couched in the conditional: 'if the concept is correct to the institution then...'. But the truth of the matter is that Hart's theory of law cannot be understood as stopping here; he is clear that reflection on fundamental legal concepts buys us insight into the nature of that to which they refer. Hart said, quoting Austin, that he aimed to use 'a sharpened awareness of words to sharpen our perception of... the phenomena.'¹⁰ Indeed, as Raz has recently remarked,

⁸ Farrell, 'H.L.A. Hart and the Methodology of Jurisprudence'. The article is a difficult one. At points Farrell appears to suggest that conceptual analysis *can* afford us substantive insight into the nature of the referents of what he calls 'hermeneutic concepts', law being one such concept. But at the same time he explicitly cautions that he aims only to defend modest aspirations for the method.

⁹ Ibid 1006

¹⁰ Hart, *The Concept of Law* 14 citing Austin, 'A Plea For Excuses' 8

'those who offer explanations of the concept of law usually do mean, as Hart did, to explain the nature of a familiar social institution.'¹¹ The point is not just to clarify the structure of our concepts, but to gain insight into law by doing so. Indeed, one could hardly be satisfied with a legal theory that sought to shed light only on the concept of law and not *also* to illuminate the nature of the institution.¹²

So we ought to say something about the relation between concept and object if – *pace* Jackson – we are to properly vindicate the importance of conceptual forms of understanding for the theory of law; to do this we need to be aware of the motivating assumptions which give rise to concerns of the type that Jackson, Leiter and others have raised. It is a central presupposition

¹¹ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 20

¹² We might also say the same of the philosophical treatment of the concept of time which we visited a few paragraphs earlier. Geach's argument concerning the relation between time and change is meant to show that four-dimensionalism is false, not merely that it is incompatible with our ordinary concepts: to be incompatible with the ordinary landscape *is* to be, in the relevant sense, a bad theoretical explanation. A different perspective on the matter is found in the work of Wilfrid Sellars. Sellars' position was that in cases of 'conflict' the 'manifest image', that is our ordinary conceptual scheme, ought to give way to the 'scientific image', of which four-dimensionalism, an apparent fallout of contemporary physics, could conceivably count as a part. The radically different purposes of our ordinary practices of language use, principally communication, and of science, aiming, as it does, at providing an accurate picture of the most basic physical aspects of reality, ought to give us pause on the matter of whether such 'conflicts' are more apparent than real. See Wilfrid Sellars, *Empiricism and the Philosophy of Mind* (Harvard University Press 1997) ch 1

of the dialectic in which such issues are considered to have force that the institutional reality with which we are concerned is, in a certain sense, *prior* to the conceptual apparatus that we use to comprehend it, that law is something that can exist quite apart from our concepts. On this view, we are led to think an institutional concept as itself equivalent to a theory; that is, as an attempt to explain or understand an independently existing object.¹³ And with this picture in mind, it becomes natural to question, first, *why* we are concerned to investigate our concepts as opposed to the reality to which they refer and, second, to query their accuracy as representations.

But if, instead, we are to conceive of our concepts as having priority, that is if we are to think of the use of legal concepts as being involved fundamentally in the composition of the institutional objects with which we are concerned, then the problem does arise. If such concepts furnish the basic structure under which law operates, then by coming to better understand their use one gains insight into the nature of legal institutions. This claim is in need of clarification and defense but the pay-off should be obvious: the aim being to better understand how the house stands up, one needs a clear grasp of its foundations. A response to those who consider conceptual investigation

¹³ It is worth noting, in this regard, that Jackson suggests that we conceive of concepts that are in public circulation as *folk theories*. See Jackson, *From Metaphysics to Ethics : A Defence of Conceptual Analysis* 31-32. The assimilation of concept with theory is also prevalent within legal philosophy. See John Finnis, 'Law and What I Should Truly Decide' (2003) 48 *American Journal of Jurisprudence* 107 'For my part, I think theories of law are concepts of law...' 125

to be the poor man's replacement for direct concern with the institutional nature of law, then, will consist in a developed account of the relationship between legal concepts and institutional reality, one in which their use is seen to play an essential role. That is the burden of this and the following chapter.

In the first section I stress the importance of institutions for an understanding of law as a social phenomenon. The second and third sections develop an account of the institutional nature of the legal system. Section two makes the case for the courts as fundamental to its existence and section three suggests that we understand such institutions as constituted by a certain kind of rule following practice. The claim is that the reality of the courts depends upon the practices of their agents in recognizing and applying the law. In the fourth section I consider John Searle's account of the constitution of social institutions and note how it differs from the one developed in this chapter. The final section introduces the conceptual basis of the account. Here I make the connection between rule following and conceptual competence. The attempt will be to show how the latter ought to be viewed as a natural precondition for the former. This final claim is defended further in the following chapter.

It should be noted that whilst discussion focuses upon the basic institutional structure of the legal system, the argument about the relation between concept and object is intended to have more general application. Whilst I will make only passing reference to the concepts of legal right,

authority and legal validity, and no mention of a number of further concepts with which jurisprudence is rightly concerned, this does not indicate that the argument is so limited. The point, which is touched upon in the first section with regard to the concept of a legal right, is that these further legal types owe their existence to the actions of law-applying institutions: they are a product of the practice of the courts, or depend for their existence upon recognition within it. As a result, the relevant concepts will bear close connection to the practices being described.

The Importance of the Institutional Context

On November 13th 1891, the Carbolic Smoke Ball Company published an advertisement in the Pall Mall Gazette. The company was offering for sale a new product, the 'Smoke Ball', which it claimed offered a cure for influenza. The ball contained carbolic acid that was to be inhaled through a small tube, the design being to use the vaporized acid to flush out viral infections. Accompanying the description of the product in the advertisement was the following:

£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions supplied with each ball.

£1,000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter.¹⁴

Mrs. Carlill purchased a Smoke Ball that she used dutifully for nearly two months. She caught the flu in January 1892 and launched proceedings against the Carbolic Smoke Ball Company the month after. The question before the court was whether the offer of the £100 reward was to be considered contractually binding upon the company. Two issues in particular were argued to stand in the way of Mrs. Carlill's claim. The first was that the offer was best understood as a 'mere puff', a claim not intended to be taken seriously. The second was that if the £100 was actionable in Carlill's case then the company was to have been understood as making an offer to the entire world, and that a contract must, as a matter of policy, be made with specific people. Neither argument convinced the court. On the first point, the deposit of £1,000 was taken as evidence of the seriousness of the company's intent. On the second issue, Lord Justice Bowen reasoned that whilst the offer was made to the world at large – anyone could purchase and use the smoke ball in the required manner – a contract was made only with those who actually did purchase and use the product in this way. The contract was not made with specific people, but it was made with a determinate class. Mrs. Carlill was awarded damages.

¹⁴ *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1 Court of Appeal

Now, the fact that Mrs. Carlill was entitled to damages depended upon a number of local and contingent factors. These included the Court of Appeal's institutional capacity to hear her particular dispute and, perhaps, on its jurisdiction to exercise a creative as opposed to purely declarative decision-making power in resolving the parties' grievances. But it should be obvious that statements of the type to which this particular assertion belongs, that is statements of legal right, bear a relation not just to particular facts of institutional history but also to a general framework. We might put the point like this: whilst the *truth* of the claim that Mrs. Carlill had a right to damages depended upon certain particular facts about the law of the UK at the time of the dispute, our ability to make such an assessment depends upon the existence of a broader institutional context, a context which is standardly presupposed by those making claims of this type.

To see that this is so we might compare the claim that John owes James £10. Now the truth of this claim could depend upon a whole range of possible facts, such as the fact that James lent John £10, or that James did £10 worth of work for John – there needs to be some story about how the money came to be owed. But it is also the case that the validity of the claim depends upon the existence of a broader institutional context. Absent the existence of a currency, there is simply no sense to be made of the assertion that this particular sum is owed, and hence no chance of it being usefully assessed as either true or

false.¹⁵ The very same is true of a statement of legal right. The claim that Mrs. Carlill had a right as against the Carbolic Smoke Ball Company can properly be said to presuppose the existence of a functioning legal system, for it is only in the context of such an institution that we can make sense of the assertion that someone has such a right.¹⁶

Now, when it is claimed that a statement of legal right only makes sense within the context of institutions, it is not meant that the statement *literally* only has meaning in such a context and appears otherwise as nonsense or as an impenetrable foreign language. That is too strong a condition. The notion should be understood pragmatically, much as we understand the general relation between statements and their presuppositions.¹⁷ When I suggest that my friend is 'in check' even though

¹⁵ Of course, there is a sense in which if there were no institution of money the claim would be false but this would not be because John *did not* owe the money but because he *could not* owe money.

¹⁶ Here I follow Hart, *Essays in Jurisprudence and Philosophy* 28

¹⁷ See, on the nature of presuppositions, Robert Stalnaker, *Context and Content* (Oxford University Press 1974) ch 2. Stalnaker's view is that a presupposition of an assertion consists in the speaker's beliefs about the common ground shared between speaker and listener for the purposes of conversation. The account has difficulty in accommodating the fact that statements can be made whereby their presuppositions are intentionally informative, and consequently do not form part of the speaker's beliefs about that which they and their partner hold in common. I may say to you that my car is broken, for example, despite being well aware that you do not know that I own a car. It is better to view a presupposition not as an aspect of that which is believed to be commonly understood, but as an implication that arises from the making of a statement, one which forms part of the background of the assertion.

they are not playing a game of chess, the point is not that I make literally no sense but that it makes no pragmatic sense for me to say what I do: the assertion presupposes that my friend *is* playing. And so too a claim of legal right, absent the existence of legal institutions, is the kind of claim which it makes no sense to assert, this being so despite the fact that it is good English.¹⁸

What theoretical conclusions ought we to draw from the fact that the existence of a legal system forms the central presupposition of a claim at law? The most natural suggestion is that an understanding of the institutions which comprise such a system will form the crucial aspect of a theory that attempts to make sense of the particular claims of legal actors, and the practices to which they contribute. For if their assertions only make sense against a background of institutional action, then the general nature of their claims can be assumed to be clarified by virtue of an understanding of this context. In the same way, because claims about the position of parties to a chess match only make sense given the assumption that they are playing the

¹⁸ So Elizabeth Anscombe put the point too strongly when she said that our particular claims concerning institutional relations require 'institutions as background in order so much as to be the kind of statement[s] that [they are].' The existence of an institutional context goes not to what kind of statement is being made, but to the possibility of its assessment. We can put the point more technically by saying that presupposition failure does not change the nature of the linguistic act of which it constitutes a presupposition, but the ability to gauge the claim as right or wrong. See G. E. M. Anscombe, 'On Brute Facts' (1958) 18 *Analysis* 69 See, also on this point, Hart, *The Concept of Law* 103-105

game, not only is it right to say that the validity of our assessments concerning, for example, who is winning are to be judged relative to the context supplied by the rules of the game, but also that the general nature of the game is to be explained by an understanding of such constraints.

A number of legal philosophers have been dismissive of the institutional dimension of the theory of law. Ronald Dworkin claims that:

We must take care to distinguish two questions, both of which might be described as questions about the nature of law. The first is sociological: what makes a particular structure of governance a legal system...? The second is doctrinal: what makes a statement of what the law of some jurisdiction requires or permits true? ...The sociological question has neither much practical nor much philosophical interest. The doctrinal question, on the contrary, is a question of enormous practical and considerable philosophical significance.¹⁹

Dworkin's sociological question is concerned with the identification of functioning legal systems, and consequently with the general structure of legal institutions: 'We might ask... using [the] sociological concept, when law first appeared in primitive tribal societies, or whether commerce is possible without law.'²⁰ His doctrinal question, by way of contrast, is the question of why various aspects of political behavior, such as the enactment of legislation, for example, count towards a statement of the law in a particular jurisdiction. To be clear, this is not the question of *what* basic materials matter within that

¹⁹ Ronald Dworkin, 'Hart and the Concepts of Law' (2006) 120 Harvard Law Review Forum 95

²⁰ Dworkin, *Justice In Robes* 3

jurisdiction, whether this be constitutional documents or a customary practice.²¹ Dworkin is concerned to explain, instead, why these aspects matter – in what way they contribute to the social world as *legal*, and provide grounds for our statements of law – and he thinks that this matter can be settled apart from the question of the institutional structure of legal systems.

But this cannot be right. Consider again the monetary case. Here it is hard to imagine what progress might be made if a similar hierarchy of philosophical importance was insisted upon. Whilst we might accept that the question about the nature of monetary institutions is distinct from questions about, for example, why certain acts make a difference to what is owed or how much each person has, we should also insist that our answers to the latter questions will, in various important respects, be constrained by our answer to the former. If we are to explain why it is the case that monetary systems impose the *kind* of demands that they do and, as such, why certain behaviors alter the balance of funds, then our explanation is going to have to appeal to various general facts about the institution. The claim that John owes James £10 not only presupposes an institutional context, but the type of claim of which it forms an example owes its explanation to that context.

²¹ Dworkin says:

We all understand as part of [our] shared understanding that what the Rhode Island legislature has enacted and what Rhode Island judges have written in the past are relevant in deciding whether it is true that contracts signed by young children are invalid in Rhode Island law.

Ibid 2

The same is true in the case of law. To suggest that an explanatory account of the demands that law imposes upon its subjects should not concern itself with the question of what, in Dworkin's words, 'makes a particular structure of governance a legal system', makes little sense.²² If we are to tell a general story about why certain of our claims about law, such as the claim that Mrs. Carlill had a right to damages, are true then this story is going to be deeply invested in the institutional context, for it is only in this context that legal standards have force. Because statements of law presuppose particular kinds of institutional structures, structures which contribute to the truth-value of such statements at the most fundamental level, the question about the nature of legal systems becomes not a side issue for the understanding of law but a central one. Questions of law have no bearing outside the scope of the authority of legal institutions; the nature of the law's demands, and of our claims about these demands, depend decisively upon the kind of institutions that they are.

So we should reject Dworkin's attempt to cleave a substantive gap as between 'institutional' and 'doctrinal' questions. For sure they concern different issues, but their answers flow from a common source. The analogy is with light shone upon one object but from two different directions. A better position, then, is one which deals with Dworkin's doctrinal question, the

²² Dworkin, 'Hart and the Concepts of Law'

question of what makes it true that certain standards are considered to be *legally* binding or valid, and consequently why certain statements of law are true, as part of an integrated theory of legal institutions. And when the issue is thought of in this light it should be said that Hart did more than any other theorist to advance our understanding. It is with several of his most important insights that we can begin to build a picture of the relation between the institutional nature of law and basic legal concepts. Two points in particular are worth considering and we shall devote the next two sections to them.

Which Institutions And What Are They Like?

A successful jurisprudence cannot ignore the institutional context in which law flourishes. But not all institutions which we typically think of as *legal institutions* form an indispensable part of that context. We can conceive, for example, of a legal system without specialist advocates, one in which the law's subjects represent themselves. Such a system would be radically different from our own but it would not fail to count as legal purely for this reason.²³ The question arises, therefore, as to what elements are truly foundational.

²³ Raz goes as far as to suggest that police and other enforcement agencies form a natural part of our modern experience of law but not an essential part: 'there may be normative systems which share all of the characteristics of legal systems and do not have law-enforcing machinery.' His idea is that whilst all legal systems regulate the use of force, they may do so in a manner that leaves enforcement to private individuals. See Joseph Raz, *The Authority of Law : Essays on Law and Morality* (2nd edn, Oxford University Press 2009) 107

In making an argument concerning this matter, I will rely on conceptual distinctions between those institutional elements that are and those that are not necessary for law. Does this involve the use of conceptual insight, circularly, as a way of vindicating the importance of the conceptual method for our understanding of the institution?²⁴ Whatever circularity is involved it is not problematic. At the general level, if one takes conceptual investigation to be central to the philosophical understanding of law, then one cannot help but make a conceptual argument in favor of such an approach; an argument for a particular conception of philosophical understanding must itself be philosophical. And in relation to the specific matter with which we are now concerned: it is almost universally granted by legal philosophers that the concepts and the distinctions marked in our common language, distinctions between the legal and non-legal aspects of the social world, may be used to fix the general subject of jurisprudence and the institutions with which it is concerned. The question is whether such concepts have a further role in allowing for insight into the nature of these institutions.²⁵

The question, then, is this: what aspects of the institutional context in which law operates ought to be considered as essential? The history of

²⁴ This argument was suggested to me both by Liam Murphy and Hillary Nye

²⁵ See, on the former role, Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 28 and Dworkin, 'Hart and the Concepts of Law' 95

jurisprudence prior to Hart was – with several notable exceptions – one that stressed the centrality of law creating institutions.²⁶ John Austin, following Bentham and Hobbes, considered the concept of the sovereign fundamental to the explanation of a range of legal phenomena, most particularly the existence and unity of the legal system. For Austin, the realization of a sovereign body within a community marked both the existence and the extent of its law. On his conception, individual laws were to be analyzed as the commands, tacit or explicit, of the sovereign. They could have no other source and the legal system no other master.

Against this dogmatism, Hart pushed back. First, the existence of a sovereign body or office presupposes a framework within which it found recognition; law-creating authority is an institutionally recognized status, not an organic property of an individual or collection of individuals. The legal system need not die with its leader and the source of its continuity is not genetic.²⁷ Second, not every legal system contains within itself a body identifiable as a sovereign. Examples abound but the most obvious is the legal system of the United States of America.²⁸ The first point shows that the sovereign could not be the primary institutional actor within the system – it is not *sufficient* to constitute law – and the second that it is not even *necessary* for

²⁶ Kelsen being one obvious exception. See Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 30-58

²⁷ Hart, *The Concept of Law* 42-44, 51-66

²⁸ *Ibid* 66-71

the existence of a legal system.²⁹ Avoiding these problems requires a shift of perspective; the force of Hart's argument was not that the Austinian conception of law failed with respect to the details but that its entire institutional focus was wrong. Law-creating institutions themselves presuppose a more fundamental element. A sovereign body, if present within a particular system, is such, Hart suggested, because its edicts are treated in the appropriate manner, i.e. recognized as authoritative, by those institutions whose function it is to determine and apply the law: the courts.³⁰

Now this point – that law-creating power presupposes institutional recognition – is not merely true of sovereign bodies, for the question arises as to why any law-creating institution has the status that it does within the system, why its utterances or other communicative acts have authority. And the answer must always be because these acts are recognized as authoritative and applied in the appropriate manner by the body whose institutional task it

²⁹ Hart did not go as far as to claim that a legal system need have no law-creating institutions, although his account could be taken to entail as much. For an explicit statement of this view see Raz, *The Authority of Law : Essays on Law and Morality* 105-111

³⁰ Legal sovereignty may be distinguished from, for example, the more general concept of political sovereignty on this basis. A body is legally sovereign when its directives are applied in the resolution of disputes, these directives being taken as the final word on the matter at hand. The political sovereign, by way of contrast, is marked by a much more general conception of recognition: here respect is paid not by institutions but by the general population, hence we are much more likely to characterize the political sovereign in terms of *power* and the legal sovereign in terms of *authority*.

is to do so.³¹ To say that a body has law-creating power is to say, in other words, that its edicts are treated as valid within the system, and the institutions that have dominion over issues of validity are the courts. The point remains, whether the law-creating institution in question is constituted by delegated or original power, and whether or not its jurisdiction is subject to substantive limitations. It is an important insight – shared nearly universally by modern theorists of law – that the activities of the courts, especially in exercise of their capacity to identify and apply the law, form the fundamental datum for a developed jurisprudence.³²

There is, then, a symmetry between Hart's analysis of the deficiencies of the Austinian account and his own theory of law. We have noticed that law-creating status derives from the more basic notion of recognition, and in Hart's account we have an explanation of this concept. The first move is to understand that courts are, in their primary aspect, law-applying institutions, a law-applying institution being a body that *ought* to apply a particular set of social standards in the resolution of disputes. To assume a duty to do so, Hart

³¹ It is, in this sense, a feature of the concept of authority that authority must be recognized. The point holds with regard to both *de facto* authorities, as considered here, and *de jure* or justified authorities. See, on the latter issue, Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 158-159

³² It is worth noting that despite his official distaste for the institutional dimension of legal theory that Dworkin agrees with this assessment. His jurisprudence is a theory of the legitimacy of *judicial decisions*. See Dworkin, *Justice In Robes* 168-178

said, was to accept a 'rule of recognition', the set of standards that the body ought to apply - those that are legally valid within the system - being the set recognized, directly or derivatively, by the rule. This concept is the second element of Hart's jurisprudence that will prove important, and we must explore it further.

Hart's Doctrine of Recognition

When we ask about the legal situation of a particular individual, or of the validity of a statute in the face of the constitution, Hart said, we must train our eyes on the complex practices of the courts, and, specifically, their capacities of recognition and interpretation. Often, especially when one's investigation starts at a relatively low level of generality, an answer is given to our question which itself calls for legal explanation: the individual is liable because they contravened this bylaw, and the bylaw affects their legal situation because it is validly made in accordance with a statute.³³ We find chains of authority tracing back to original or inherent powers, limits thereon and other basic types of law, behind which there rests no further legal authority. And by isolating these final aspects of the legal system as identified by the courts, we use their rule of recognition. The point is that the rule of recognition, a rule which defines the essential aspects of the courts' duties,

³³ Hart, *The Concept of Law* 107

identifies the constitution which in turn validates all other law, including the procedures *for* – and, by implication, the possible sources *of* – law creation.

There is something both intuitive and unsettling about the idea that ‘the foundation of a legal system’ consists in the existence of a particular kind of rule following practice, that of recognizing and applying a given set of standards in the resolution of disputes.³⁴ The idea confirms much of that which we take for granted: that there are criteria for understanding what forms of political action count towards the law in particular jurisdictions – often complex, perhaps rough and incomplete, but criteria nonetheless – and that they rest ultimately in the dominion of the courts.³⁵ It is, after all, the work of the judiciary to which we look to in order to comprehend the basic structure of the legal system: to understand the constitution we study, in the first instance, the judgments of the courts. But in its simplicity the claim confounds. How can it be that the existence of the legal system in all of its complexity owes itself to the practice of a set of institutions, a set of institutions defined by their adherence to a particular kind of social rule?

³⁴ Ibid 100. To be clear, what is conceptually determined on Hart’s account is that there be a rule of recognition at the core of every legal system. The content of the relevant rule will, of course, vary from system to system.

³⁵ Wittgenstein reminds us that indeterminacy is not a bar on existence of a meaningful social standard: ‘But is it senseless to say “Stay roughly here”? Imagine that I were standing with someone in a city square and said that. As I say it, I do not bother drawing any boundary, but just make a pointing gesture – as if I were indicating a particular spot.’ Wittgenstein, *Philosophical Investigations* 38

The position, properly understood, is less remarkable than it might seem. A community's law is, for example, not reducible to its rule of recognition. The claim is merely that the rule identifies the foundation, i.e. that it identifies those sources of law which themselves have no legal warrant such as, for example, those associated with bodies with original or inherent law-making powers. The criteria that it lays down may allow great scope for complexity in the life of the law, a life that often reaches far beyond the basis it secures. One need only think of the long connection between, for example, the constitution and local ordinances in order to see the point. Nor do we see the rule of recognition for any given system laid out as we might the rules of a game in an instruction manual. We notice its presence typically, Hart said, not by finding an explicit, canonical statement thereof as a précis to judgment, but by virtue of the rule's use as part of the everyday grammar of legal practice.³⁶ We notice in the UK, for example, the way in which common law is typically subordinated to statute and the way in which both are recognized and applied as sources of law.

³⁶ 'In the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule; though occasionally, courts in England may announce in general terms the relative place of one criterion of law in relation to another, as when they assert the supremacy of Acts of Parliament over other sources or suggested sources of law. For the most part, the rule of recognition is not stated, but its existence is shown in the what in which particular rules are identified...' Hart, *The Concept of Law* 101

And on the matter of understanding what a court is – for here we might also worry that there has been a false reduction – the point is not that the doctrine of recognition is exhaustive of their practices. It is meant to show the crucial trait, not to constrain the role. The notion of the court, as in its primary aspect characterized as a law-applying institution, should not, for example, obscure the fact that judges are also law-making agents. The relationship is between basic – *law-applying* – and derivative – *law-making* – capacities. To see this, consider again Mrs. Carlill’s case. The truth of the claim that she was legally entitled to damages was dependent, we noted earlier, upon the particular law-applying capacities of the Court of Appeal. More controversial elements of the judgment, such as those relating to the determinacy of the class of people to whom the offer in the advertisement was made, and those with whom contracts were eventually forged, may also have involved the exercise of law-making power by that institution. Now, the question arises as to the source of this law-making power on the part of the court and as to its legal authority to make new law. And in order to establish that *this court* did have authority, one would refer to the general practice of *the courts* as accepting such discretionary decisions as legitimate. We would refer to the primary capacity of the courts as law-applying institutions in order to vindicate the secondary law-making capacity of the particular court.

It is true also that the concept gives us only a partial understanding of the internal structure of the courts in modern societies: the rule of recognition identifies the duties of law-applying institutions. It shows that they are courts,

but does not determine their physical composition and procedures. Here a further set of conventions comes into play. These rules, which Hart labeled the 'rules of adjudication',³⁷ determine the composition and methods of adjudicative institutions and form an important data point when considering the legitimacy of particular legal systems. The existence of a rule of recognition implies the need for such further rules, but it does not determine their shape.

Certain critics have noted what they perceive to be a tension in this further specification. If we are to accept the rule of recognition as determinative of the constitutional structure of a particular legal system, and we are also to concede that 'rules of adjudication' form a necessary part, then it must follow that we are stuck in a circle in the specification of rules: the rule of recognition presupposes the existence of rules of adjudication – we need to be able to determine who is to fulfill the duty – and yet the rules of adjudication are themselves 'valid' as part of the constitutional system. Neil MacCormick sets out the issue as he saw it:

...the rule of recognition presupposes the existence of 'judges', whose official duties are regulated by the rule of recognition. And there are, *per* Hart, 'judges' only if there are people empowered by a rule (or rules) of adjudication to make

³⁷ Ibid 97

authoritative determinations of legal disputes. Are we to say that the rule of adjudication is a 'valid' rule or not?³⁸

But the question does not arise because there is not really a problem here.

Consider, by way of analogy, the case of the sporting official, such as an umpire in tennis or a referee in football. Now their general duty is to ensure that the rules of the game are complied with. And their position, including the procedures to which they must adhere in fulfilling their duties, are specified according to further rules. But these further conditions are not recognized in accordance with the rules that determine their duties. That is, the rules determining who is to be an official are not valid according to the scheme that determines what an official is to adjudicate on: they are not part of the rules of the game. The rules specifying office and the rules determining the duties of office instead presuppose each other. Neither is valid according to the other. There is no problem of circularity, it is just that both are necessary and together compose the whole.³⁹

³⁸ Neil MacCormick, *H.L.A. Hart* (Edward Arnold 1981) 109. He later came to see the matter differently. See Neil MacCormick, *H.L.A. Hart* (2nd edn, Stanford University Press 2008) 151

³⁹ For a similar treatment of the relation between the rule of recognition and a legal system's rules of change, i.e. rules regulating the introduction of new laws, see Gardner, *Law as a Leap of Faith : Essays on Law in General* 103-106. A different treatment of the problem is provided by Scott Shapiro. Shapiro argues that all legal systems need to resolve second order uncertainty, e.g. uncertainty about who is to fulfill judicial office, in order to settle first order uncertainty about the rights and obligations that compose the law, and that consequently the norms which regulate judicial office must themselves be considered norms of the legal system. This, however, is like saying that because we need to decide on who is to referee a sports match if we are going

But perhaps the most startling element of the account is its emphasis on the concept of a rule-following practice and how this is meant to ground the existence of law. The question is: how can the fact of rule following be sufficient to bring into existence a social institution, and not just any institution, the legal system being a fundamental aspect of modern political society? The claim is that the issue must be less trivial; rule-following practices cannot bridge the gap between our concepts and intentions, and the existence of institutions.

One way of unpacking the suggestion encourages this line of thinking. If you and I together were to adopt a rule specifying a particular code as our 'law' and were to attempt to apply it to the disputes that arose between those in our immediate vicinity, we would not thereby *have* a legal system. We would most likely be ignored and the ordinary life of the community would continue. But have we not in this case 'accepted' a rule of recognition and were we not promised that this fact formed the foundation of the legal system? The problem with the argument is that it fastens on too minimal a

to be able to settle disputes about the application of its rules in an efficacious manner, then the rules determining this office must themselves be considered as rules of the game. But this is wrong. Such standards are required if we are to have a properly refereed game, but they are not part of its rules. In the same way, what is necessary for a legal system to exist and what is internal to it are different things. See Scott Shapiro, 'What Is the Rule of Recognition (and does it exist)?' in Matthew D. Adler and Kenneth Einar Himma (eds), *The Rule of Recognition and the US Constitution* (Oxford University Press 2009) 250-253

description. For it is not the acceptance of a rule of this type which creates the legal system, but the actual regulation of disputes in accordance with the standards identified by it.⁴⁰ The relevant concept is that of a rule-following practice – i.e. the practice of resolving disputes in accordance with the standards identified by a community's rule of recognition – not simply acceptance. There must be a community not only notionally subject to the relevant institution's jurisdiction but, at least to a certain extent, under its control: this is what theorists, following Kelsen, have called the efficacy condition on the existence of the legal system.⁴¹

Once we have a proper sense of the relation between rule and institution that is being suggested, the apparent gap seems much easier to bridge. Indeed, we may begin to see how Hart's account situates law not on an impossible basis but as an integrated part of our general social ontology for

⁴⁰ For Hart's discussion of acceptance and related concepts see Hart, *The Concept of Law* 88-89

⁴¹ See Kelsen, *General Theory of Law and State* 42. See also Hart, *The Concept of Law* 103-104 and Joseph Raz, *The Concept of a Legal System : An Introduction to the Theory of Legal System* (2nd edn, Clarendon Press 1980) ch 9. Does the fact that we can intelligibly talk of science fiction examples of legal systems, or of legal regimes long vanished, such as that which governed Rome during the republican period, not stand in opposition to the view that efficacy is a condition on the existence of a legal system? No more than our ability to talk intelligibly of imaginary people, such as Sherlock Holmes, or those long dead, such as Abraham Lincoln, stands in the way of the view that the concept of personhood is the concept of an existing person. Indeed, it is only in light of this fact, i.e. the fact that the concept settles on the actual, that we are able to distinguish the real from the imagined, and the extant from the no longer existent, in each case.

which the idea of rule following is absolutely central.⁴² Consider the example of chess. We say of two people that they are playing the game when they engage with its rules in a distinctive way. That is, if they act on them competitively for the purposes of engagement. It is acting in accordance with these conditions that make it the case that the relevant individuals can be properly described as playing the game. Minor violations are, of course, consistent with the general practice; in such a case the relevant participant might be thought of as cheating or perhaps not taking the game seriously. But large-scale violations – both of the conditions in the rule-book, and with regard to the requirement of competitiveness – mean that participants are no longer to be thought of as playing the game. Both compliance with the particular rules of chess, and the more general standards that condition the practice of competitive game playing, form essential aspects of the relevant ontology.

Now there is a dispute in the literature about whether the more general requirements of game playing, such as the requirement of competitiveness, are to be thought of on the model of rules, and Joseph Raz famously dissents. What motivates Raz's disinclination to consider the competitive requirement of game playing, for example, as a rule? 'If [agents] do not try to win... they

⁴² An important influence on Hart was Peter Winch, and his work examines the concept of a rule with reference to meaningful social action as a general class. See Peter Winch, *The Idea of a Social Science and its Relation to Philosophy* (2nd edn, Routledge 1990) ch 2

do not thereby break any rule. They simply fail to play the game.’⁴³ This, however, begs the question. Everything depends upon what we mean by a rule and Raz’s condition doesn’t make the difference: he says that failure to put oneself forward as attempting to win means not playing. This is true but it is not implausible to think, however, that the same condition holds with regard to the rules of the game written in the manual, and Raz *does* want to say that these are rules. If you don’t try to abide by a sufficient number of them then you don’t just play chess badly, you fail to play chess. Here, then, rule following, both at the general and particular level, may be said to be constitutive of the reality.

Hart’s insight was that legal institutions function also on this general model.⁴⁴ As with the case of game playing, we must say that intermittent derivations from the requirements of legal practice do not alter its identity. Occasional violation of the duty imposed by the rule of recognition on the part of law-applying institutions does not cause revolution – indeed the fact that the practice is considered as a violation reminds us that the old order is maintained – and the existence of an anarchist in the midst of the judiciary would not signal the end of the legal system. But widespread and willful disrespect of the old order in favor of a new constitution does constitute a revolution and failure on the part of the judiciary to pay proper respect to

⁴³ Raz, *Practical Reason and Norms* 117

⁴⁴ For an interesting account of the analogies between law and chess see. Andrei Marmor, ‘How Law Is Like Chess’ (2006) 12 *Legal Theory* 347

institutional history as identified in accordance with the rule of recognition is sufficient to call into doubt the existence of the legal system. Just as we are properly considered to be playing a game when accepting certain conditions on our behavior, so the bringing into existence of a legal order is also most fundamentally a matter of rule following.

The matter does not stop at law and chess. John Searle has argued that social institutions quite generally depend for their existence upon rule-following practices.⁴⁵ On Searle's view, the story we have been telling about legal institutions as rule-governed entities generalizes in an important respect. We are to think of money, government, the state and many other social institutions along the same lines. The creation of such entities will involve different kinds of practices, constrained by different basic rules, but the general structure remains the same: in all cases rule following plays an essential role.

To Searle's treatment we should be broadly sympathetic. As currently specified, it reflects not only the spirit but also the substance of the theory that we have been exploring. What I am going to do in the next section is to

⁴⁵ See his John R. Searle, *The Construction of Social Reality* (Allen Lane 1995) and more recently John R. Searle, *Making the Social World : The Structure of Human Civilization* (Oxford University Press 2011). The conception owes much to Elizabeth Anscombe's important but obscure work on the distinction between brute and institutional facts. See Anscombe, 'On Brute Facts'

criticize the way in which Searle understands the nature of such rules, and show why the conception defended here avoids the problems of his account.

Searle's Theory of Rules

Searle's theory of institutions depends, we have noted, upon the central importance of rule following. And I have suggested a basic connection between this phenomenon and the nature of legal institutions, this being that the particular kind of rule-following practice encompassed by Hart's doctrine of recognition is essential to their existence. In making this point, then, I attributed a special importance to the role played by such rules. But Searle makes a more controversial claim about institutional rules. It is not just for him that such rules play a foundational role in relation to the existence of social institutions, but that they do so by virtue of having a particular logical form. Searle suggests that to understand what institutions are, we need to notice a distinction between *kinds of rules*:⁴⁶

What are... institutions? To answer this question I [will introduce a] distinction, the distinction between 'regulative' and 'constitutive' rules. Some rules regulate antecedently existing activities. For example, the rule 'drive on the right hand side of the road' regulates driving: but driving can exist prior to the existence of the rule. However, some rules do not merely regulate, they create the very possibility of certain activities. Thus the rules of chess do not regulate an antecedently existing

⁴⁶ Here Searle follows Rawls. I use Searle's account in what follows because it is the better developed of the two. See John Rawls, 'Two Concepts of Rules' 64 *The Philosophical Review* 3 18-29

activity... Rather, [they] create the very possibility of playing chess.⁴⁷

The latter type but not the former, Searle holds, matters for the purposes of the analysis of institutions.⁴⁸

What are the criteria for differentiation? The main argument is about what Searle calls 'new forms of behavior.'⁴⁹ His idea is that with regard to regulative rules we can specify the behavior subject to the rule independently thereof. That is, we can describe driving without mentioning the rule telling

⁴⁷ See John R. Searle, *Speech Acts : An Essay in the Philosophy of Language* (Cambridge University Press 1969) 33-36 and Searle, *The Construction of Social Reality* 27-28. In his most recent book Searle suggests that constitutive rules have a more limited role in the maintenance of institutional systems, but he continues to draw the distinction. See Searle, *Making the Social World : The Structure of Human Civilization* 9-10 and 19-24

⁴⁸ Rawls uses the distinction in order to mark the proper scope of utilitarian norms. His argument is that utilitarian analysis properly applies to our decisions about whether or not to have particular institutions and not whether to act on a particular rule under these institutions. The restriction allows Rawls to save the theory from the claim that it cannot explain the importance of, for example, keeping one's promises. The idea is that utilitarian assessment leaves the matter of whether to keep a promise too open to the mercy of consequences. The question, for Rawls, however is not do we have good utilitarian grounds to keep *this* promise but do we have good utilitarian grounds to maintain the institution of promising. If the answer to the latter question is yes, then utilitarianism of Rawls' particular kind will require us to keep our promises most of the time. See Rawls, 'Two Concepts of Rules'.

⁴⁹ There is a further test that Searle uses. Constitutive rules can be phrased in the following way: 'x counts as y in context c'. But he notes that this cannot be a formal criterion because 'any regulative rule could be twisted into this form.' See Searle, *Speech Acts : An Essay in the Philosophy of Language* 36

us which side is the right one to drive on. Things are different in cases where constitutive rules feature. Here there could be no such description if we leave out the rules:

Suppose... in my athletic circle football is a game played according to such and such rules. Now, the specification, 'They played football', cannot be given if there were no such rules. It is possible that twenty-two men might go through the same physical movements as are gone through by two teams at a football game, but if there were no rules of football, that is, no antecedently existing game of football, there is no sense in which their behavior could be described as playing football.⁵⁰

Thus, 'constitutive rules constitute an activity the existence of which is logically dependent upon the rules'.⁵¹

The distinction is misleading. All social rules have, in Searle's sense, both regulative and constitutive aspects. Consider the rule requiring one to drive on the right. Now the rule is clearly regulatory. It tells you how to drive. But it also has a constitutive aspect: the rule makes possible the activity of driving on the *correct* side of the road. Absent the rule this is not even a possibility for, *ipso facto*, the standard by virtue of which we are to make the appraisal does not exist. And the same is true of the rules of football or chess. These regulate how one is supposed to kick the ball or move the pieces

⁵⁰ Ibid 35-36

⁵¹ Ibid 34. There is something awkward about the suggestion that rules constitute activities. It is better to say that the rules mark out the nature of particular activities and that the practice of following such rules means we are engaged in them.

around the board and in doing so they also constitute the possibility of playing the relevant game. The general point being made is that we can view Searle's regulative cases as constitutive and his constitutive cases as regulative.⁵² There is no distinction here between *kinds of rules*, only aspects of rule following behavior.

To his credit, Searle foresaw the objection, but his response does not improve the position:

There is a trivial sense in which the creation of any rule creates the possibility of new forms of behavior, namely, behavior done as in accordance with the rule. That is not the sense in which my remark is intended. What I mean can perhaps be best put in the formal mode. Where the rule is purely regulative, behavior which is in accordance with the rule could be given the same description or specification (the same answer to the question 'What did he do?') whether or not the rule existed, provided the description or specification makes no explicit reference to the rule. But where the rule (or system of rules) is constitutive, behavior which is in accordance with the rule can receive specifications or descriptions which it could not receive if the rule or rules did not exist.⁵³

⁵² The rule of recognition can also be viewed from both perspectives. It is a rule that both regulates the behavior of the courts and at the same time constitutes them as law applying institutions.

⁵³ See Searle, *Speech Acts : An Essay in the Philosophy of Language* 35. Similar objections to Searle's point can be found in G. J. Warnock, *The Object of Morality* (Methuen 1971) 37-38 and Raz, *Practical Reason and Norms* 109. Despite these criticisms Searle's theory has found support in Andrei Marmor's recent book on social conventions. The defense is a puzzling one. Marmor notes that Searle's attempts to defend his theory are subject to criticism along lines similar to those suggested here but goes on to declare without further argument, and 'in spite of these difficulties', that 'Searle's insight is basically correct and captures something of great importance.'

This doesn't take us any further. We can describe the activities of both people pushing pieces around a board who have no idea of the rules of chess, and those engaged in the game, without, in the latter case, mentioning the rules, in precisely the same way i.e. as involving people performing certain physical actions in relation to the pieces. This is what is allowed with regulative rules when the rules of chess are meant to be constitutive. We can also say of someone that they are driving - a description that avoids the rule - or driving legally - a description that includes it. And inclusion of the rule allows a new description. The point is that Searle has only restated the position including the mistake and it is still subject to the same criticism. All of the examples have a dual aspect.

There are other passages in his work, often touted by those who are attracted to Searle's distinction, which suggest that our argument misses the point. It is of course true that all rules license new descriptions. But that, it is said, is not what the distinction is about. Rather, the idea is that constitutive rules create new possibilities, whereas regulative rules impose order upon activities that would occur independently:

The rules of chess do not regulate an antecedently existing activity. It is not the case that there were a lot of people pushing bits of wood around on boards, and in order to prevent them

Andrei Marmor, *Social Conventions : From Language to Law* (Princeton University Press 2009) 31-36

from bumping into each other all the time and creating traffic jams, we had to regulate the activity.⁵⁴

But this merely reduces the distinction, which was meant to be a distinction between types of rules, to one concerning the practical worth of certain 'unregulated' activities. We may have good reason to drive even if no rule determines the side of the road that we should be on, but there is very little reason to push 'bits of wood' around a board absent the structure imposed by the game of chess. This, however, is no longer a point about kinds of rules.

We should reject Searle's attempt to distinguish between regulative and constitutive rules. An issue remains, however. I have argued for the central importance of the rule of recognition in the creation and maintenance of a legal system. Without it, it was suggested, there can be no law. Surely such a rule deserves to be called constitutive, especially when contrasted with various non-essential aspects of legal practice such as rules specifying, for example, prison terms, or when damages in tort law are too remote to be claimed? The point is well taken but we can accommodate it in another way.

Searle was right to note the special role played by certain rules in the creation and maintenance of social institutions. What he wrongly did was to identify this role with a logical property of the rules under consideration. The matter depends, instead, upon the function that the relevant rules have in

⁵⁴ Searle, *The Construction of Social Reality* 27-28

relation to the identity of the institution. It is, for example, a constitutive rule of chess that once the king is taken, the game is over.⁵⁵ It is not a constitutive rule of the game that the piece that represents the king is the tallest on the board. This latter rule is a convention that we could alter whilst preserving identity (it is still chess even if the pawns are the largest pieces). In the same way, it is a constitutive rule of a legal order that there be a duty imposing rule, accepted by the courts, identifying the valid sources of law, whereas it is not necessary that there be legal rules outlawing, for example, various taboo social practices. In marking the distinction, we do not notice rules with different logical properties, but rules with different statuses with regard to the identity and existence of the institution.

Rule Following and Conceptual Competence

I have suggested that law-applying institutions or courts are formed by a particular kind of rule-following practice, but we do not yet have an account of how legal concepts feature in the account. Here I make the initial connection. The aim, to be clear, is not to provide anything close to a theory of concepts, or a general account of their nature, but only to offer an intuitive understanding of the relation between institutional concepts and the social practices to which they refer that will, in subsequent chapters, be tested in

⁵⁵ Which rules are constitutive of a particular game may well be controversial, and it may be that minor changes to these rules are compatible with continued use of the same label.

argument. It is worth noting, however, that much has been written in the past half a century on the theory of concepts spurred, in particular, by the supposed 'conceptual turn' in mid-twentieth-century analytic philosophy.⁵⁶ If philosophical understanding was to be equated with analysis then questions about the nature of concepts – and in particular questions about their structural basis – appear to acquire a new sense of urgency. Aspects of this literature, particularly those inspired by psychological findings concerning knowledge acquisition, have proved unhelpful. The so-called 'prototype' theory of concepts, for example, which involves the suggestion that a concept's identity is determined not by the criteria for its use but by images of prototypical examples in the mind of language users, repeats many of the famous errors of the picture theory of meaning espoused by the young Wittgenstein – a theory on which the meaning of a term depended upon it mirroring a discrete aspect of the world – and rejected definitively in his later work (what picture or prototype, we might ask, is to be associated with the concept of an infinite series, or of an imperative?). It is easier to avoid error if one focuses not on the abstract question – what is a concept? – but on the more concrete question of what it is to possess a concept, and it is in this light

⁵⁶ Some of the more important contributions are collected in Eric Margolis and Stephen Laurence, *Concepts : Core Readings* (The MIT Press 1999). For an account of the 'conceptual turn' see Williamson, *The Philosophy of Philosophy* ch 1

that I will approach the question about the relationship between social practices and institutional concepts.⁵⁷

The first point to note, then, is that having a concept is naturally equated with having a certain kind of capacity.⁵⁸ One has the concept of addition, for example, if one is able, in normal circumstances, to perform arithmetical calculations involving the relevant operation and to judge the acts of others according to the same criteria. Possession of the concept of a contract, to take an example closer to home, involves the ability to identify situations in which such legally enforceable agreements are formed, and to use the concept in language in a way that accords with this understanding. We accredit people with concepts, in other words, on the basis that they are able to use them appropriately, i.e. in accordance with the rules for their use. Such an ability may be manifest in various ways. The lawyer may, for example, use the concept of a contract in recognizing such a relationship, or when drawing up a deed and thereby creating a promissory bond. And the math teacher may use the concept of addition, for example, to perform an operation for their class or to appraise the arithmetic of students. But their possession of these concepts remains one that we equate with a capacity – to understand, to act, etc.

⁵⁷ Joseph Raz proceeds similarly. See Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 20

⁵⁸ Such a capacity having, I argued in the previous chapter, a linguistic basis.

Next, the question of engagement in a social practice. What is it to be properly attributed with such a role? Going through the motions, quite clearly, is not sufficient. Two people could, to go back to our earlier example, spend an hour pushing pieces around a chessboard in a way which accords with the legitimate moves of the game but at the same time it is perfectly possible that they may not be playing chess. They may, for example, be moving the pieces around at whim without any intention of engaging with the rules of the game, or even, perhaps, without knowing of the existence of such rules. And equally it might be that what looks like the practice of law is really something of an institutional mirage. We see this sort of a situation, to take an example with a different emphasis, when we uncover kangaroo courts: people acting under the veneer of law but without actually abiding by the rules that they hold themselves out to be honoring. All the same, the practices *look* right. And for this reason we should distance ourselves from behaviorist accounts of engagement in social practices. Whatever their attraction in putting space between us and the picture of the ghost in the machine, and the implicated notion that the minds of others cannot be comprehended, they fail to mark this important distinction.⁵⁹

⁵⁹ Gilbert Ryle, *The Concept of Mind* (60th anniversary edn, Routledge 2009) 1-25. The main attraction of behaviourism comes from the fact that we discern the conscious activities of others on the basis of external clues. It is wrong, however, to conclude that those external clues are the activities. The claim confuses an epistemological question with a constitutive one.

In order to gain a better understanding, we must ask ourselves what makes the difference between these cases and the situation in which we can legitimately ascribe engagement in the relevant practice. Here the natural answer is that the relevant agents count as being engaged in their respective practices when they act in a way that directly engages their rule following capacity. What was wrong in the chess case was that the parties did not know the rules, and by implication could not have been using them as a way of guiding their behavior. What was wrong in the case of the kangaroo court was not that the relevant agents did not know (in being part of a kangaroo court one knows all too well what one is putting oneself out as doing), but that their activities were not in line with what they professed to have been doing. Rule following in genuine cases, then, consists in the exercise of a capacity. It is this feature of our practices which distinguishes the actual from the apparent, the sincere from the insincere.

These two points combine to deliver the following suggestion: that when we engage in social practices we do so by drawing upon our abilities with regard to the use of the concepts most closely associated with such practices, i.e. the concepts which express the forms of rule-governed behavior which feature in such situations. The actions of those who play chess or fulfill institutional roles are properly described as such, in other words, because they involve the use of the most basic concepts associated with these practices. Their activities depend, for their intelligibility, upon the fact that they follow certain rules, rules which mark out their practices as the kinds of

practices that they are, and their ability to do so involves a conceptual capacity. To engage in a game of chess, for example, one must act in accordance with its rules. To know how to move the knight, the pawns, etc. one has to have the concept of chess. And to engage with these particular rules in the right way, i.e. competitively, one also needs the general concept of a game. In the legal case, then, the suggestion is that those who act so as to maintain the court system, by identifying and applying the law in accordance with shared criteria, do so by drawing upon their capacities with regard to the concept of law, and other basic legal concepts. The courts, for example, recognize their joint actions in applying the law as *authoritative*, and as identifying the first order *rights* and *obligations* that compose the *legal system*. Their ability to participate in the relevant practice involves, then, the basic concepts that feature in our descriptions of their actions.

And what is true of judges, as the primary actors in a legal system, is, of course, also true of lawyers and others who competently engage with the institution. Their activities too, although they do not constitute the system, involve the use of the very same concepts. For the lawyer is tasked with divining the rights and duties recognized within their jurisdiction, as well as recognizing as authoritative the role of the courts in identifying these standards. Their actions, unlike those of the courts, do not directly shape the structure of the legal system. Nonetheless, those who understand the law must meet those whose activities are most fundamental to its existence and

this involves the sharing, as the fundamental part of their practices, of a language or conceptual scheme.

Now, it might seem as though this description over-intellectualizes that which comes naturally. Rule following is an aspect of our lives that is, in an important sense, effortless. And so it might be suggested that the phenomenology of the framework is out of sync with the phenomenology of real life, that there is less to our engagement in social practices than is being proposed. In response, we must note two things. First, there is no following of a rule that one does not know: one cannot be guided by a rule that one does not have an understanding of. Second, the form of competence required by this account is deeply practical: it is a matter of knowing how to engage in a form of activity. It is not as though in order to play chess one *decides* to engage one's conceptual competence. But the activity is nonetheless one that involves the exercise of this capacity, and therefore the use of the relevant concepts. So too in law. When a judge recognizes a statute as authoritative, or a company as having transgressed a rule of corporate responsibility, we can only make sense of their activities by assuming their competence with regard to the basic legal concepts of authority and liability, and at bedrock a competence with regard to what it is to act as part of a law-applying institution. There is no active decision here, but the activities of the agent involve the use of the relevant concepts nonetheless.

An emphasis on the practical nature of conceptual competence forms an important aspect of the account and we will explore it more fully when we turn, in chapter five, to consider the difficulty involved in coming to a theoretical understanding of legal concepts, but it is worth emphasizing for now that I am not trying to suggest that the courts are intimately attuned to the nuances of Hart's theory of recognition. A competent actor does not form the thought 'I must now act in accordance with the rule of recognition pertinent to this legal system' before deciding a dispute in accordance with the law. Dispute resolution is a natural activity much like speaking a language in accordance with its rules. And as with language users, the competence of law-applying institutions is shown in their practices. The doctrine that Hart made us familiar with is successful *if* it is a good explanation of this competence, and I have argued that it is.

Conclusion

We began this chapter with a concern that a conceptual approach to jurisprudence might be thought to face – when our interest is in the nature of legal institutions the question arises as to why we are concerned to understand concepts. This concern was motivated by a particular assumption about the relation between concept and object in the legal case: that our concepts exist, in a certain sense, apart from the reality of law. The aim of this chapter has been to suggest that we should think differently. My central claim has been that the existence of law depends most fundamentally upon the rule-

following practices of institutional agents. A rule-following practice, I have suggested in turn, is one grounded in conceptual competence. The idea is that the concepts with which general jurisprudence is concerned do not feature separately from the reality of law, but form the basis of the actions that give rise to it. This claim, which I have here introduced, is defended more fully in the following chapter where we will consider Joseph Raz's claim that law may exist in a society whose members do not possess the concept of law.

Chapter Three: Law And Boundaries

Introduction

In the previous chapter I argued for an understanding of the nature of legal institutions that attempts to show why conceptual investigation forms the central task of the theory of law. For law to exist in a society is for a complex social practice to arise whereby a body of agents acts so as to form a court system. Acting in accordance with this social role depends, it was suggested, upon a conceptual capacity: a practical capability to recognize those acts which are licensed by such a practice. It is, then, an understanding of the rules for the use of the concepts which feature in such activities that allows us a clear view of the nature of law. A consequence of this argument is that the possession of a range of basic legal concepts –including, most fundamentally, the concept of law – by institutional agents forms a necessary condition of the existence of law. This, of course, is not the only role for such concepts allowed on such a picture – the concept of law and other closely related concepts are used, we noted, by both lawyers and competent laypeople in their identification of the first order rights and obligations that comprise the content of the law in any given jurisdiction,¹ in the formation of legal

¹ As Dworkin notes, 'When a lawyer declares, for example, that it is the law that price fixing contracts are illegal, he is using the concept of law in stating the content of the law of a particular community.' Dworkin, *Justice In Robes* 226

argument and in the identification of legal institutions – but it forms, perhaps, the central element of their use.

Joseph Raz has, in a series of recent articles, suggested that he too conceives of the concept of law as both the central object of jurisprudential theorizing as well as basic aspect of contemporary political culture. In fact he goes as far as to baptize it ‘our concept of law’, in part as a way of signifying the latter fact.² But the way in which it features in Raz’s conception differs from the way it has been suggested to in this thesis: whilst he submits that the concept of law is in fact ‘used by each and all of us to mark a social institution with which we are all, in various ways, and to varying degrees, familiar’, ‘our concept of law’ Raz claims ‘does not make an awareness of it in a society a precondition of that society being governed by law’.³ How is it, one might ask, that use of the concept is so prevalent in modern society, but nonetheless its use not form an essential aspect of a community under law? The answer is to be found in the fact that Raz’s claim is one about *possibilities*. It is a contingent matter, he claims, that we have and use the concept of law, but things could have been otherwise and we may still have had legal institutions. Raz explains:

Our society not only is ruled by law. It also conceives of itself as being ruled by law. Some other societies are governed by law,

² Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 31-36. The articles are collected in *ibid* chs 1, 2, 3, 4

³ *Ibid* 40

but their own self-understanding makes no use of the concept of law....⁴

So whilst Raz too considers the concept of law to form an important aspect of our self-conception, his argument undercuts the way in which I have suggested that legal concepts relate to institutional practices and, consequently, the reason given for suggesting that the analysis of such concepts allows for an understanding of the nature of the institution. For Raz, legal concepts and institutions have a kind of independence that is not allowed under the conception here being defended.

It is important to note that Raz does not intend by his claim to imply a methodological divergence from a conceptual or hermeneutic approach to understanding law, for he too countenances jurisprudence most fundamentally as a conceptual investigation.⁵ Whilst not necessary for the existence of law, Raz suggests, the attempt to understand the concept of law forms the basis of the philosophical theory of the institution, and any such theory will begin with the concepts and conceptions prominent in the culture of its development. But despite this explicit methodological agreement, Raz's understanding of the relation between law and institutional concepts cannot stand alongside the argument made in the previous chapter about *why* an understanding of such concepts allows for insight into the nature of the

⁴ Ibid 97

⁵ Ibid 18-24 and 55

institution. For us the use of basic legal concepts features at its basis whereas, for Raz, this need not be so, at least with regard to the concept of law. Indeed, whilst Raz himself wishes to maintain the connection between the analysis of the concept of law and an understanding of the nature of the institutions to which it refers, it is hard to see how. Why is it, in other words, that the attempt to understand an aspect of our intentionality, a concept that plays no necessary role as part of the reality of law, can be said to allow us to make important claims about the way things are? It would be a disappointment to learn that the question about the nature of law was a question only about our perceptions.

So here I consider Raz's argument. Doing so will prove instructive, not simply as a way of fleshing out the central thesis of the previous chapter – the claim about the way in which the concept of law, amongst other basic legal concepts, relates to the reality of law – but as a means of highlighting a range of important features of legal concepts, and their association with other forms of social ordering. In the first section, I introduce Raz's argument for the centrality of the concept of law to modern society and make clear the way in which it is qualified so as to avoid the conclusion that its possession by social actors forms a necessary element of society under law. In section two I introduce a distinction between social concepts that may be applied to societies not familiar with their basic conditions and concepts that may not.

An attempt is then made to provide an explanation of this distinction. In section three the theory is applied in the legal case.⁶

Raz on 'Our' Concept of Law

Raz tells us that concepts, 'as objects of philosophical study, ...relate to how people conceive certain objects, or phenomena'.⁷ 'Metaphorically speaking' he says:

[they] are placed between the world, aspects of which they are concepts of, and words or phrases, which express them... and are used to talk about those aspects of the world.⁸

⁶ I confine discussion primarily to the concept of law itself, for it is with regard to this concept that the dialectic has been developed, but it should become clear how the approach applies also to other basic legal concepts.

⁷ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 18

⁸ Ibid 18. A misplaced emphasis on the importance of the association between concept and referent as 'aspect of the world' has had a corrosive effect on legal theory. For it has been taken by some to suggest a false dilemma: that one must either find for every concept a referent that is in some sense 'in the world', or else discount it as meaningless. This was the view, for example, of a number of the more distinguished American and Scandinavian realists. The American realist, finding no 'empirical object' to which the concept legal rule referred, developed a skeptical theory of the place of legal rules in judicial reasoning. The Scandinavian realist, Alf Ross, again finding no easy empirical counterpart to the concept of legal validity, urged a reductive conception on which the legal validity of a rule was to be analyzed in terms of the felt emotional experience of 'being bound' on the part of a judge, which itself was conceived of as an empirical phenomenon. Both of these mistakes would have been avoided had the initial temptation to find the reference of the relevant concept 'in the world' as a way of making sense of it been avoided, if it were instead recognized that such concepts specify normative relations within a system, relations which cannot be either reductively defined, or eliminated.

Raz's central aim is to stress a close connection between understanding, in the conceptual sense, and philosophical inquiry into the nature of various aspects of human culture. This is the concept/ world aspect of Raz's metaphor and he thinks it the more important: 'when Ryle wrote about the concept of mind, or Hart about the concept of law', he says 'they meant... to offer explanations of the nature of mind and of law'.⁹

In what sense is the transition legitimate? Those who emphasize such a connection between concept and object, Raz says, 'can be said to be... committed to the view that a complete understanding of a concept consists in... understanding all the necessary features of its object'.¹⁰ Since Raz himself believes that such a principle holds in the legal case, he suggests that the theory of law is best understood as an investigation into the nature of the institution by way of an investigation into the concept: 'let us accept that what we are really studying is the nature of the institutions of the type designated by the concept of law'.¹¹ We form a conception of law, as a mode of social

See, on the American perspective, Hart, *The Concept of Law* 136-141 and Hart, *Essays in Jurisprudence and Philosophy* ch 4 and on Alf Ross, *ibid* ch 6

⁹ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 19. For Raz's criticism of those who stress a close relation between concepts and words see: *ibid* 53-58

¹⁰ *Ibid* 20

¹¹ *Ibid* 32

organization, on this view, by way of an exploration of the conditions under which we would credit someone with the concept of law as manifest in our common practices and uses of language.¹²

What place, on Raz's view, does the concept have within society? As we have already noted, he suggests that 'talk of *the* concept of law really means *our* concept of law'.¹³ This is intended to indicate two things. First, that the concept of law differs from 'theoretical' concepts, such as those introduced by, say, economists and sociologists, in that it is not a product of theory, but an existing aspect of our social vocabulary.¹⁴ Second, that its use forms an aspect of the self-conception of only certain societies under law, such that it need not feature as part of the conceptual scheme of all communities governed by the institution. We can take these points in turn.

¹² Raz says:

'I will assume we can explain what [concepts] are by explaining what it is to have and understand them. That is, we explain a particular concept by setting out the conditions under which it is true of people that they have and understand that concept.'

Ibid 20

¹³ Ibid 31

¹⁴ Ibid 32. For a different interpretation of this passage, as indicating a form of relativism about legal concepts, see. See Brian Bix, 'Raz on Necessity' (2003) 22 *Law and Philosophy* 537 and Keith Charles Culver and Michael Giudice, *Legality's Borders : An Essay In General Jurisprudence* (Oxford University Press 2010) ch 3

First, the hermeneutic aspect of the concept. It is, in this sense, 'ours' in that it is a cultural product: 'The concept of law is part of our culture and of our cultural traditions,' Raz says; 'it plays a role in the way in which ordinary people as well as the legal profession understand their own and other people's actions.'¹⁵ The contrast is between ours – as familiar, cultural – and other – as a theoretical imposition:

The notion of law as designating a type of social institution is not... part of the scholarly apparatus of any learned discipline. It is not a concept introduced by academics to help explain some social phenomena. Rather, it is a concept entrenched in our society's self understanding.¹⁶

In what way is this understanding manifested? The concept, Raz says, 'is used...to mark a social institution with which we are all, in various ways, and to varying degrees, familiar':¹⁷

We know that the regulations of a golf club are not a legal system, and that independent states have legal systems. I know that an Act of the British Parliament is legally binding, but a resolution of my neighbors to deny any non-resident access to our street has no legal validity. And so on. Moreover, while the

¹⁵ Raz, *Ethics In The Public Domain : Essays In The Morality Of Law And Politics* 221

¹⁶ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 31. So it is wrong to say, as Brian Tamanaha does, that theories which 'specify what law is are not right or wrong, or testable or falsifiable.... Its use value is determined by the purposes for which the concept of law is constructed.' Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 133-134

¹⁷ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 31.

distinction is not marked by the presence of the same linguistic cues, it is fairly stable, used by lawyers, politicians, bureaucrats, and lay people, always referring to the same sets of practices and institutions.¹⁸

This way of explaining the importance of the concept of law within society may be taken to imply that it has its primary use as a tool for distinguishing law, as an aspect of social reality, from other institutional forms. This is indeed how Raz sees the matter.¹⁹ 'The distinction between the legal and the non-legal,' he suggests, 'is part and parcel of those practices that determine the concept of law.'²⁰ In this sense we may come to understand the concept as a means of classifying a particular aspect of political society.²¹

We might pause here to consider whether this feature of the concept of law – as a means of discerning – doesn't imply, also, a range of more practical

¹⁸ Ibid 28

¹⁹ In making this contention, Raz may add to the impression that the primary import of conceptual investigation is itself 'classificatory', that it is about distinguishing law from other social types. Brian Bix, for example, claims that '[t]he focus of conceptual analysis [for Raz] is on the boundaries of the category, here what makes something "law" or "not law".' But this taxonomic project is in reality tangential to the primary aim of deepening our understanding of the institution. Contrast *ibid* 31 and Brian Bix, 'Raz, Authority, and Conceptual Analysis' (2005) 50 *The American Journal of Jurisprudence* 311 313-316

²⁰ 'Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 28

²¹ A similar view is to be found in Stephen Perry, 'Hart's Methodological Positivism' in Jules L. Coleman (ed), *Hart's Postscript : Essays On The Postscript To 'The Concept of Law'* (Oxford University Press 2001)

uses. If, for example, we use the concept in distinguishing an effective legal authority from the resolutions of a revolutionary body, does it not follow that the concept is also used, for example, by lawyers, judges and laypeople in their identification of the first order rights and obligations that comprise the law in their particular jurisdictions? If conceptual competence of this kind is required to distinguish the law for the demands of a different institution, surely it is also required to identify it? And if such uses are in this way interconnected, then does this not potentially imply a foundational role for the concept in our legal practices after all? We will return to these points later, but for now it is worth noting the potential.

So the concept of law is used by us, Raz claims, to mark the distinction between legal and non-legal aspects of social reality. Crucially, however, he argues that the institution may exist without being so marked: 'our concept of law' he says 'does not make an awareness of it in a society a precondition of that society being governed by law.'²² It is ours only contingently, and there

²² Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 40. See, more generally, *ibid* 36-41 and 91-96. Raz attributes this position also to Hart, but provides no textual support for the claim. Dworkin, on the other hand, explicitly joins Raz in his conclusion in so far as it relates to the concept of a legal system: 'It is not necessary for anyone in a community to understand that a legal system is a distinct form of social organization, let alone have any idea about what features might be thought to mark it off from other forms, for that community of have a legal system.' The issue is different, for Dworkin, when we come to consider the 'doctrinal' concept of law, the concept used in stating the law of particular jurisdictions. See Dworkin, *Justice In Robes* 231, and for doubts about the independence of Dworkin's institutional and doctrinal questions see chapter two.

exist both possible and actual historical societies ruled by the institution with no awareness of the concept:

Jewish religious rules and practices are rich and diverse... Whenever theocratic autonomous Jewish communities existed or may exist they would be subject to law, i.e. Jewish religious law. But the concept of law is not part of the Jewish religion, and where such communities existed in the past they often existed in societies whose members did not possess the concept of law. Jewish religious thought and doctrine encompasses much more than law. It encompasses what we regard as comprehensive systems of law, ethics, and religion, areas which though overlapping are also – in our eyes – distinct. To the Orthodox Jew of old there is no division within Judaic doctrines which captures the divisions indicated by ‘our’ concepts of law and ethics. Yet beyond doubt theocratic Jewish communities did have a legal system even though they lacked the concept of law, or at any rate some of them (those which had not learnt it from other cultures) lacked it.²³

On Raz’s interpretation, Jewish codes encompassed law, but it was not for them a distinct form of social ordering. They did not have ‘our’ concept, or respect in their practices ‘our’ distinction between, for example, law and ethics, but they were ruled by the institution nonetheless. This fact, in turn, is taken to imply a form of parochialism inherent in the theory of law. ‘In working out a theory of law,’ Raz says, ‘we are explicating our own self-understanding of the nature of society and politics’ but because the concept of law does not form a necessary aspect of society ruled by law, such a theory

²³ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 40

'does not necessarily capture the way [other] societies [understand] their own organization and practices.'²⁴

How might such a distinction – between what is marked by our concepts, and what exists independently – be conceived? It is best to start with an easy case. Consider, for example, the concept of a mountain. Now it is clear that the concept, as fashioned in accordance with human purposes and represented in various natural languages, forms a fairly stable part of our conception of the natural world. But it is a concept that exists relative to human culture and is perhaps represented only in a subset of languages. The concept is, in this sense, culturally specific. But it would be wrong to conclude from this fact, as Richard Rorty famously did, that the existence of the mountains are themselves as dependent upon our practices of language use as the dissemination of the concept. The Alps, to put the point crudely, do not care for our distinctions, and their history is much longer than ours.²⁵

²⁴ Ibid 97

²⁵ Rorty had what he took to be an answer to this kind of objection:

Given that it pays to talk about mountains, as it certainly does, one of the obvious truths about mountains is that they were here before we talked about them. If you do not believe that, you probably do not know how to play the usual language-games which employ the word "mountain." But the utility of those language games has nothing to do with the question of whether Reality as It Is In Itself, apart from the way it is handy for human beings to describe it, has mountains in it.

According to Rorty we ought to distinguish between two levels of discourse. As part of our language game, the process of deploying the concept *mountain*, it makes sense to talk of mountains as an independent aspect of the world, to

There are other examples that display the property of independence which are less reliant upon factors external to human practices and experience, and in this sense closer to the legal case. We know, for example, that certain languages contain nuances in the depiction of emotional states and colors not as easily accessible in others, cases where there exists no direct word-for-word or concept-for-concept translation. The concept of law, for Raz, is in this sense comparable to a description of emotions or colours available in one language but lacking in others. The institution may be experienced in both communities, but the concept, which marks it as distinct, is absent in one.²⁶

claim that they existed long before we did and to speculate that they will probably exist long after we have come to an end. But if we were to stop playing the game, if we were to stand outside of its system of rules, we would realize that mountains don't *really exist* in any important sense. To think otherwise is to consider as a matter of introjection that which we project onto the world. But this again confuses the mode of existence of the criteria for judging that, for example, Mont Blanc, constitutes an example of the type, with the criteria for the existence of the landmass itself. We can, of course, only make the judgment in language, but this does not mean that that which is judged owes its existence to the very same social practice. See Richard Rorty, 'Does Academic Freedom Have Philosophical Presuppositions?' in Louis Menand (ed), *The Future of Academic Freedom* (University of Chicago Press 1996) 29-30. For criticism see Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe it' 25 *Philosophy & Public Affairs* 87 95-96

²⁶ Some have taken the presence or absence of concepts in different language to imply various radical theses concerning the capacity for understanding as between members of different linguistic communities, such that it might be inherently limited. But the truth is rather less exciting. Facts about our productive capacity in relation to language – i.e. our capacity to understand

How persuasive, however, is Raz's example involving Jewish law? It is important to be clear that the argument does not depend upon detailed knowledge of the historical context to which he refers, i.e. that of early Jewish communities. The claim is conceptual and so the worth of the example depends upon its ability to make clear to us the relevant possibilities. And so we may ask ourselves more directly about the issue in a way which abstracts from the historical context: might we be able to conceive of a society subject to this particular form of political organization whilst failing to recognize it as distinct? What would it be, in particular, for the courts not to regard the law in light of its concept, and in this sense distinct from religious and other codes of conduct? Raz's example is complex and does not provide us with a clean answer to these questions. So we might begin with a number of more simple cases.

Some Kinds of Social Concept

There is, in fact, an important distinction between kinds of social concept, one that Raz notes, but which fails to perceive the import of in the legal case. In support of his argument for the logical independence of law and of our ability to conceptualize it, he draws attention to the fact that a number of other social

new expressions based upon combinations of concepts already known – suggest, instead, that translation is always a going possibility.

concepts may be applied to societies that are not familiar with the criteria for their use. His own example is that of the standard of living, which he says 'may not have been available to the people of medieval Europe.'²⁷ Despite this fact, Raz notes, 'there is nothing... to invalidate discussion of the effect of the War of the Roses on the standard of living in Lancashire.'²⁸ So too might we consider a number of other social concepts which display this property including, for example, that of economic recession. This concept applies to any market-based economy which satisfies a certain condition – i.e. that it suffers from a business cycle contraction – but importantly, the fact that there is such a contraction in the economy, or indeed the criteria for judging this to be the case, need not be known within the relevant economic community.²⁹ It is not simply that the fact of recession could be hidden, but that the ability to understand need not be manifest and yet the economic pattern still be present.

The possible independence of concept and object, is, Raz notes, less plausibly asserted as a property of other aspects of social reality. He says, for example, that 'arguably since gifts are gifts only if intentionally given as such

²⁷ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 95

²⁸ Ibid 95

²⁹ The concept, Searle notes, only came into existence in the twentieth century, 'though there were many recessions prior to that time.' See Searle, *Making the Social World : The Structure of Human Civilization* 21

there cannot be gifts among people who do not possess the concept of a gift'.³⁰

The idea is that a gift is an object that must necessarily be presented in accordance with a particular understanding. This feature is most clearly emphasized in cases where it is lacking. We cannot make sense, for example, of a gift given on the condition of remuneration or as a way of paying off a debt. But what is it, more precisely, for a gift to be given 'as such', and how does this condition explain the difference?

The relevant difference as between the concept of a gift and the economic concepts that we have just considered is that the concept of a gift builds in, as a criterion of its application, that those objects to which it refers have been, or will be, transferred in accordance with the rules for the concept's use. For my activities to fall under extension of the concept of gift giving I must give away an aspect of my property to another without intending, thereby, to generate an obligation of reimbursement. These criteria are at the same time conditions on my intentionality – the rules to which I must orient myself if I am to act in the appropriate way – and conditions for the application of the concept. In this sense, the concept of a gift plays a dual role: its use forms an essential element of the social interactions to which it applies and its criteria furnish the basis of our descriptions of the type.

³⁰ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 95

We recognize the latter aspect when we note that we should only apply the concept to members of a society quite different from our own if we are able to determine that they exchanged goods, whilst intending that their acts be understood in accordance with the conditions specified. We would need to understand their behaviors, to use the well-worn metaphor, from the inside. But it is the first aspect that implies that a person must have the concept in order for it to apply to their acts. Why is this? If, in order for my behavior to fall under the concept's extension, I must act in accordance with the criteria for its use, then this requires that I have an understanding of what it would be to do so and, consequently, the ability to recognize, in an abstract sense, the forms of behavior falling under the social category. The concept is, in this sense, self-reflexive.

Consider now the concept of the standard of living. For the concept to apply in a given social setting, no one need act with the intention of satisfying the rules or criteria specified by concept's intension. Indeed, the concept does not have intentionalistic conditions of application; it applies to any society that exists in a condition of resource scarcity relative to their needs and desires.³¹ We can then ask of this social group: what is the quality of life for its members as compared with, for example, other societies or as with itself at

³¹ A further question concerns the factors that influence a change in the standard of living in particular societies, and it may be here that intentional elements play a major role. Such factors, however, are not conditions on the application of the concept.

different points in history? A similar analysis applies to the concept of recession. It has application, given a pattern of economic behavior, i.e. a business cycle contraction, regardless of whether the particular pattern is intended, or understood, within the relevant community as signifying a distinct situation. The crucial question is whether for social actions to fall under the extension of a concept it need be the case that the relevant agents must act on an understanding of the criteria for its use and for this, as well as a range of other economic concepts which function externally to the intentionality of social actors, there is no such requirement.³²

³² This should not be taken, however, to imply that all economic concepts have this structure. As Searle notes a market consists, at the most basic level, in a pattern of actions, transactions etc. that must be conceived of intentionalistically.

These actions in turn constitute a system at the macro level from which there may be unintentional fallouts: the ground-floor facts about the economy are the buying and selling and other economic activities and attitudes of the participants. These will have certain macro consequences such as, for example, the trade cycle.

The concept of recession is, in turn, a 'systemic fallout', a consequence of these basic activities, taken together. So it is wrong to say, as the political right is prone to, that the market is a 'natural' system, where this term is understood in contrast with intentionalistic, or imposed, systems of social ordering such as the state. The market too is built up out of a range of intentional actions, although these are exhibited primarily at the micro, as opposed to macro, level. In this sense it is no more natural, and most certainly no more inevitable than the state. See on 'systemic fallouts' Searle, *Making the Social World : The Structure of Human Civilization* 22

It is important to be clear, here, that we are not merely signaling a distinction between social concepts that have intentional action falling under their extension and those which do not. The contrast is between concepts, an awareness of the rules for the use of which feature as a precondition of acts falling under their extension, and concepts that do not require this. For it is only the latter distinction that properly cuts between concepts, the possession of which is a requirement on action of the appropriate type, and concepts for which this is not the case.

A good way of understanding this difference is by comparing the way in which certain intelligent animals use rocks as tools, and the way in which we have introduced artifacts such as hammers to perform a similar role. It may seem as though the only difference between the two cases is one of relative formality, or sophistication in the use of instruments. But there is actually an important difference in kind. If, for example, you were to notice someone using a hammer in order to stir their soup you could quite rightly tell them that this is not what it is meant for. This is not possible, by way of contrast with regard to an animal's use of a rock or, for that matter, a similar ad hoc use by a person stranded in the wilderness. If it is used at one point to hammer and the next as a way of fulfilling some other task, there is no absolute mistake in usage at any point, although the stone's relative efficacy will vary in a task-dependent way. The hammer is *meant* to be used a certain way, whereas the stone does not care how it is used, if it is used at all. How do we explain the difference? The hammer is such not simply because it can

play a certain role but because it has been assigned a particular function, by being either manufactured or designated for a purpose, and this assignment, which specifies the rules for the object's use, carries with it a conception of appropriate and, by implication, inappropriate usages. The stone, by way of contrast, has not been assigned such a role, and so the condition specifying correct and incorrect usage does not hold. The stone just is, and may, because of its shape and weight, be put to varying uses, none of which are either right or wrong, although, as we have noted, the object may be more or less efficient depending upon the task at hand.

How does this contrast relate to our discussion? The point is that in order to use the stone as a rudimentary tool, one does not need any concepts; one just needs to carry out a basic physical action. The concept of 'use' in this way ranges over an intentional action, but not one that requires users to have anything like a conceptual understanding of what, for example, a tool is. But if, instead, we are to consider the way in which hammers and other tools feature in society – remembering that that these are objects which have been imbued with functions and therefore have conditions on their use – then it needs to be the case that at least those creating or designating the relevant objects as tools have an understanding of such uses. So in this case, someone has to have the concept and to relate it to the physical object in question, either by making it or marking it out with the aim for it to have a particular

use, or by representing that it has this use in some other way.³³ This is what makes the object an artifact. It comes to have, in other words, a social role that goes beyond its physicality, and this can only be bestowed by a person who has a conception of appropriate and inappropriate forms of use; they must have the concept of the relevant artifact.

We can apply the same distinction – between merely intentional and concept-dependent action – so as to show its importance in the gift case. For gift giving too has a social meaning that goes beyond the performance of the physical actions necessary for the task. I do not give a gift just because I move a bottle of wine in your direction, and to do that I don't need any concepts. But if I am to give it as a gift, I need to perform these actions in a way that signifies that it is to become your property without any need for recompense: I must act in a way that incorporates into the transaction the rules specified by the concepts intension. In this way, because it is a particular social meaning, gift giving involves the use of the concept.

³³ As Searle points out, it need not be the case that future users have a well-formed awareness of this aspect:

One person, or perhaps a group of people, invent tools, say, screwdrivers and hammers, for example. In such a case, they create types of devices on which they impose a certain function by collective intentionality. But subsequent generations are simply brought up in a culture containing screwdrivers and hammers. They never think about the imposition of collective intentionality; they simply take it for granted that these are certain types of useful tools.

Searle, *The Construction of Social Reality* 126

It is worth reminding ourselves here of a point that I emphasized in the previous chapter – that rule-following and concept use are, in a sense, natural activities – for it may sound as though the descriptions we have been giving of artifacts and gifts are far too intellectualized. The difference between merely intentional – pushing, moving, hitting – and concept-dependent activities – such as giving gifts, using and creating artifacts – may not feel for the performer, or appear to its audience, to be marked in such a fundamental way. Nonetheless, the difference is a profound one and it distinguishes vast swathes of human activity from the much broader category of intentional action that frames, also, the actions of many intelligent animals.

We might summarize before moving on to discuss the legal case. Concept possession is a requirement of action falling under the extension of a social concept in those cases where the relevant social act is circumscribed by a set of rules that people to whom the concept applies must act in accordance with. A less cumbersome but perhaps more metaphorical way of putting the point is that social acts of this type carry with themselves their related concept's basic social meaning. The key distinction is not between intentional and unintentional activities, but rule-constrained and other forms of activity.

Law without Boundaries?

Our question is whether law may exist in a society that fails to perceive it as distinct from say, religious or other forms of social practice. But we must

begin by noting that there exists an ambiguity in the concept of 'society' that may be liable to obscure the issue. In asking whether possession of the concept is necessary for law's existence, we may have in mind the question of whether the concept of law and other closely related concepts need be possessed by the law's subjects, those who fall under the institution's coercive power but who play no direct role in creating the system. Or we may have a more encompassing understanding of society in mind, one that includes not just the law's subjects but also its agents. The distinction is an important one because there is good reason to think that law can exist and govern independently of it being recognized as distinct from other forms of social ordering, by those subject to it, in a way that it cannot function from the institutional perspective.

We might focus first on the question of law's subjects. What relation must they have to the system? Recall that in the previous chapter I argued that for a legal system to exist it must be efficacious: that is, in order that a society have law it must be properly regulated in accordance with the standards identified by its rule of recognition.³⁴ A 'legal system' with no power over those notionally subject to its jurisdiction is, in other words, no legal system at all.³⁵ What is it, however, for a society to be regulated in this way? Hart noted that, standardly, we may say that that a legal system is in

³⁴ Hart, *The Concept of Law* 103-104

³⁵ Efficacy being, on the standard interpretation, an existence condition for law.

force if 'the rules recognized as valid at the official level are generally obeyed',³⁶ that is, if the law's subjects generally comply with the system's primary obligation imposing requirements.³⁷

³⁶ Why not a more minimal condition? Can we not say that a legal system exists just in case a self-proclaimed authority manages to effectively coerce those falling under its organizational apparatus when they refuse its commands? Jeremy Waldron explains:

An occupying army may have a chain of command and an organizational army of its own, which involves secondary rules etc.; but it may not be appropriate to say that that apparatus exists as a legal system among the members of a social group that comprises not only the occupiers but also those lives they govern... Surely it is part of the existence-conditions of a legal system among a given population that all the members of the population participate in some sense in the practices that the legal system comprises. It is not enough that there be some whose lives are affected by the system in question (otherwise we should have to say that Americans shared a legal system with the Vietnamese in the 1960s and with the Iraqi people at present!)...It will be misleading to say that a legal system among the coercers, their troops, and those who feel nothing but the sharp end of their bayonets.

See Jeremy Waldron, 'All We Like Sheep' (1999) 12 Canadian Journal of Law & Jurisprudence 169 176

³⁷ Hart, *The Concept of Law* 118. Why not also include, as a measure of the systems efficacy, compliance with those aspects of the legal system that confer powers on private parties? The reason, as Hart pointed out, is that failure to comply with these elements is in no sense a legal wrong. If I fail to form a contract properly it is not that I am in breach of the law, but that the law will not uphold my bargain. The issue may differ with regard to powers that constitute the agencies of government. Whether they act within their constitutional remit – i.e. only in line with the powers granted to them – may well be taken to go to the efficacy of the system. See, on power conferring laws, *ibid* 27-42

Now, my capacity as a subject to abide by a particular rule of law does not require me to show in my attitude an understanding of the concept of law. I need only understand that the rule functions, in society, as part of a set of standards that I ought to obey and in this sense I need not recognize it as emanating from a distinct form of social control. What we are saying about the individual case, in turn, generalizes. If, for a system of law to be in force, it must be the case that the majority of its subjects conform to its dictates – by obeying most of its rules most of the time – then their obedience need only be informed by the concepts necessary for this task, such as the concept of a rule, and perhaps the concept of authority. Those under law’s dominion must generally obey its demands if the system is to be in force.³⁸ They need not, however, recognize these demands as legal requirements on action, as opposed to, for example, religious or more broadly social norms, and so they need not have the concept of law.³⁹

³⁸ The notion of obedience under consideration is a broad one. One may obey owing to, for example, a sense of moral duty, fear or ideology. The legal system does not mind which.

³⁹ Hart noted a different way in which the general population may become isolated from the reality of law. Whilst they must be aware of at least certain of the first order requirements of law in order for the system to be in force, the system’s basic criteria for validity may be opaque to them. ‘A great proportion of ordinary citizens’ Hart said ‘[may] have no general conception of the legal structure or of its criteria for validity.’ See Hart, *The Concept of Law* 114. For discussion see Waldron, ‘All We Like Sheep’ and Leslie Green, ‘Positivism and the Inseparability of Law and Morals’ (2008) 83 *New York University Law Review* 1035 1046-1047

It should be clear here that the type of case we are discussing – one in which the law’s subjects fail to recognize the mark of the institution, i.e. that the rules which they obey are the product of a specific means of social organization – is quite removed from the reality of modern society in that the concept of law is both widely available to, and used by, the general population. It is, as Raz says, ‘our’ concept.⁴⁰ For whilst it is true that the expertise required to properly navigate the system is commonly the preserve of a particular elite – an elite to whom we are, at least to some extent, hostage for the purposes of representation in court and to whom we commonly defer in our use of various specialized legal concepts – it is natural to think that basic comprehension of the structural aspects of the institution persists outside the world of the specialist.⁴¹ But again, we must be aware of the possibility that things could be otherwise.

⁴⁰ He is right to say that ‘in our cultures the concept of law is available to all... most people have a fairly good grasp of it.’ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 94

⁴¹ Hart noted, for example, that in contemporary societies an educated person ‘might be expected to be able to identify these salient features [of legal systems] in some skeleton such way as follows’:

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

See Hart, *The Concept of Law* 3

Is Raz's claim limited in this way to questions about the required competences of those who fall under law's power? There are aspects of his argument that may be taken to suggest a focus primarily on law's subjects and their role in society.⁴² But he makes clear elsewhere that the argument is intended to encompass also the self-conception of the law's principle agents, the courts.⁴³ Indeed, there is a real sense of artificiality when the question – of whether society can exist with law but without its concept – is posed in a way that only applies to those upon whom law operates. Crucially, the stipulated understanding of society would leave out the most important range of social actors for our understanding of the nature of law, those whose practices form the foundation of the system. So we must ask our question in a way that is sensitive to this fact.

But what would it be, as per Raz's description, for the courts not to comprehend themselves in light of the concept of law? The first step is to have a basic understanding of the concept in mind. I argued in the previous chapter that the concept of law is the concept of a political community governed by a set of social standards identified at the official level in

⁴² See Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 93-94

⁴³ He considers the case of a 'court in a country with law but which does not think of it as such'. Such a court, he claims, would be 'concerned to decide cases in accordance with the rules of the system, which are in fact rules of law' despite their ignorance of the fact. See *ibid* 85

accordance with a set of criteria, the system's rule of recognition. The occurrence of such a state of affairs, it was argued, grounds the existence of legal institutions – the courts being those bodies which accept such a rule and determine disputes in accordance with the standards identified by it – and forms the background condition for the various particulars that comprise the content of the law in any given jurisdiction: they are such because they are identified by the system's rule of recognition. The courts, in other words, are such because they recognize and apply the law and the law is such because it is recognized and applied.

The concept of law is one that refers, then, to a particular kind of rule-governed social practice and in this sense we must say that there is a direct parallel with the case of gift giving. Recall that we noticed that the criteria associated with the concept of a gift have a dual role, both as conditions on the application of the concept, and as conditions on the intentionality of those whose actions fall under the concept. The rules for the use of the concept of law play, in the same sense, a dual role, both as conditions on the application of the concept, it having as its referent a particular kind of rule-bounded social practice, and as conditions on the intentionality of those whose actions constitute the relevant institution, those whose practices together give rise to the existence of law as a mode of political domination, the courts. So our question – what would it be for such agents to fail to conceive of themselves in accordance with such a concept? – receives the following answer: it would be for them not to comprehend the rules designated by the concept, and

consequently the identity preserving conditions on their actions. They would not be, because they could not be, participants in the form of social practice which gives rise to the institution.⁴⁴

Now Raz suggests that 'the courts' may function without the concept of law 'deciding cases in accordance with the rules of the system, which are in fact rules of law' despite their ignorance of this fact.⁴⁵ But this cannot be right. As Raz himself has elsewhere noted, for rules to be rules of law they must be treated in the appropriate way by law-applying institutions i.e. recognized in accordance with a set of shared criteria and applied in the resolution of disputes.⁴⁶ And this kind of act requires, at a general level, an understanding of the distinctive requirements of the task: a conceptual capacity to act in accordance with the relevant institutional role. Failing to understand the structure of the relevant kind of institutional action – in particular, the distinct method of the law as identified by the concept – one cannot begin to act in the right way. Just as I cannot give a gift without recognizing it as such, so a

⁴⁴ As we noted in the previous chapter, what is true of judges in their role maintaining the system, is true, secondarily of lawyers. They too use the concept of law as well as other basic legal concepts in identifying the law and arguing before the courts. Without such concepts they could not perform this role.

⁴⁵ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 85

⁴⁶ See, in particular, Raz, *The Authority of Law : Essays on Law and Morality* ch 3 and Raz, *Ethics In The Public Domain : Essays In The Morality Of Law And Politics* ch 9

person cannot act as part of a law-applying institution without an understanding of the rules which circumscribe this institutional role. To understand that much is to understand the concept of law.

Now it might be suggested that this task, that of recognizing and applying a particular set of social standards in the resolution of disputes, may occur without being recognized as a discrete form of political action. The practice, so the objection goes, may arise without being understood as autonomous. But the capacity to act as part of an institution, as an agent in a particular social practice, requires that one acknowledge its distinguishing features. To know that, as a result of one's particular constitutional role, one *ought* to recognize and apply a particular range of social norms in the resolution of disputes, is to recognize, also, that this forms a distinctive requirement on action mandated by one's position in the system. To suggest otherwise is akin to claiming that one understands both the words 'affect' and 'effect', but not the distinction between them.

Another possibility is that our claim trades on a confusion about levels of discourse. All that has been shown by the argument, it may be suggested, is that for there to be law, the courts must respect a range of local constraints on action: they need to understand what *the law* is within their jurisdiction, but they need not, so the argument goes, show understanding of *the concept of law* as an abstract requirement. They need to know and uphold the first order rights and obligations of the system, but need not demonstrate an

understanding of what law is as a form of social category. Raz himself may hold a view of this type. In a detailed response to Ronald Dworkin's argument about the relation between law and legal theory, he considers Dworkin's claim that 'to know the law governing each case one must be making, explicitly, or implicitly, assumptions about the nature of law'.⁴⁷ This, Raz argues, is a mistaken view. The requirements on competent legal action are, he claims, more minimal:

American courts are required to decide in accordance with American law, just as Chinese courts are required to decide in accordance with Chinese law. It would follow that in rendering decisions American judges, acting in good faith, as we can assume that they do, presuppose that their decisions are in accordance with American law. They presuppose, perhaps, something about American law. This need not be much. It could be that it contains a particular rule, and that nothing else in it modifies the application of the rule to the facts of this case. Courts usually rely on a much richer set of beliefs, but these are commonly only about a tiny fragment of the law. To make such [assumptions], even to be justified in making [them], one need have little idea of what the rest of the law is, let alone an idea of how exactly it is to be established.⁴⁸

Raz's claim is that sound judging requires that one understand the requirements of the law in one's jurisdiction, or perhaps only part thereof, but not that one have a more basic comprehension of law, or of legal practice, as a general concept. In identifying the law of their jurisdiction, and in maintaining the system in accordance with its rule of recognition, however,

⁴⁷ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 83

⁴⁸ *Ibid* 83

the courts inevitably display such an understanding. Indeed, as we have already noted, the law of a jurisdiction is *only such* because it is identified in accordance with a general practice of this type.

Consider, by way of analogy, the need for a general form of understanding when participating in even the most rudimentary of games. It is, for example, essential for the participation in a game of tag that a participant regards himself or herself as hunter if caught by the previous person playing this role. Now the reason the participant is able to respond appropriately in the individual case is because they have a general concept that they use in the particular situation. This general form of understanding, moreover, is shown by the fact that their comprehension expands over a range hypothetical cases: they can, for example, recognize others being caught and conceive of themselves in imaginary circumstances playing the game.⁴⁹ In this sense, we can say that the activities of the law-applying agents in particular cases – deciding according to UK law, or according to the law of Texas, for example – involve the use of a general concept. They thereby exhibit the capacity to distinguish legal from the non-legal requirement on action and ultimately to understand the mark of law, as a kind of institution.

Considerations having to do with the nature of the judicial role bolster the argument that a general form of understanding is present in particular

⁴⁹ So too with gift giving: if one is able to give in an actual case, one demonstrates the more abstract capacity.

institutional acts. For when a judge faithfully attempts to declare the rights of the parties before them, their act belongs to a particular social genre. The decision, because a decision at law, carries with it a general conception of its justificatory basis, and suggests to us means by which we might, ourselves, appraise it as better or worse. Just as a gift carries with it the meaning that it is passed on without need for recompense, so a judicial decision is rendered in a way that intends to respect the constraints appropriate to the kind of institution of which its author forms a part. The judge ought to apply the law identified in accordance with the rule of recognition of their particular system, or else change it only where so allowed by the rules determining the extent of their creative jurisdiction. The fact that their act is constrained by, and answerable to, considerations of this type shows that their actions involve the use of the general concepts that express these standards including, most importantly, the concept of law. If this aspect were missing then the decision would not be of the right type. It would not be a judicial decision.⁵⁰

One final objection deserves consideration. I have said that those who act in law-applying institutions must recognize the general mark of the

⁵⁰ Indeed, this consideration shows Raz's initial question – what would it be for the courts to fail to treat the law as such? – to be misconceived. For the sake of their identity the courts are bound to respect the law, to treat cases that come before them in accordance with standards identified by their rule of recognition – this is, ultimately, what it is for a body to be a court. And so the question, whether the courts can fail to recognize the law as such – i.e. in accordance with the concept of law – must ultimately be discarded as nonsensical, as resting on a confusion about possibilities.

institution of which their actions comprise a part, the distinctive form of practice in which they participate. Does this not amount to saying that in addition to fulfilling their institutional role, the courts must also recognize their action as falling under the concept of law? Surely what matters, so the objection goes, is that the action of those who maintain institutions is of the right type not that they recognize their action under any particular description or concept.⁵¹ To suggest otherwise seems to involve a superfluous element i.e. the requirement that institutional actors recognize the law as law but also, and on the same basis, to engender a form of circularity (what, after all, can be taken to count as recognition in the second specification, other than that which is already contained in the first).⁵²

But the claim is not that the act of an agent who forms part of a law-applying institution must, separately from that act, receive recognition as falling under the concept of law. The claim is, instead, that it is in the very nature of an institutional act of this kind that those who perform it exhibit a capacity to perform acts of the type, and to recognize the exercise of such a capacity in others. This is so because their act consists in the particular use of a general concept. It is not accompanied by a separate act of concept application; the general capacity is already included in the initial act.

⁵¹ This objection was suggested to me by Leslie Green.

⁵² A similar problem, having to do with the apparent circularity built into the test for the existence of customary international law, is explored in Finnis, *Natural Law and Natural Rights* 238-245

What, then, are we to say of Raz's argument involving ancient Jewish law? Recall that the case was intended to suggest to us the theoretical possibility of a society without the concept of law that was nonetheless ruled by the institution. We now understand why such a claim cannot stand. The institutional capacities of the judge, which enable them to fulfill their role and thereby to maintain the legal system, are themselves general and conceptual. There can be no law without the concept of law for the reason that those who maintain the system do so as an exercise of their rule-based conceptual capacities.

We noted earlier that the concept of law's role in designating the legal system, as well as its jurisdiction-specific requirements on action, might also imply a more practical role. We are now in a position to remind ourselves of the most basic such role: the concept of law not only describes the institution but its use forms the basis of the attitudes and actions that give rise to it. The judge, in identifying and applying the first order rules that comprise the system, harnesses and uses the concept of law.

Conclusion

This and the previous two chapters have suggested a picture of legal practice dependent, in a certain sense, upon agreement. Law exists, I have argued, because it embodies, on the part of those who maintain it, a common

language or conceptual scheme. To act as a part of its institutional structure or to engage competently with law one must meet in understanding with others who also do so, and this requires sharing with them basic legal concepts including, most fundamentally, the concept of law. Judges and lawyers share, as the foundational aspect of their practices, in the rules for the use of such concepts, concepts that determine the structure, or logic, of the institutional actions which gives rise to the existence of legal systems, and which provide the standards to which a successful theory of law will respond. But this picture of unity in the actions of legal institutions, a picture that forms the basis of our claim about jurisprudential method, faces two important and quite different objections, each having to do with the notion of disagreement. The first concerns the fact of first-order disagreement within legal practice and its relation to the idea that lawyers and judges can be said to operate according to common rules for the use of legal concepts. The second concerns disagreement, not within legal practice, but about the interpretation of legal concepts at the philosophical level. We can take each of these in turn.

First, then, what is the issue relating to disagreement in law? Lawyers and judges offer, as a permanent feature of their practices, competing interpretations of the law and of its future path. The question is whether this argumentative aspect of law, the deep controversies which form its most important and well-known moments, is compatible with a picture of the nature of legal concepts of the kind we have here defended, as furnishing

common criteria for the engagement in legal practice and featuring as its rule-bound basis.

Ronald Dworkin, more persuasively than anyone else, has argued that it is not. Real legal disagreement, he suggests, is both cramped and distorted by the dictates of theories that hold that legal practitioners, as part of their practices, operate according to common criteria for the use of legal concepts. Lawyers and judges do not merely disagree, he says, about the particular rights and obligations of the parties before them, but about the nature of rights and obligations generally and, most fundamentally, about the nature of law. They offer, as part of their legal arguments, competing interpretations of the point or purpose of legal practice, and employ different criteria in structuring their claims about law. Because such disagreements are no aberration or mistake, but a central part of the legal experience, so '...the project of digging out shared rules from a careful study of what lawyers say and do, [is] doomed to fail...'.⁵³ Our legal practices, Dworkin suggests, indicate, not as I have suggested *agreement* in the use of legal concepts, but *disagreement*, and any good theory must reckon with this fact. The question of whether Dworkin is right forms the subject of the next chapter.

But there is a further issue that arises, and this has to do not with the fact of disagreement within legal practice, but second-order disagreements

⁵³ Dworkin, *Law's Empire* 43

between philosophers and others about its conceptual foundation. For even if Dworkin is wrong to suggest that lawyers and judges do not share in the rules for the use of basic legal concepts, and I will argue that he is, we must still reckon with the fact that philosophers and theorists disagree about the best general interpretation of these practices. Why, if I am right that law occurs under the rubric of shared rules, is it the case that this foundation is not easily visible to those who engage in argument about the nature of law? If theory responds to the basic aspects of the language of law, the rules for the use of concepts shared by all with an understanding of the institution, then the question arises as to why a philosophical conception of law is not easily arrived at, why conceptual forms of disagreement dominate the annals of jurisprudence. This latter question, which forms part of a larger inquiry concerning the opacity of conceptual truth, we can reserve for the chapter that follows the next.

Chapter Four: Disagreement In Law

Introduction

When lawyers or judges disagree about the resolution of particular cases it is not always clear what they are disagreeing about, and there are a number of alternatives. Some disputes concern the best understanding of existent law. Two judges may, for example, interpret a particular line of precedent differently. And in certain situations we may be able to determine, by exercise of our own interpretive judgment, that one is wrong and the other right. But this need not be so. Indeed, there are many cases – especially those which are heard in appellate courts – where the state of the law is such that the exercise of creative discretion in the application of the law is called for and where divergence in interpretation is, legally speaking, legitimate.

Many disputes between lawyers are interpretive. But others are not; practitioners also disagree about the best way of developing the law. This is most clearly the case in common law jurisdictions where judges are explicitly tasked with the piecemeal reform of particular areas of law such as contract and tort, although it is also the *de facto* situation in systems which are less explicit about the law-making powers of judges: the notion that in civilian systems judges never make law is a dogmatic stipulation which we would do

well to dispense with.¹ And in cases like these, particular judges may well disagree with each other about the future path of the law.²

These are examples of the types of dispute that are commonplace in legal practice. And whilst, in making such claims, lawyers and judges use basic legal concepts – such as the concepts of right, authority and law – they do not appear to be arguing *about* these concepts. That is to say, a disagreement about how to resolve a particular case is different in kind from a disagreement about the concept of law: it is about the state of the law on a particular issue, or about how the law should be developed in the relevant jurisdiction, not about what law is, or about the truth conditions of legal claims as a general class. We recognize a distinction, corresponding to this difference, in the grammar of our descriptions. A dispute about the best interpretation of a line of precedent is a dispute about *the law*, not a dispute about *the concept of law*. And a disagreement about whether a new equitable right should be recognized is a dispute about what it is to constitute progress

¹ The common law position is stated by Lord Nicholls:

Judges have a legitimate law-making function. It is a function they have long exercised. In common law countries much of the basic law is still the common law. The common law is judge-made law. For centuries, judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations.

Re Spectrum Plus Ltd [2005] 2 AC 680

² Quite often legal argument sits on the boundary between interpretation and innovation. Given that no exact divide exists between these two categories, and that both form an important aspect of the judicial role, such a state of affairs is to be expected.

within the legal system, not about the concept of a legal system. As Raz says, 'when in the course of rendering judgment a court interprets the law, it does not interpret the concept of law'³ and it is the latter, but not the former, which forms the subject matter of general jurisprudence.

Dworkin called a view of this type – a view on which there is thought to be a meaningful distinction between first-order practice, 'the discourse of non-philosophers reflecting and arguing about what is right or wrong, legal or illegal', and second order theorizing about law, a 'meta' discourse, 'in which first order concepts are defined and explored' – 'Archimedean' and he thought of it as doubly mistaken.⁴ Disagreements between lawyers about the

³ Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 81

⁴ The term is first applied by Dworkin to legal theory in the essay 'Harts Postscript and the Point of Political Philosophy'. See Dworkin, *Justice In Robes* ch 6. But it was earlier put to work in criticizing the distinction between ethics and meta-ethics (meta-ethics being a reflection on the status of ethical claims and judgments, and about the way in which the ethical perspective is best understood). Dworkin's view was that skeptical and relativistic meta-ethical views – views on which there exist either no right answers to ethical questions, or only 'right' answers relative to the dispositions of a community – are, in reality, abstract but pernicious first order claims about ethical possibilities. It follows that they are to be met, and defeated, by first order argument about what is properly justifiable from the ethical perspective. A more moderate view, one that maintains much of what is good about Dworkin's account, is that put forward by Thomas Nagel. Nagel's view is that the distinction between the ethical and meta-ethical is real; he allows the difference between argument about the domain of discourse and argument within it. Nonetheless, Nagel holds that the meta-ethical views which Dworkin takes issue with are to be confronted by first order claims which do not allow for qualification on the terms which these positions imply:

state of the law were, by Dworkin's lights, 'theoretical': small scale and concretized versions of the disagreements that philosophers have about the concepts that form the basis of their practices. In turn, disagreement between legal philosophers he thought of as practically engaged, as more abstract versions of the arguments we see every day between lawyers:

General theories of law... must be more abstract [than the arguments of judges and lawyer] because their aim to interpret the main point and structure of legal practice, not some particular part or department of it. [But] no firm line divides jurisprudence from adjudication or any other aspect of legal practice. Legal philosophers debate about the general part, the interpretive foundation any legal argument must have. We may turn that coin over. Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others. So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.⁵

First order thoughts [about the domain of ethics] – thoughts expressed in the object language – rise up... as the decisive factor in response to all second order thoughts about their psychological character.... And those first order thoughts aim to be valid without qualification, however much pluralism or even relativism may appear as part of their (objective) content... That is why we can defend moral reason only by abandoning meta-theory for substantive ethics. Only the intrinsic weight of first-order moral thinking can counter the doubts of subjectivism...

For Dworkin's critique of meta-ethics see Dworkin, 'Objectivity and Truth: You'd Better Believe it' and for Nagel's position see Thomas Nagel, *The Last Word* (Oxford University Press 1997) ch 6

⁵ Dworkin, *Law's Empire* 90

Dworkin's claim is that legal opinions carry with them, or 'assume', contentious conceptions of the foundations of their practice. So, for example, when one judge disagrees with another about the resolution of a particular case in a way that cannot be attributed to empirical failing, their disagreement ought to be characterized as depending upon the fact that each holds a different background theory of law, a different understanding of the practice of which their claims form a part.

This, to be clear, is not the claim that legal actors are prone occasionally to treat conceptual questions or to engage in philosophical forms of disagreement from time to time in their first-order discourse. A lawyer who claims that a contract has been formed between his client and another party despite the absence of agreement is making a conceptual mistake to be sure. And it may be that issues of this type are occasionally litigated. This, however, would not make conceptual disagreement a major part of legal practice any more than our propensity to make false conceptual claims in natural language would show it also to be a domain of major conceptual dispute. Normally, we observe the rules of our language and occasionally we fall into confusion and require correction. And the same is true of lawyers in their use of first-order practical concepts such as contract, tort and causation.

Dworkin's claim is rather that an important subset of lawyers' arguments - normative arguments about the resolution of particular cases - embed the use of differing conceptions of law. When two lawyers disagree

about a legal issue, he suggests, they are best interpreted as holding different background understandings of the concepts that they deploy; not differing views about what *the law* is on a particular matter, because that is trivially true, but conceptions of law *simpliciter*. And it is these deep divergences concerning jurisprudence, Dworkin says, which explain their surface convictions and differing dispositions about the case at hand. In this sense, he concludes, there is a direct connection through from theory to practice.

What is the intended force of the argument?⁶ Dworkin's aim is to show that there can be no prospect for a theory of law that attempts to comprehend

⁶ I simplify here, and focus on one of the supposed implications of Dworkin's argument. There are others. Notably the argument about the relation between theory and practice was also intended to motivate the political aspect of Dworkin's theory, the claim that the general theory of law, because of its role at the foundation of legal argument cannot aim at detachment from the ethical perspective but must instead be understood as actively engaged, as making a moral difference in much the same way as legal argument. The theory of law, Dworkin claimed, must be normative, in the sense of aiming at the realization of certain political ends:

We understand legal practice better, and make more intelligible sense of propositions of law, by pursuing an explicitly normative and political enterprise: refining and defending conceptions of legality and drawing tests for concrete claims of law from favored conceptions.

Jules Coleman says, similarly, that on Dworkin's view 'analysis of our concept of law -the distinctly philosophical approach to explaining it - cannot be a descriptive activity of identifying the shared criteria of application for the term 'law'. Instead, the distinctly philosophical account of law is interpretive, and thus normative; it is an effort to provide the best interpretation of our...practices [sic] of applying the concept of law. Legal philosophy - jurisprudence - is thus a branch of political philosophy.' Jules L. Coleman, *The*

the basic rules of legal practice, to supply the 'criteria' for the ordinary use of the concept of law and other fundamental legal concepts.⁷ Why? Because the prevalence of theoretical disagreement – normative disagreement about the resolution of particular cases, disagreement which in turn demonstrates divergence in the use of such concepts – shows there to be no such ground rules.⁸ If legal argument, at least in certain cases, involves the urging on either side of differing conceptions of law – if one side holds that a particular right accrues because this is dictated by the theory of legal rights to which they are committed, and the other denies this because they operate under a different conception – then the fact of disagreement will show the parties to be using different criteria, following different rules, in their use of the relevant concept.⁹

Practice of Principle : In Defence of a Pragmatist Approach to Legal Theory (Oxford University Press 2001) 156. See Dworkin, *Justice In Robes* 170

⁷ Dworkin, *Law's Empire* 31

⁸ Ibid 46. Dworkin uses the term 'theoretical disagreement' to range ambiguously over two distinct types of disagreement: disagreement about the criteria for law in particular systems, and disagreement about the criteria for the application of the concept of law and other basic legal concepts. See, on this point, Coleman, *The Practice of Principle : In Defence of a Pragmatist Approach to Legal Theory* ch 11. Dworkin's arguments about the former have received the most treatment in the literature, and here we focus on the latter. See Scott Shapiro, 'The Hart/ Dworkin Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press 2007) and Brian Leiter, 'Explaining Theoretical Disagreement' (2009) *The University of Chicago Law Review* 1215

⁹ See, for example:

This is how, by way of comparison, Dworkin imagines our disputes about justice:

We do not follow shared... criteria for deciding what facts make a situation just or unjust. Our most intense disputes about justice – about income taxes, for example, or affirmative action programs – are about the right tests for justice, not about whether the facts fit some agreed test for justice in some particular case.¹⁰

Dworkin's claim is that our disagreements about this concept show us to be using different criteria in determining its content. The utilitarian and the libertarian, for example, disagree about the best 'test' for justice and not merely about the empirical circumstances which inform the application of a shared view: 'a libertarian thinks that income taxes are unjust because they take property from its owner without his consent... a utilitarian, on the other hand, thinks that income taxes are just only if they contribute to the greatest

'When a lawyer declares, for example, that it is the law that price fixing contracts are illegal, he is using the concept of law in stating the content of the law of a particular community. I [rely] on that particular connection in posing this question: if two lawyers appear to disagree substantially about the content of the law, as lawyers often do, do they therefore have different concepts of law...? I pointed out that they cannot share the same concept of law if we accept... the criterial view of concept sharing... I concluded that because lawyers obviously do genuinely disagree about the content of the law of their jurisdiction... the criterial view of how they share a concept must be wrong.'

Dworkin, *Justice In Robes* 221

¹⁰ Dworkin, *Law's Empire* 73

long-run happiness...'.¹¹ These actors, Dworkin contends, are not united in the use of the relevant concept but in argument about the best criteria *for* use. It follows that, with regard to important political concepts of this type, philosophers cannot ground their theories in the shared rules which structure our practices of using them, for there are none.¹² And so Dworkin claims for law:

[L]egal philosophers are in the same situation as philosophers of justice... They cannot produce useful semantic theories of law. They cannot expose the common criteria or ground rules lawyers follow for pinning legal labels onto facts, for there are no such rules.¹³

Our description of the problem is currently impressionistic and thin – we will use examples later in the chapter to make clearer Dworkin’s argument about law – but the important point to notice is that if he is right about phenomenology of disagreement, if he is right that legal disagreement involves the use by lawyers of different criteria or rules in the deployment of legal concepts, then it follows that we cannot look to the foundations of legal practice, to the competences of those who act so as to maintain the institution, for the standards by which to determine our best theory. If Dworkin is right,

¹¹ Ibid 73

¹² For a different view about the depth of disagreement in morality and its relation to the possible aims of moral philosophy see Derek Parfit, *On What Matters* (Oxford University Press 2011) ch 34

¹³ Dworkin, *Law's Empire* 90

'...the project of digging out shared rules from a careful study of what lawyers say and do, [is] doomed to fail...'.¹⁴

Dworkin's argument, then, stands in direct opposition to the conception of analysis developed in this thesis. For I have argued not only that those who maintain legal institutions share legal concepts in the sense that Dworkin denies – i.e. that the identity of the basic legal concepts that inform their actions is given by the rules for the use of such concepts – but also that legal philosophy is responsive, in the last, to the structure of these concepts, as a description of the rules that we go by.

In the first section I canvass two interpretations of Dworkin's argument for the connection between theory and practice, both of which allow that lawyers' disagreements unsettle the general picture of legal practice that is here being defended. Neither, I argue, is ultimately successful. In the second section, I suggest reason to favor the view that there exists, amongst institutions and legal actors, a genuine unity in the use of legal concepts, despite the prevalence of disagreement in law.

Is Dworkin Right?

¹⁴ Ibid 43

What, then, do Dworkin's arguments establish? We must distinguish between strong and weak versions, both of which are alluded to in the passage with which we began. On the strong interpretation, Dworkin's claim is that because legal practice has 'abstract foundation' with which the philosopher is concerned, it follows that '... any judge's opinion is itself a piece of legal philosophy'.¹⁵ The notion here is that competing legal arguments *are themselves* competing philosophical arguments. On the weaker interpretation it is not that judicial opinion counts itself as theoretical, but that divergent judicial claims imply the use of different conceptions of law. This is the idea that practical legal argument '...assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others'.¹⁶

Let us first pursue the strong version of the argument, the claim that legal argument is, in the pertinent sense, theoretical. On this interpretation, because legal practice 'assumes' an 'abstract foundation', it follows that a legal claim itself forms an aspect of a general theory of law.¹⁷ The first point to note is that there is a problem with the way Dworkin puts the point, by suggesting, as he does, that practitioners in their arguments *assume* the abstract or conceptual aspects of law. For, strictly speaking, what is assumed

¹⁵ Ibid 90

¹⁶ Ibid 90

¹⁷ Ibid 90

or presupposed by a legal argument is not abstract and conceptual, but concrete and actual. A person making claim at law presupposes not a general concept or range of such concepts but the existence of a functioning legal system. They assume, as the point was put in the second chapter, an institutional context. The claim that a particular individual is entitled to a legal right by US law, for example, does not *presuppose* the concept of law and related concepts but, instead, the existence of an institution – the US legal system. Nonetheless, institutional concepts do feature in this relation, and in two ways. First, as I argued in chapters two and three, those acting so as to maintain the institutional background against which claims at law are made and assessed, i.e. the courts, themselves do so by using basic legal concepts, concepts that furnish the ground rules of their practices. Second, such concepts also feature in the activities of those making legal claims, although in a different way from that suggested by Dworkin. A claim of legal right, on the part of a practitioner or layperson, involves not the assumption but the *use* of the relevant concepts. In making the assertion that a particular individual has a right to free speech under the US constitution, for example, I use, but do not presuppose, the concept of law.

With this amendment in mind, we should grant a version of the premise – it is true that legal argument employs the abstract foundation which legal theory, when successful, explains: the theory of law attempts to provide an accurate understanding of the most basic concepts which feature in the language of law, in the practices of institutions and in legal argument,

the concepts of authority, obligation, etc. The problem is that the conclusion, that legal argument is itself philosophical, or that opposing legal arguments contain opposing conceptual theories, does not follow. The fact that such arguments have a conceptual foundation does not entail that the claims of practitioners are claims *about* the foundation. Indeed, it shows that they are not.

Consider by analogy the relation between the claims of scientists and the subject matter of the philosophy of science. The latter seeks to explain the methods and aims of scientific practice. Philosophers of science debate, for example, whether scientific theory aims at objectivity – whether it aims at a representation of how the world *is anyway*, as Bernard Williams famously put the point – or holds itself out to some other more minimal and pragmatic standard of assessment, perhaps by being useful for human purposes in a way which does not appeal to the notion of representation. This is a debate about the concepts used within scientific practice, the scientific standards of assessment, evidence and truth. But it would be wrong to say that this fact shows scientific claims themselves to be small-scale works in the philosophy of science. Whilst scientific practice involves the use of concepts that this area of philosophy aims to explicate – the concepts of inductive reasoning, confirmation, etc. – it does not, for this reason, *become* philosophy. Heisenberg's uncertainty principle is a principle of science, not a principle of the philosophy of science.

And so in law. The truth of the proposition, that legal argument employs those concepts which legal theory seeks to explain, does not entail the conclusion that legal claims express philosophically controversial conceptions of the subject. Consider, for example, the way in which the concept of legal validity features in practice. If I were to claim that a particular standard were legally binding and had bearing upon a present dispute, this would be a claim about whether the standard displayed the property of validity – it would be a claim that this standard was in itself legally valid. It would not be a claim *about* the concept of legal validity (the question being whether this standard passes the test, we must keep our understanding of what the test is fixed). This remains the case even though the claim involves the concept.¹⁸

So the strong version of Dworkin's argument will not go through. But perhaps we can save the connection between theory and practice in a different

¹⁸ The same is true in ethics and the division between first order discourse and meta-ethics is maintained despite Dworkin's arguments to the contrary (see n4). We can well understand the distinction between claims about the domain of discourse – claims about morality – and claims within it – moral claims. The meta-ethicists theory is good if it captures, properly, the nature of ethical judgment; the investigation is about the general structure of our ethical concepts. False meta-ethical claims do not capture the perspective, but they are not – contra Dworkin – to be assessed from within it. Subjectivism, for example, is false because it does not square with our capacity to reason properly about morality – a capacity all moral agents have and display even in the face of the now fashionable relativistic onslaught – not because it is itself a pernicious morality. See Dworkin, 'Objectivity and Truth: You'd Better Believe it'.

way. Whilst rival legal claims are not themselves theoretical, it might be conceded, they display in their divergence *implicit* adherence to different conceptions of law on the part of those who make them: this is the weaker and perhaps more plausible interpretation of Dworkin's argument. The idea is that whilst the surface grammar of legal disagreement is not philosophical, those engaged in argument about the resolution of particular cases reveal, at a deeper level, adherence to differing understandings of basic legal concepts. Their claims, whilst not directly about such concepts, imply different conceptions thereof. This is one way of making sense of Dworkin's claim that 'any practical legal argument... assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete, a legal argument assumes one and rejects others'.¹⁹ The formulation, unlike the previous one, is compatible with the notion that in the decisions of courts 'the philosophy is hidden and the visible argument is dominated by citation and lists of facts'.²⁰

An assumption of the argument is that those who furnish philosophical explanations of basic legal concepts, in doing so, take sides in actual legal disputes which we see litigated in courts, that jurisprudence speaks to us when we engage in the normal practice of adjudication by urging one decision over another. For if this were not the case, then we would not be able to make sense of the claim that practical disagreement implicates, as a general

¹⁹ Dworkin, *Law's Empire* 90

²⁰ *Ibid* 90

matter, theoretical or conceptual disagreement. That claim, to be clear, is not the superficial one, that judges are often wedded to particular political philosophies and that these influence their practical decision-making capacities, for that point is manifest and no one would deny it.²¹ The claim is rather that general approaches which seek to provide a systematic understanding of legal practice figure, controversially, at the basis of legal argument and that legal disagreement involves implicit adherence on the part of its participants to differing conceptions of law. But does general jurisprudence play this kind of substantive role? Dworkin motivated the assumption that it does most clearly with his famous discussion of Mrs. Sorenson's case, an imagined example which tracks a real controversy in tort law – the issue of market share liability. We will follow him in using the case in order to test his claim.²²

Mrs. Sorenson was injured by a generic drug that she had been taking for many years, and which she had purchased from a number of different pharmaceutical companies. Each would uncontroversially have been liable had Mrs. Sorenson been able to prove that the drugs they manufactured had

²¹ This holds true even when the political approach in question achieves currency in law schools as has occurred, for example, with the law and economics movement. For, whatever else theories of this type are, they are not and do not imply general theories of law.

²² Dworkin, *Justice In Robes* ch 6. What follows, on the interpretation of Mrs. Sorenson's case, and on Dworkin's misdiagnosis, owes much to Timothy Endicott, 'Adjudication and the Law' 27 *Oxford Journal of Legal Studies* 311

caused her harm, but she was unable to show which she had purchased from at any given time and resultantly which particular defendant's drugs had injured her. Mrs. Sorenson's lawyers argued that this fact, the lack of a causal connection with a particular defendant, should not stand in the way of her claim to compensation; each company had manufactured a dangerous drug and should be held accountable in accordance with their share of the market over the years of her treatment. They argued for the principle that 'those who have profited from some enterprise must bear the costs of the enterprise as well'.²³ The lawyers for the drug company, on the other hand, argued that such a ruling would contradict the long-established rule that no defendant should be held liable absent the proof of a causal link between harm to the claimant and their particular wrong. No time-honored rule of law allowed the novel claim to succeed, and so it should be rejected.

The dispute that Dworkin imagines is one which bears the hallmarks of a typical appellate case: the claims both in favor of Mrs. Sorenson's right to recover, and those against, are intelligible as legal arguments and it is not clear that either is groundless. Such structural aspects will be familiar to anyone with more than a passing understanding of legal practice. In what sense, however, are the claims of either side taken to involve the competing uses of concepts? In what sense does the disagreement involve different conceptions of law? To understand this interpretation we need to know more

²³ Dworkin, *Justice In Robes* 144

about Dworkin's theory, and about his own understanding of opposing theories.

On Dworkin's view, legal argument is best understood as 'interpretive' and he gives that concept a special sense. The basic idea is that the truth of a particular legal claim will depend upon '...principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practice'.²⁴ The theory is one that is opposed to theories that take law to be grounded ultimately in the rule-following practices of particular institutions – Dworkin takes as his target Hart's theory of law, but the criticism applies to all conceptions that stress this institutional aspect, and the implicated view that law has social, as opposed to moral, sources. It is this kind of theory that Dworkin wants to implicate as political, as taking sides against his own view in ordinary legal argument.

How does this dispute about the nature of law relate to Mrs. Sorenson's case? Dworkin paints his own theory as permissive in the sense that it might tolerate either a decision in favor of Mrs. Sorenson or a decision against her claim:

In my own view [those who are tasked with deciding the dispute] should try to identify general principles that underlie and justify the settled law of product liability, and then apply those principles to this case. They might find, as the drug companies insisted, that the principle that no one is liable for

²⁴ Ibid 14

harm that neither he nor anyone for whom he is responsible can be shown to have caused is so firmly embedded in precedent that Mrs. Sorenson must therefore be turned away with no remedy, Or they might find, on the contrary, considerable support for the rival principle – that those who have profited from some enterprise must bear the cost of that enterprise as well, for example – that would justify the novel market-share remedy. So on the view I favor Mrs. Sorenson might, but does not necessarily, have the best case in law.²⁵

The law may require, because the best moral interpretation leads us to this conclusion, that we respect the long-established principle of causation. Or that it may, in the final analysis, require greater respect for the principle that one bear the costs of one's risky behavior. Everything depends, for Dworkin, on the best moral reading.

The matter is different, Dworkin claims, when we come to consider a number of alternate theories that can only be taken to support the claims of the defendants. A theory that suggests that the content of law is fixed by institutional practices in a way that does not depend upon morality, he says, must side against Mrs. Sorenson. The view that law consists only in social standards identified in accordance with the practices of the courts is, on Dworkin's view, 'very far from neutral as between the parties in Mrs. Sorenson's case'.²⁶

The drug companies' lawyers made [an argument which assumes that the content of law is determined only by existent

²⁵ Ibid 164

²⁶ Ibid 164

social standards]. They said that her claim fails because nothing in the explicit law of the state, as identified by settled legal conventions, provides for such a claim. Mrs. Sorenson's lawyers argued to the contrary. They denied [this conception of law]: they said that general principles inherent in the law entitled their client to win.²⁷

Dworkin's idea is that because, *ex hypothesi*, the existent law – identified by reference to institutional criteria – does not support the market share claim, someone who adopted a theory which suggested that the content of the law was fully determined by the practices of law-applying institutions would be required to deny Mrs. Sorenson's claim. And so it might seem as though this legal dispute really does involve the use of different conceptions: Dworkin's moral theory allows a result that an institutional understanding of law cannot tolerate.²⁸

But does the latter theory really take sides in Mrs. Sorenson's case? We must answer in the negative. Dworkin's argument trades on a *non sequitur* and it is important to see how. For he moves from the claim that existent law,

²⁷ Ibid 164

²⁸ Endicott says, with reference to Hart's theory of law:

If Dworkin's argument were sound, then Hart's theory of the nature of law would take sides against Mrs. Sorenson, in a genuine controversy over the content of the law of her jurisdiction. That would undermine Hart's 'sources thesis'. For, if the sources thesis is aligned with one side and against the other in a genuine legal dispute, then the sources thesis is not a general truth about law, but only a traditionalist argument in favor of one side in a dispute over what the law really is.

Endicott, 'Adjudication and the Law' 314

identified in the way proposed by his theoretical target, does not support Mrs. Sorenson to the claim that she must, on such a conception, lose her case.²⁹ But the conclusion does not follow, and a theorist who disagrees with Dworkin should not accept the transition.

One problem with the argument is that it rules out the possibility that a judge, faced with a case like Mrs. Sorenson's, may be imbued with a creative jurisdiction that would enable them to grant her a right to recovery despite the novel nature of her claim. So, whilst such a right may not yet be written into the law, the jurisdictional power of the court to grant a right to recovery may well be, the existence of a such a jurisdiction being, itself, identifiable in accordance with the rule of recognition employed by the courts. Timothy Endicott makes the point:

What if the social sources of the law do not support the conclusion that Mrs. Sorenson has a legal right to compensation? Contrary to Dworkin's argument, that would not mean that, so far as the law is concerned, she must lose. If the law gives the court power to create a new legal rule entitling her to damages, and to give effect to that new rule in the case, then the law does not require that she lose... Far from imposing a general ban on awards of compensation of a kind that has never been ordered before, the law commonly gives a court a restricted authority to make a novel award.³⁰

The basic point is that those arguing on Mrs. Sorenson's behalf may have other resources at their disposal than a claim about existing rights and

²⁹ See *ibid* 315-317

³⁰ *Ibid* 315

liabilities. If before a court that is appropriately situated, in the sense of having the relevant jurisdictional capacity, then they may also be able to argue that the law is developed so as to recognize claimants like Mrs. Sorenson and the potential injustice of denying them compensation. Whether such an argument would be successful would, of course, depend upon whether the court would be willing to take up the invitation to impose a new legal liability, but it is not ruled out as a possibility by a theory that takes the content of law to be determined exclusively by the rule-following practices of such institutions.

Dworkin is, of course, famous for having argued that all legal disputes are about the interpretation of the existing law and not, as we would naturally think, sometimes about the best way of developing the law. His conception of fidelity to law or 'legality' demands that decisions be made only when 'licensed or required by individual rights and responsibilities flowing from past political decisions'.³¹ But this controversial premise of *his own theory* cannot form the central part of the argument against alternate accounts which are willing to admit the possibility of judicial law-making. It is well and good, in other words, to dispute the view that argument in law may establish new rights and obligations, but it is not acceptable to simply assume against the

³¹ Dworkin, *Law's Empire* 92

possibility when assessing the explanatory worth of a theory that holds otherwise.³²

Now, it might be objected that I have merely moved the problem one step further back or else failed to do anything, for the matter of Mrs. Sorenson's fate still depends, on this picture, upon whether there actually exists an identifiable power on the part of the judiciary in her jurisdiction to recognize her claim. Dworkin's view is open to the possibility of her succeeding *as a matter of right* whereas the theory that he opposes suggests that her ability to recover might be ruled out if there exists no power to impose a new liability, and no favorable standard written into the law. So the theory of law as a system of social rules might, in the last analysis, still take sides in Sorenson's case.

The objection proceeds from a misunderstanding of the argument, and this brings us to the more important problem with Dworkin's interpretation. It is not, on this view, that the theory of law determines the acceptability of her claim, that the conception to which Dworkin is opposed 'takes sides'. The legal justifiability of a claim either in favor of Mrs. Sorenson's right to recover or against is, I am saying, a matter which depends ultimately upon the rules of the jurisdiction in which it arises, both those which impose liabilities and

³² For Dworkin's argument against the permissibility of appeal to judicial law-making in jurisprudence see *ibid* 15-40. I argue against such a conception in chapter seven.

those which grant judges the power to impose new liabilities. And the general theory of law says nothing *substantive* about these matters.³³ The legal answer to Mrs. Sorenson's problem depends on the system and not on mediation by way of theoretical explanation.

Consider again, by way of comparison, our earlier discussion of the relation between the philosophy of science and scientific practice. We noted that one of the major tasks of the philosophy of science was to explain the concepts that underlie the formation of scientific theories. Here we are seeking an explanation, first, of what it is to form a theory of the right type – what would make a theory scientific as opposed to pseudo-scientific – and, second, what it would be for such a theory to be true. But notice that this task merely circumscribes *possibilities* for the discipline. What ultimately makes a theory respectable depends, contextually, upon its relation to available *a posteriori* evidence, at a more basic level, upon its relation to causal processes in the natural world. Theory, in the philosophical sense, does not determine the correctness of particular scientific models, although it does seek a proper understanding of the approach. The same is true of the relation between the general theory of law and specific claims within jurisdictions. A sound

³³ The theory of law must certainly explain what it is for the law to have the content that it does. It must explain, for example, why it is the case that in Britain it is illegal to drive above 70mph on any road, and why in other countries the matter is different. But telling a story about why this is the case is quite different from telling a story about whether, in a particular system, it is the case. See Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 77-78

understanding of the concepts that feature in legal practice determines possibilities, not actualities.

So it is wrong, in a way, to say what I said earlier: that, on the theory I have been defending, Mrs. Sorenson may have further resources, because the existence or non-existence of the relevant judicial power is not itself an implication of the theory of law which Dworkin attacks. It is instead a *possibility* under it. The philosophical approach, in other words, leaves open the matter of law. Just as the respectability of a particular scientific claim depends upon its relation to the evidence, so the respectability of a legal argument depends upon its relation to the constitutional particularities of the system in which it is deployed. And the point is not specific to Mrs. Sorenson's case. A general jurisprudence will not rule on the substance of disputes nor on the powers and duties in particular jurisdictions. These are matters of law, not theoretic explanation of the concepts that feature at its basis.³⁴

³⁴ Raz makes the point in terms of the 'content independence' of the theory of law. Here he discusses this aspect of Hart's theory:

A central feature of Hart's explanation of the nature of law is that it is just about absolutely content-independent at bottom. That is, the fundamental criteria for validity, those whose existence does not presuppose others, are almost entirely content independent. Jurisprudence stipulates that legal systems are systems with a certain structure (including law making and law applying authorities). But beyond that, all is contingent. The content of the law and the specific identity and powers of its institutions are entirely dependent on the relevant practices in the country, i.e. on its rule of recognition.

To see that this is so, we might consider the argument of one of Dworkin's sympathizers, David Dyzenhaus, for he also attempts to maintain an imperative link between theory and practice.³⁵ Dyzenhaus' focus is on the interpretive method of judges who acted in apartheid South Africa and his claim is that their endorsement of alternate conceptions of law wedded different judges to different 'styles of reasoning'.³⁶ Those who favored theories which held law to be institutionally determined, Dyzenhaus argued, would be more likely to accept a 'plain fact' style of legal interpretation whereby statutes were interpreted as 'the government wanted them interpreted'.³⁷ By way of contrast, those who endorsed theories closer to Dworkin's would interpret the law in light of fundamental principles of justice accepted as part of the common law tradition of the country, thereby hampering the injustice intended by the apartheid regime.

See *ibid* 78. This understanding of the relation between theory and practice differs from that, recently criticized by Kevin Toh, according to which legal philosophy is seen as providing the grounds for first order legal claims. It does not do that. Instead, it explains their possible forms. See Kevin Toh, 'Jurisprudential Theories and First-Order Legal Judgments' (2013) 8 *Philosophy Compass* 457 459-463

³⁵ See David Dyzenhaus, *Hard Cases in Wicked Legal Systems : Pathologies of Legality* (2nd edn, Oxford University Press 2010)

³⁶ *Ibid* 198-205

³⁷ *Ibid* 198. For the argument aligning positivism to the 'plain fact view' and a response to critics see *ibid* ch 6

Consider the case of *Telegraphs v Rasool*.³⁸ The question before the court was whether an instruction by the Postmaster-General to divide a post office into 'European' and 'Non-European' sections was lawfully authorized under a power to issue instructions 'deemed necessary' for the carrying out of official duties. Dyzenhaus characterized the reasoning of the majority, which deemed the directive lawful, as being deeply wedded to the historical record. They argued that:

If one looks at the history of [statutes such as the one in question] it is clear that they form part of a pattern of segregation of whites from blacks. The pattern is such that the best historical explanation of any statute that seems to belong to this class is that it forms part of an overall design initiated by whites because they consider blacks inferior and want to avoid all social contact with them.³⁹

The claim of the majority was that because those who composed the legislature intended the relevant statute to further their policy of segregation, this fact should constrain interpretation of the statutory power. They reasoned directly from 'plain facts' about the institutional context, through to the best understanding of the limits of the statutory power in question.

By way of contrast, Gardiner AJA, writing for the minority, held that there existed a general principle of equality before the law. This was a principle to which 'the courts of law must give effect, save where the

³⁸ *Telegraphs v Rasool* 1934 AD 167, discussed in *ibid* 42-54

³⁹ *Ibid* 47-48

legislature has made provision to the contrary'.⁴⁰ Because the power in question did not explicitly authorize the racist distinction drawn by the Postmaster, Gardiner would have declared the instructions ultra-vires. This latter approach, because of its attachment to the importance of judicial principles, Dyzenhaus calls the common law approach and he associates it with Dworkin's theory.

Why does Dyzenhaus believe this latter argument to be unavailable to those who adopt a theory which grounds law in the recognitional practices of the courts? The argument moves from a particular theory of legislative intent, itself supposedly an entailment of an institutional theory of law, through to a claim about the possibilities for judicial decision on such a theory. And at every stage in the argument there is room for doubt. We can leave to one side the question about the connection between the historical record and the best understanding of legislative intention – although this too is unpersuasive as an implication of an institutional conception of law⁴¹ – and focus on the relation between statute and the best decision in the case. Assuming that the statute, unmediated by the common law, has the content that the majority

⁴⁰ Ibid 50

⁴¹ We might note in passing that a principle which assimilates the intentional content of a communicative utterance with the intended effect of such communication – interpreting the government's edicts 'as it wants them to be interpreted' – elides the important distinction between intention in action and the intended consequence of action. For this reason, amongst others, it cannot count as part of a good theory of legislative interpretation by anyone's lights.

suggests, what prevents the courts from using judicial principles to mediate its application?

No fact about a general theory. If the principle of equality before the law is firmly established in the common law tradition of the country, as Gardiner claims it is, then it has a social source; and if judges have a general practice of treating the common law as supplying principles which condition the actions of the administration then, because of the role of their rule-based practices in determining the shape of the legal system, it does. Both of these facts are entirely compatible with a theory of the type that Dyzenhaus wishes to make trouble for.

But perhaps, as with Mrs. Sorenson's case, we can tighten up the description such that there exists no such avenue of argument. What if, in the last resort, South African judicial practice did not support activism of the kind required to sustain Gardiner's approach? The possibility is a real one, but this would be a failing of the South African legal system in the face of justice, and there were many at the time; it would be no fault of jurisprudence. There is nothing about a theory of law that grounds the validity of legal standards in the practices of the courts, their capacity in recognizing and applying the law, that stands in the way of the common law playing the envisaged role.⁴² The

⁴² Dyzenhaus' failure to see these points owes much to his assimilation of the institutional thesis which he is opposed to with the views of a number of historical figures who endorsed it and who were also opposed, politically, to

point is again that the matter is one of law within the jurisdiction. There is here, as there was with Mrs. Sorenson's case, only the appearance of partiality, the implication of a general theory despite the fact that it does not play the required practical role.⁴³

Intelligibility and the Grammar of Legal Discourse

Where, then, does our argument leave the relation between theory, general concepts and practice? I have said, first, that lawyers' debates are about the law, not the nature of law. Second, I argued that the general theory of law, when understood as an investigation into the basic concepts that feature in institutional action, is not properly to be thought of as taking sides in legal

judicial activism, Bentham being his most obvious target. But the fact that a theorist endorses two distinct propositions does not show them to be connected in a theoretically interesting way, and we have good reason in this case to doubt that they are. See, for a defense of this view Dyzenhaus, *Hard Cases in Wicked Legal Systems : Pathologies of Legality* ch 8

⁴³ John Gardner explains the motivating attitude of the alternate picture well:

When a philosopher of law asserts a proposition that neither endorses nor criticizes what [lawyers] do, but only identifies some necessary feature of what they do, [the latter] are often frustrated. They automatically start to search for hidden notes of endorsement or criticism, secret norms that they are being asked to follow. They refuse to believe that there are none. They cannot accept that legal philosophy is not wholly (or even mainly) the backroom activity of identifying what is good or bad about legal practice, and hence of laying on practical proposals for its improvement (or failing that, abandonment).

See Gardner, *Law as a Leap of Faith : Essays on Law in General* ch 2

disputes. Having criticized Dworkin's conception of the relation between theory and practice, I conclude here by offering a positive reason to favor the picture with which we began – a picture on which there exists an important distinction between the subject of legal disagreement – interpretation and innovation in the law – and the basic conceptual aspect of legal discourse, which is the subject matter of general jurisprudence. This has to do with the intelligibility of the claims of those who argue about law.

We find ordinary disagreements between judges, lawyers and laypeople intelligible *as* legal disagreements because they conform to the ground rules of legal argument, and thereby involve the fundamental concepts with which general jurisprudence is centrally concerned. In all cases the fundamental starting point are the criteria for identifying law employed by the courts, and the concepts that relate to this practice. Both interpretive disputes and disputes about the development of the law involve the use of, for example, the concept of legal validity or, as Dworkin would have it, the concept of the grounds of law. A dispute about interpretation is about the meaning of a legally valid standard – that is, one identified in accordance with the system's rules of recognition – and a creative disagreement between judges about the development of the law presupposes the existence of a valid law-making power, identified in the same way. The concepts hold constant, and the rules for their use form the plateau upon which disagreement takes place.

Now, it is of course true that one or both parties to a legal disagreement may be wrong in their initial assumption. It may be that the standard which they take to be legally valid for the purposes of interpretation, or on which they base their assumption of power, is not identified as such within the system. But we can only make sense of their claim as embodying good faith *legal disagreement* if we assume that they invoke the general, conceptual part of legal practice, although they are wrong in their understanding of the reach of their own system. In such a case, they would be comparable to someone who mistakenly imports a standard from another language, or from none at all, whilst attempting, in good faith, to speak their own. Although their particular judgment about the reach of their own language is wrong, their general competence shows familiarity with the rules for the use of the concept of a language. Indeed, it is a condition of our engagement with them, and of our ability to correct them when wrong, that they accept the criteria that determine what counts as a language and what counts as a linguistic error.

This point about intelligibility is fundamental, and Wittgenstein stressed it most persuasively.⁴⁴ One of the most important claims of his later philosophy is that disagreement, genuine disagreement within a practice, is only intelligible against a shared background of rules for the use of concepts. When a student goes wrong in mathematics, for example, our ability to

⁴⁴ See Wittgenstein, *Philosophical Investigations* s 143-144

correct them depends upon them sharing with us the concept of a number scheme, and an understanding of what counts as going right relative to that system.⁴⁵ Indeed, the very thought that what the student is doing is mathematics relies upon us attributing to them these concepts.⁴⁶ And so it is in law: it is only because you and I both comprehend what it means for someone to have a legal right, i.e. we share criteria for the use of the concept, that we are able to argue intelligibly about whether Mrs. Sorenson should be awarded damages. We share this and other concepts – the concepts of recognition, of legal authority and obligation. It is this joint vocabulary that makes possible our various disagreements. It is because we both, to use the well-worn metaphor, play according to the rules of the game that our claims properly engage.

⁴⁵ Wittgenstein explains:

Let's now examine the following kind of language game: when A gives B an order, B has to write down series of signs according to a certain formulation rule. Let the first of these series be that of the natural numbers in the decimal system. – how does he come to understand this system? First of all, series of numbers are written down for him, and he is required to copy them... And here already there is a normal and abnormal learner's reaction. – At first, perhaps, we guide his hand in writing out the series 0 to 9; but then *the possibility of communication* will depend on his going on to write in down by himself. – And here we may imagine, for example, that he does copy the figures by himself, but not in the right order: he writes sometimes one, sometimes another, at random. And at *that point* communication stops...

Ibid s 143 p 62

⁴⁶ And if we do not share these we will have to revert to more basic lessons.

What general jurisprudence does is to scrutinize these basic aspects of our legal practices, the concepts that make each of us intelligible to each other, and structure the actions of our institutions. Indeed, this fact – the fact that jurisprudence stands outside of, and seeks to understand from a more detached perspective, the basic rules of legal practice – may help to explain why many professional lawyers see little utility in the theory of law, at least in its explanatory, as opposed to its explicitly normative and critical, mode. Its questions – questions about the nature of law, as opposed to questions about the law – are not theirs. The theory does not speak to them, at least not directly. And this is so despite the fact that it is about the practice in which they engage every day.⁴⁷

It is worth noting that Dworkin addressed the problem of intelligibility in his own work, albeit in a radically different way. He suggested that both practitioners and theorists aim to offer arguments that together share as their object the aim of justifying the use of coercion on the part of the state:

... I suggest the following as an abstract account that organizes further argument about laws character. Governments have goals: they aim to make the nations they govern prosperous or powerful or religious or eminent; they also aim to remain in power. They use collective force they monopolize to these and other ends. Our discussions about law by and large assume, I

⁴⁷ Dworkin, of course, disagreed. He said that the theory of law should ‘speak for Mrs. Sorenson and for all the others whose fate depends on novel claims about what the law already is. Or, [if it] can’t speak for them, at least speak to them, and explain why they have no right to what they ask.’ Dworkin, *Justice In Robes* 186

suggest, that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to the ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.⁴⁸

Rather than sharing in criteria for the use of legal concepts, as I have suggested that participants in legal practice do, Dworkin urged the view that participants in both legal argument and legal theory share a political end.

Why will this not do? The condition implies a deeply controversial theory of law – as a constraint on state action – and this renders unintelligible a large swathe of legal argument, argument, for example, that aims at declaration rather than justification, as well as a number of plausible general theories, theories which aim at conceptual elucidation and description as opposed to political validation, before discussion has even commenced. Indeed, it is hard to think of a single treatment of jurisprudence other than Dworkin's that aims explicitly to provide the conditions under which the exercise of state coercion would be justified.⁴⁹ The suggestion cannot claim to offer the bedrock of agreement from which we are able – as practitioners

⁴⁸ See Dworkin, *Law's Empire* 93. For a defense of a theory of this type which does not rely upon Dworkin's plateau, but which instead seeks to ground it, see Nicos Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' (2009) 22 *Ratio Juris* 339

⁴⁹ Perhaps Hobbes' genealogical explanation of the need for the state comes closest.

arguing about the law or as theorists attempting to arrive at a general theory – to proceed.

Does our conclusion suggest that Dworkin's own theory, a theory which speaks explicitly to lawyers and takes up a controversial justificatory task, does not qualify as a general jurisprudence? This was Hart's view. He wrote that '[l]egal theory conceived... as [a general theory of law] is a radically different enterprise from Dworkin's conception of legal theory... as in part evaluative and justificatory and as addressed to a particular legal culture'.⁵⁰ Dworkin himself would have refused the conclusion. On his view, the difference between general jurisprudence and the practice of adjudication was a matter of degree and not kind, but I have here considered and rejected his arguments that we should think of the issue in this manner.

Conclusion

I have suggested in this chapter that Dworkin's argument concerning the connection between legal practice and theory does not hold; controversies relating to the nature of law differ in kind from controversies concerning the

⁵⁰ Hart, *The Concept of Law* 240. See also Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 33-34. Dworkin said of his theory, and of theories of the same type that they were 'by their nature addressed to a particular legal culture, generally the culture to which their authors belong.' But he later came to doubt this limitation on the generality of his theory. See, for the original position, Dworkin, *Law's Empire* 103. For the later view see Dworkin, *Justice In Robes* 162-163

law in particular jurisdictions. Legal disagreements do not involve the use of alternate conceptions of law and so the fact of disagreement in law does not imperil our claim that institutional actors are united in the rules for the use of legal concepts, or that it is their shared practices of concept use to which jurisprudence responds. Indeed, as I argued in the last section, the best understanding of their disagreements supports these contentions.

But this conclusion raises a different problem. For even if the arguments of lawyers, judges and skilled laypeople occur against a shared conceptual backdrop, such that their disagreements do not imperil our general picture, theorists and philosophers of law surely do disagree about the nature of law. An important issue, which remains unresolved, then, is why the development of the general theory of law- if it is truly a theory that responds only to our shared use of concepts - is marked by difficulty and philosophical disagreement. If, as I have claimed, the answer to the question about the nature of law is written into our shared language, as the basic part of our conceptual practices, it is justified to ask why it persists. It is to this question which we turn in the next chapter.

Chapter Five: Opacity in the Context of Institutions

Introduction

I have argued that legal institutions, and the rights and obligations which constitute the content of the law in particular legal systems, are borne out of a shared practice, a practice that depends upon the manifestation of a distinctive conceptual capacity in the actions of law-applying agents. This is why conceptual investigation forms the central aspect of the theory of law. In the last chapter, I defended this thesis about the nature of legal institutions against Dworkin's suggestion that the structure of disagreement in law – disagreement about the state of the law in particular jurisdictions, or about how to resolve particular cases – shows the law's agents not to accept common rules or criteria for the use of legal concepts. The claim, I suggested, fails both when interpreted as an argument about the subject matter of legal disagreement and as an argument about what is implied by such disagreement. The conclusion was that lawyers and judges are not, as part of their practices, involved in the use of divergent and controversial conceptions of law. Instead, they participate in a structured form of intentional action whereby they show themselves to be committed, in use, to the same basic concepts. Indeed, the intelligibility of legal disagreement *as such*, I suggested, rather than supporting the argument of our interlocutors, favors this conclusion.

Such a conception of institutional action, and of the central importance of agreement in the use of concepts to its possibility, does however raise several closely related epistemological problems concerning the formation of the philosophical theory of law. This chapter is devoted to them. The most basic such problem is easy to state: if, as I have been arguing, the basis of law's institutional reality, the grammar of legal discourse, is constrained by a set of publicly available rules for the use of concepts, concepts possessed by all competent legal actors, then why is the task of forming a conception of this basic structure and its relation to other aspects of social life – i.e. the task of developing the general theory of law – marked by difficulty? Hart reminds us at the opening of *The Concept of Law*:

Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'¹

And on this point he is surely right. How, we may ask, is this history to be accommodated if, as I have been suggesting, the answer to this and other closely related jurisprudential questions are written into the structure of the institution, as the basic part of its language? Why, in other words, are the rules for the use of concepts that are possessed by all competent legal actors *opaque* to us when we view them from the perspective of theory? Wittgenstein suggests that in philosophy, 'we want to *understand* something that is already

¹ Hart, *The Concept of Law* 1

in plain view'.² The question is why we do not understand it already.

A further and closely related problem: if the grammar of legal discourse, the logic of institutional action, rests on consensus in the use of concepts, then why is legal philosophy consumed by controversy? Why, in other words, do we disagree – and it is undeniable that we do disagree – about the best understanding of legal concepts if we as theorists, actors and students conduct ourselves in accordance with the rules for their use when engaging with law?³ This is the phenomenon of disagreement *about* law, about the basic concepts of law, legal system, right and authority, as distinct from the phenomenon of disagreement within legal practice, our concern in the previous chapter.⁴

² Wittgenstein, *Philosophical Investigations* s 89 47

³ Hart also noted this problem:

What officials do about disputes is... the law itself; 'The prophecies of what the courts will do ... are what I mean by the law'; 'Statutes are 'sources of Law... not parts of the Law itself'; 'Constitutional law is positive morality merely'; "One shall not steal; if somebody steals he shall be punished.' ...If at all existent, the first norm is contained in the second norm which is the only genuine norm... Law is the primary norm which stipulates the sanction.' ... These are only a few of many assertions and denials concerning the nature of law which at first sight, at least, seem strange and paradoxical...

See Hart, *The Concept of Law* 1-2

⁴ Dworkin, it was noted in the previous chapter, does not acknowledge a firm distinction between disagreement within law, between practitioners and about the resolution of particular legal controversies, and disagreement about the nature of law, about the structure of basic legal concepts. But I also rejected his argument against such a division. See 158-177

Consider, in this regard, Hart's doctrine of recognition, his theory that the law of a particular system is such because it is identified in accordance with a set of criteria accepted by its courts. I provided a defense of the most basic aspects of that theory in chapter two. But both that defense and other more sophisticated variants are themselves contentious. Dworkin, for example, famously denied that the unity of a legal system is to be characterized in terms of a 'master rule', a set of criteria for recognizing law in the sense expressed by Hart. Both the existence of deep controversy in the law and diversity in the range of standards brought to bear in deciding particular cases were taken by him to deny the picture of a system based upon official consensus. '...I want to oppose' he claimed 'the picture that 'the law' is a fixed set of standards of any sort...':⁵

I hope to persuade lawyers to lay the entire picture of existing law aside in favor of a theory of law that takes questions about legal rights as special questions about political rights, so that one may think a plaintiff has certain legal rights without supposing that any rule or principle that already 'exists' provides that right.⁶

Instead of what he termed the 'model of rules', Dworkin urged a view on which the law of a political community is such because it either features in, or follows from, the best justification of their institutional history. This, needless to say, is a view quite different from Hart's, and the theory, or at least a

⁵ Dworkin, *Taking Rights Seriously* 76

⁶ *Ibid* 293

version of it, has won favor with a number lawyers, judges and philosophers.⁷ But if Hart is right, and if we are to take him as elucidating the most basic conceptual aspects of an institutional structure with which we are all familiar, we must ask why his theory comes to us afresh, or to some not at all.⁸ Does the way in which we receive the theory not have the paradoxical implication that we do not know, or did not know until Hart made salient, central aspects of our own language or conceptual scheme?

To be clear: the problem to which Hart addressed himself is not merely *academic*. It is not, as we noted in chapter three, a problem about contingent

⁷ See, for example, Stephen Breyer, 'The International and Constitutional Judge' in Scott Hershovitz (ed), *Exploring Law's Empire : The Jurisprudence of Ronald Dworkin* (Oxford University Press 2006)

⁸ The doctrine of recognition, it is worth noting, was new when introduced by Hart in *The Concept of Law* and quite different claims about the grounding of the legal system had been popular before it. We noted in chapter two how Austin's conception of a legal system was premised on the existence of a sovereign body from the authority of which law followed, expressly or impliedly. We also recorded a number of flaws in a theory of this type, but for now it is worth noting simply that it diverges in various important respects – by suggesting, e.g., that the most fundamental legal capacity is that of the law-maker, and not that of the law-applier – from the theory here favored. Kelsen, again, had a different view although his was closer to and partially inspired Hart's own account. For Kelsen, the legal system rested on the court's presupposition of a hypothetical 'basic norm' which conferred authority on the historically first constitution: 'the basic norm confers on the act of the act of the first legislature – and thus on all other acts of the legal system resting on this first act – the sense of 'ought' [and] is simply the expression of the necessary presupposition of every positivistic understanding of legal data.' See Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L. Paulson trs, Clarendon Press 1992) 58-63

forms of philosophical or social classification removed from the reality of political life. The issue is not only about how we 'conceptualize' the legal aspect of social reality. It is about the basic structure of the institution, the way in which judges in particular must act such that we have law within our communities. The question of why this aspect of our ontology is not within easy reach is therefore a profound one.

It is worth noting that this problem, unlike the problem of disagreement *in law* (about the resolution of particular cases, and about the content of the law), is not so obviously diagnosed as missing its target. Recall that I argued in the previous chapter that disagreement in law does not threaten the thesis that legal practitioners are united in the use of legal concepts. My argument was that Dworkin's claim concerning the nature of first-order legal disagreements, as also second-order disagreement about the theory of law, was mistaken. But here we are noticing the fact that disagreement occurs at the level of theory – about the best understanding of the general aspects of legal practice – and this seems harder to square with our positive assertion concerning the place of legal concepts in social life.

Indeed, it is tempting when considering disagreements of this sort, long and often intractable disagreements about important political and institutional concepts, to see the problem that we are facing not as an epistemic one – that is, one to do with our means of access to conceptual truths – but as a constitutive one, having to do with the nature of our

concepts. And this, famously, is what W.B. Gallie did when he baptized a range of political and social concepts – including art, democracy and social justice – as ‘essentially contested’.⁹ By this he did not mean to highlight the fact that we disagree about the nature of such concepts, for that description would require no new term of art. Instead, Gallie meant to suggest to us that our disagreements about these concepts formed part of their very nature, such that if you did not understand the fact of perpetual disagreement in relation to, for example, the notion of democracy then you did not understand the notion in the first place.¹⁰ But, as Jeremy Waldron has pointed out, we ought not to move too quickly from the fact of disagreement through to a characterization of our legal concepts as having the kind of ‘internal complexity’ demanded by Gallie’s analysis.¹¹ And so we ought to think first about whether there is a suitable epistemic explanation of our disagreements

⁹ See W. B. Gallie, ‘Essentially Contested Concepts’ (1955) 56 Proceedings of the Aristotelian Society 167

¹⁰ Jeremy Waldron puts the point nicely when he says that the phrase essentially contested has to do, at least in part, with the site of disagreement:

One way of getting at Gallie's idea is to say that the term "essentially" refers to the location of the disagreement or indeterminacy: it is contestation at the core, not just at the borderlines or penumbra of a concept.

Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (In Florida)?’ (2002) 21 Law and Philosophy 137 149

¹¹ Ibid 148-150. Indeed, it is a philosophical moot point whether concepts *could* have the kind of internal complexity demanded by such a conception.

concerning law, only moving to consider more radical alternatives if one cannot be found.

So in this chapter I consider both the problem of opacity and the problem of disagreement about basic legal concepts in the context of the theory that has here been developed and defended. The aim will be to show how both phenomena are compatible with the thesis that legal action occurs under the rubric of shared rules, i.e. in accordance with the criteria for the use of the basic concepts, to which the theory of law is properly oriented. In the first section, I consider and reject a model according to which legal experts, to whom we defer in our explanations, have a theoretical understanding of basic legal concepts that is lacking in the broader population. In the second, I explore a picture, heavily indebted to Freud, accounting to which the rules for the use of legal concepts are known to us but only unconsciously. In the final section, having noted several important flaws in the Freudian explanation, I fix on a positive proposal. The claim that I will be defending is that practical knowledge of the rules for the use of legal concepts, the form of understanding that all competent legal actors display, is different in kind from the theoretical understanding of these rules. The former neither presupposes nor implies the latter, and so our difficulties and disagreements can be understood as entirely compatible with the view that we share in the use of legal concepts.

Deference and Expertise

The law is an institution characterized by a fundamental distinction between agents and subjects of the law. The concepts had and deployed by judges and lawyers often seem impenetrable from the perspective of the layperson, and the institution is regrettably often something more of an effect felt by its subjects than a form of social organization properly understood by that population.¹² The suggestion that learning the law is like learning a new language contains an important truth, and may be taken to suggest an explanation of the problems with which we are concerned.

We see in many domains of human discourse a division in theoretic capacity as between experts and the more general population, between those who may be accredited with specialist knowledge of theories and concepts and those whose capacity in reference and understanding is derivative. Hilary Putnam describes such a situation as one in which there is a 'division of linguistic labor':

Every linguistic community exemplifies... the linguistic division of labor... that is, it possesses at least some terms whose associated "criteria" are known only to a subset of speakers who acquire the terms, and whose use by the other speakers depends upon a structured cooperation between them and the speakers in the relevant subset.¹³

¹² Although see our discussion of the extent to which the laws subjects must engage with a legal system for it to be in effect in chapter three.

¹³ See Putnam, 'Meaning and Reference', 706

The standard example is the scientific case: here it is clear that the general population may refer to and use specialist concepts despite their lack of familiarity with the relevant theoretical explanations or criteria for the use of such concepts. I, for example, have very little understanding of what a quark is but may nonetheless refer to the concept, my use depending upon the fact that the term is competently used by scientists and that they, as experts, are able to provide an account of the phenomenon. The best understanding of the term is opaque to me, but not to them.

Can such a division – between experts and laypeople – provide an explanation of the opacity of basic conceptual truths in the case of law? I allowed in chapter three that certain of the most fundamental legal concepts need only be possessed by a subset of the population within a political community for that society to have law. I argued that for law to exist in a given context, those who act to create and maintain the court system need to possess the most basic legal concepts, including most importantly the concept of law, but that those who form law's subjects need only show obedience to the rules accepted at the official level. The legal system has, then, a double aspect: requiring specific comprehension of legal concepts on the part of its officials, whilst requiring only the more minimal attitude of obedience – which may or may not include a capacity to understand the distinct mark of the institution – on the part of its subjects. The suggestion, against this backdrop, then, is that the problem of opacity is a result of a lack of familiarity

with the basic conceptual aspects of law amongst those who cannot be characterized as experts. As it is that the layperson need not understand basic scientific concepts, so they need not have an understanding of the conceptual basis of law.

The explanation fails. Even a cursory glance at the famous debates in jurisprudence shows us that the problems of opacity and disagreement are not confined to those without a life in the law. Indeed, the fiercest of disagreements about the nature of law, disagreements which show the basic structure of the institution not to be transparently available, occur between judges, lawyers and legal theorists, and these people are our experts, if anyone is. As Hart noted, the most famous and controversial theses of jurisprudence are 'not orchestrated by visionaries or philosophers professionally concerned to doubt the plainest deliverances of common sense'.¹⁴ They are the proclamations of lawyers and theorists with a practical grounding in the subject, those who are trained in the language of the law and who use its concepts everyday. Even amongst our experts – including those who I have previously argued must possess legal concepts if the system is to exist – there is no consensus, no joint textbook of jurisprudential 'knowledge'.¹⁵ The opacity of the basic institutional structures that constitute

¹⁴ Hart, *The Concept of Law* 1

¹⁵ Peter Hacker makes the point at a more general level, and again by way of comparison with the scientific case:

a legal system exists apart from any possible division of linguistic labor, and occupies us the experts as much as it would the layperson drawn to better understand the nature of the system under which they live.

Now, it might well be suggested that the division of linguistic labor as a general phenomenon does not require, as a condition for its realization, theoretic understanding on the part of those to be properly attributed with the relevant concepts, the experts in particular domains to whom others defer. This phenomenon, we might suggest, is present in the scientific case but absent in others, including the legal case. Indeed, our discussion of the possibilities for a division in law as between the general population, who need not possess basic legal concepts, and those who act as part of law-applying institutions, who must possess them in order to govern as part of the institution, suggests as much. The experts – lawyers, judges, etc. – may be accredited with the relevant concepts without themselves having the ability to conceive of their own activities theoretically. But this just shows, once more,

...if one asks a physicist or biologist...what knowledge has been achieved in his subject, he can take one to a large library, and point out myriad books which detail the cognitive achievements of his subject. But if one asks a philosopher for even a single book that will summarize the elements of philosophical knowledge – as one might ask a chemist for a handbook of chemistry – he will have nothing to present. There is no general, agreed body of philosophical knowledge – although there are libraries full of philosophical writings from antiquity to the present day, which are in constant use.

See, P. M. S. Hacker, 'Philosophy: A Contribution, not to Human Knowledge, but to Human Understanding' (2009) 65 *Royal Institute of Philosophy Supplements* 129, 130

that the division between the expert and the layperson, although an important aspect of language, cannot be used to explain the epistemic problems that we are addressing.

Implicit Knowledge and the Unconscious Mind

A different explanation of our inability to provide an account of the concepts which feature in our common practices relies upon an analogy with the Freudian picture of mind. John Searle notes that the question of how certain rule-governed aspects of our own behavior may be unfamiliar to us is given a 'standard' answer in both cognitive science and linguistics: 'the answer is: of course we are following these rules, but we do so unconsciously...'.¹⁶ 'Since Freud' Searle suggests 'we have found it useful and convenient to speak glibly about the unconscious mind'.¹⁷ He traces a line from Freud through to Chomsky's account of universal grammar – a theory which postulates a series of innate universal rules which allow for the learning of the rules of grammar in particular languages – and Jerry Fodor's explanation of the language of thought – a conception on which it is suggested that there exists a mentalistic language which forms a precondition of spoken language. In both cases, the appeal is to rule following which occurs in the 'unconscious' aspect of the mind.

¹⁶ Searle, *The Construction of Social Reality* 128

¹⁷ *Ibid* 128

So too, it has been suggested, are the basic rules that govern our use of institutional concepts understood: they are said to be known unconsciously or implicitly.¹⁸ Christopher Peacocke says, for example, that those who are properly accredited with a particular concept must be taken to possess an ‘implicit conception’ thereof, and this is interpreted by Tyler Burge, amongst others, as involving an appeal to ‘unconscious psychological... structures’.¹⁹ And in the philosophy of law, Ian Farrell has argued that Hart’s task, in *The Concept of Law*, was one of making explicit the concept of law ‘implicit’ in our linguistic practices. Here too, the notion of the unconscious is taken to play a role.²⁰

¹⁸ Searle himself criticizes the view on which rule following in the context of institutions occurs in the ‘unconscious mind’ for the reason that we have no good theory of the unconscious. He says:

Our picture of unconscious mental states is that they are just like conscious mental states only minus the consciousness. But what exactly is that supposed to mean? I have not seen a satisfactory answer to that question – certainly not in Chomsky or Fodor and not even in Freud.

Ibid 128

¹⁹ See Christopher Peacocke, ‘Implicit Conceptions, Understanding and Rationality’ (1998) 8 *Philosophical Issues* 43. For the Burge interpretation see Tyler Burge, *Cognition Through Understanding Self-knowledge, Interlocution, Reasoning, Reflection* (Oxford University Press, 2013) 522

²⁰ Farrell, ‘H.L.A. Hart and the Methodology of Jurisprudence’, 996-999. It is hard to know in the end how closely each of the cited authors associates their theory with the Freudian conception of mind, and about the extent to which they would accept the analogy, or wish, instead, to provide a different explanation of their references to the implicit or unconscious in the case of institutional concepts. It is worth bracketing these concerns and pursuing the

How did Freud's theory inspire this general picture? Freud postulated, as a basic aspect of his psychoanalytic framework, a cyclical relation between memories consciously known to individuals and memories repressed and contained in the unconscious mind. Conscious memories may be called to attention with little in the way of effort, although they are not always present in the mind. Repressed memories, by way of contrast, are understood to be removed from consciousness, such content being properly ascribed to individuals not because it is directly accessible but because it is effective on choice and action. The idea is that memories of this type, which may be revealed by psychoanalytic techniques, can be evoked in understanding the causes of certain behaviors. Thomas Nagel explains the conception:

[T]he entire system [was] psychological... [I]t sought to provide an understanding of human beings "from within" so that we could put ourselves in their shoes and make sense of their symptoms and responses by attributing to them beliefs, desires, feelings and perceptions - with the difference that these were aspects of their point of view of which they were not consciously aware.²¹

Because these aspects of mind are simultaneously latent and operative, this opens up the possibility that they may influence the behavior of those upon

argument in a direct form, however, so as to understand the extent to which formulations based on the notion of the unconscious are able to draw upon the Freudian picture.

²¹ Thomas Nagel, *Other Minds : Critical Essays 1969-1994* (Oxford University Press 1995) 28

whom they impinge, such that their content figures in a proper explanation of such people's actions, without being available in the moment.²²

How is the analogy developed? Where a person is able, on the basis of their competence, to give a good account of the rules for the use of their concepts, they are taken to have conscious or explicit awareness of such criteria. Where, however, such rules are not easily stated, they are said to be known only unconsciously. Because the rules are taken, as with repressed memories, to be both latent and operative, we can accommodate within the account the duality with which we began, the ability of people both to bring their behavior under the extension of institutional concepts, or else to recognize the actions of others as being framed by such concepts, whilst being unable to form an accurate conception thereof. Just as repressed memories may be unavailable to us whilst still influencing our behavior, so we may act in accordance with the rules for the use of legal concepts without being able to bring these rules into the conscious aspect of our minds. The aim of philosophical argument, on this view, rather like that of the psychoanalytic technique, is to convey that which is buried to the surface, to enable the possessor of the relevant concepts to recognize a good account as true to their

²² The fact that these aspects are internal to the subject implies that the verification of psychoanalytic theses depends upon the patient coming to recognize the hypothesized memory as their own. So, for example, Freud's conjecture that one of one of his subjects had forgotten a Latin phrase because anxious that his mistress may be pregnant depended, for its confirmation, upon the subject themselves recognizing the explanation as correct, not from a neutral standpoint, but from their own personal perspective.

unconscious knowledge. In each case, what is known at the unconscious level is provoked through specialist techniques, so as to reappear in the conscious mind.

How close, however, is the analogy? There are certainly a number of similarities as between our standard relation to the concepts that we, as competent users of language, possess and the association between our actions and the unconscious aspects of our psychology. These include, for example, both the obscure nature of these mental structures and the fact that in each case recognition of the correctness of an explicit account – of our repressed memories and of our concepts – depends upon its relation to aspects of the personal perspective: the fact that these memories are mine or the fact that this account is true to the way in which we use concepts.²³ There are, however, a number of important dissimilarities which suggest that, whilst an account which appeals to the unconscious mind may point us in the right general direction, it ought to be rejected as a model.

²³ Nagel notes the analogy:

Although a [subject] does not formulate his unconscious knowledge or attitude of his own accord and may deny it upon being asked, it is usually possible to bring him to see that the statement in question expresses something he knows or feels... Even though knowledge of the rules of the use of a language is in other ways quite unlike the unconscious knowledge revealed by psychoanalysis, accurate formulations of grammatical rules often evoke the same sense of recognition from speakers who have been conforming to them for years that is evoked by the explicit formulation of repressed material that has been influencing ones behavior for years.

Nagel, *Other Minds : Critical Essays 1969-1994* 60

The first problem is this: there is no obvious psychological fact accounting for repression in the case of our concepts, whereas there is for at least a certain class of our memories. Freudian repression is typically understood as a crude, instinctual coping mechanism, a way of assigning particularly troubling or painful aspects of our history to a place out of view. Such aspects of our biographies are hidden, on the Freudian picture, as a way of managing their specific character. Commonly, the process achieves its purpose, at least in the short term, although in more extreme cases repression may become maladaptive. The main point is that there is a candidate explanation for repression from the psychological perspective. By way of contrast, there is no such explanation of why we would suppress what we mean by our words, or the rules for use of concepts that enable our participation in institutional practices and other forms of meaningful social activity.²⁴ Quite the reverse: such information would allow us to detail the basic conceptual aspect of our language, of our social institutions and structures including law. It would serve our interests to have these rules explicitly available, and much bad theory would be avoided if this were the case.

Now it is sometimes suggested that the ‘mental weight’ that would be imposed upon us, if we engaged with social ontology by virtue of explicit or

²⁴ A similar objection is developed in Colin McGinn, *Truth By Analysis : Games, Names, and Philosophy* (Oxford University Press 2012) 53-54

conscious recognition of its structure, provides an explanation of a process analogous to repression in the institutional case. Given the incredible complexity of the social world and the number of institutional structures contained therein, it may be thought that explicit awareness of the rules which furnish its basis would make our interactions with these aspects of social reality impossibly demanding.²⁵ But theoretic literacy does not appear to slow us down in the context of action. The fact that an individual possesses, for example, a sound account of the rules which structure democratic institutions will not make them a less effective agent within those institutions, although they will have a particular kind of philosophical awareness which escapes many of their contemporaries. This, then, is the first problem with the Freudian picture: we have no good account of why repression or some closely analogous process would apply to institutional concepts.

The second problem with the Freudian explanation is that whilst repressed memories enter into the mind first explicitly and then become unconscious, explicit introduction is not necessary in the institutional case. Freud's theory of the relation between the conscious and unconscious mind is, as we noted, cyclical: it depends on material consciously entering the mind and then being suppressed, reappearing to consciousness when made visible by virtue of the application of psychological techniques. The picture is one on which the explicit precedes the implicit. But the criteria for the use of legal

²⁵ See, on the metaphysical burden of social ontology, Searle, *The Construction of Social Reality* 1-4

concepts, by way of contrast, need never have been explicitly learnt by those with competence in relation to law. To be sure, much that lawyers are taught *is* explicit. Ordinarily, we learn about the rule of parliamentary sovereignty in the UK, or the standard of strict scrutiny as applicable to government infringement of various rights under the US Constitution by consulting the books. However, when we come to consider the ways in which legal actors most commonly become familiar with, for example, the concept of a legal right or the concept of a legal system, we must acknowledge that they do so by example and participation, not by sitting down with a volume of techniques for the application of these concepts. Indeed, there is no such volume and if an attempt were made to write one its central tenets would be no less controversial than any others in philosophy. The most basic of the rules of legal practice – those that constitute it *as* legal practice – come to us in action and not in theory.²⁶ We are, if the Freudian analogy is to be applied, at the stage of repression before having anything to repress.

Now it might be said that neither of these dis-analogies are decisive as against the Freudian type of explanation, although they do help to loosen the comparison; that there is no obvious explanation for repression, nor any explicit material to repress in the case of institutional concepts, does not prevent the appeal to the unconscious, and this is the fundamental part of the theory. It is our final point, however, which is the most important. This is that

²⁶ On the practical aspect of concept learning see Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 67-69

the understanding which competent legal actors display of the concepts that they possess is actually manifested *consciously*. If, for example, someone were to suggest that they would be entitled to certain legal rights and benefits in the state of nature, i.e. absent an existent legal system, we would know that they were making a conceptual mistake – without institutions, claims at law will not merely fall on deaf ears but are presented without the backing which they presuppose²⁷ – and our recognition of this fact would be explicit. We would react similarly to a person who claims to be obeying a legal authority's dictates because they have decided, independently, that the particular course of action it prescribes is a wise one. Agreement on a course of action, we are aware, is not submission. Now perhaps full explanation of why these are both examples of conceptual errors escapes us, but we recognize them as such nonetheless. Our ability with regard to the use of the relevant concepts is manifested explicitly, and the lack of a good theory on our part does not make our cognizance of the mistake of others 'unconscious' in the psychoanalytic sense. The model lacks explanatory capacity at the crucial point where it is required: the rules for the use of institutional concepts are not unconsciously known, because we manifest our competence in use consciously.

²⁷ And so we understand Locke's claims that, for example, nature has laws that govern it, and that law gives natural rights, as involving analogies with, but not the direct use of, the concepts that general jurisprudence has as its central concern.

The Practical And The Theoretical: Knowing How And Knowing That

We must reject the Freudian framework as providing a general model of the relation between concept possession and institutional understanding in relation to law, but in recognizing its faults we are moved in the direction of a better conception. The final two points made against the Freudian picture are particularly instructive. I argued that concept learning is a practical exercise which need not be accompanied by theory – we need not learn the rules for the use of particular concepts by studying the rulebook, as it were – and that competent users of concepts consciously display their proficiency in action by, for example, recognizing the mistakes of others. Both of these points suggest a distinction not between levels at which we may know – between conscious and unconscious knowledge of the same information – but between *ways* of knowing. Mastering particular concepts, we might say, is a practical matter, one which is borne out in action and not in theory. It is what Gilbert Ryle called a form of ‘know-how’.²⁸ This form of knowledge, I am going to argue, is to be distinguished from the quite separate matter of ‘knowing that’ or theoretical knowledge – i.e. a propositional understanding of the rules for the use of our concepts – in the sense that the former is neither reducible to, nor

²⁸ Ryle, ‘Knowing How And Knowing That’

entails, the latter.²⁹ The distinction between practical and theoretical knowledge is an important one, and we see it in many domains of human activity. I will use it here to explain how, consistent with concept possession, the problems of opacity and disagreement in relation to our understanding of legal concepts may arise. It might be best to begin, however, with some examples of the distinction drawn from contexts outside of the law.

Ryle asks us to consider the differences that we might acknowledge as between a 'clever' and a 'stupid' chess player. What, he asks, does the former know that the latter does not? 'Obviously' Ryle suggests, 'there is no truth or set of truths of which we could say "If only the stupid player had been informed of them, he would be a clever player"'. He explains:

We can imagine a clever player generously imparting to his stupid opponent so many rules, tactical maxims, 'wrinkles,' etc., that he could think of no more to tell him; his opponent might accept and memorize all of them, and be able and ready to recite them correctly on demand. Yet he might still play chess stupidly, that is, be unable intelligently to apply the maxims, etc.³⁰

²⁹ There exists a debate in the literature concerning whether Ryle's categories 'knowing how' and 'knowing that' express the same distinction as that between practical and theoretical knowledge or some other division. Ryle himself appears to see no important difference, referring to manifestations of 'know how' and 'knowledge that' as 'practical' and 'theoretical' performances respectively. I follow him in this regard. See *ibid* 2.

³⁰ *Ibid* 5

The difference between the two, Ryle suggests, is one of skill or capacity and not theoretical knowledge. What the intelligent chess player knows is how to act in a given situation, and they may or may not be able to give a theoretical account of this ability.³¹ Moreover, another person would not inherit the capacity to play well by being fed a series of theoretical propositions concerning the game. They need to learn how to act and it is no substitute to learn, instead, that such and such is a good theory to bring the expertise of the master chess player under.³² So here we have an example of know-how, an ability in action, which is not necessarily accompanied by, nor translatable into, theoretical knowledge.

³¹ It is sometimes said that computer architecture designed to run chess simulations or to engage human players provides a counterexample to this type of analysis. The computer has, it is said, only theoretic knowledge – i.e. knowledge of a series of explicit rules determining how it ought to play – and this forms the basis its ‘expertise’ in action. But a computer, only capable of using syntactic information to order symbols, cannot understand anything – practical or theoretical – about the game that it is modeling a part of. It does not, indeed cannot, know the meaning of its actions. See, on this issue, John Searle’s famous discussion of the ‘Chinese Room’ in John R. Searle, ‘Minds, Brains, and Programs’ (1980) 3 Behavioral And Brain Sciences 417. For doubts about Searle’s argument see Georges Rey, ‘What's Really Going On In Searle's “Chinese Room”’ (1986) 50 Philosophical Studies 169

³² As Ryle notes, even if one has all the relevant material in a theoretical sense, it takes skill to apply these principles, and this ability cannot itself be reduced to a further series of rules or principles for fear of regress. See Ryle, ‘Knowing How And Knowing That’ 2

How, more precisely, are we to characterize the epistemic condition of the skilled chess player? 'When a person knows how to do things of a certain sort' Ryle suggests:

his knowledge is actualized or exercised in what he does. It is not exercised... in the propounding of propositions or in saying "Yes" to those propounded by others. His intelligence is exhibited by deeds, not by internal or external dicta... When a person knows how to do things of a certain sort (e.g., cook omelets, design dresses or persuade juries), his performance is... governed by principles, rules, canons, standards or criteria.... But his observance of rules, principles, etc., [is] realized in his performance of his tasks.³³

The exercise of practical knowledge does not consist in the secret recitation of sentences – the expert chess player does not regulate their activity by first

³³ Ibid 8-9. A detailed argument against Ryle's original characterization can be found in Jason Stanley and Timothy Williamson, 'Knowing How' (2001) 98 *The Journal of Philosophy* 411. Stanley and Williamson also develop a positive conception of knowledge how, which they view, not as distinct from, but as a species of theoretical or propositional knowledge. Under their preferred framework, the claim that Hannah knows how to ride her bike in a particular way (*w*) is to be treated as equivalent to the claim that Hannah knows that *w* is a way for her to ride a bike. This claim, in turn, is true:

...if there is some contextually relevant way *w* such that Hannah stands in the knowledge that relation to the... proposition that *w* is a way for Hannah to ride a bike, and Hannah entertains that proposition under a practical mode of presentation.

The requirement that the relevant proposition be entertained under a 'practical mode of presentation' exists because someone may know that *w* would be a way for them to ride – if, for example, a friend shows them – and yet be unable to do so. When they are so able, by way of contrast, they are taken to entertain the proposition under the 'practical mode'. The worry, then, is that this condition on the account – that one entertain a proposition under a 'practical mode of presentation' – is a disguised way of reintroducing the distinct concept of know-how, when the aim was to assimilate it. See *ibid* 417-430

producing in the mind a set of explicit rules or principles, which they then bring their action into accordance with – but is instead realized directly in the actions of those who possess such understanding. To have such knowledge is, we might say, to have a certain kind of ability.

Ryle's point is not that the expert chess player's skill goes beyond the application of 'principles, rules, canons, standards or criteria' but that their activity, which is rationally governed, is neither accompanied nor preceded by theoretical consideration of these criteria.³⁴ In this sense, Ryle's focus differs from an explanation of our ability to relate actions to rules in a way which prizes common sense over the rigid application of dicta – for the lawyer, this is the ability displayed when working within the spirit, if not the word, of the law. Practical knowledge, on Ryle's conception, may be displayed in both the steadfast application of particular standards, or by their consideration in light of further pragmatic aspects. What matters is that the display is of a rule-governed ability one which is not accompanied by theoretical mediation, and not the way in which these rules or principles are brought to bear in a given setting.

There are many situations in which the distinction between the practical and the theoretical is exhibited. It is commonly the case, for example, that people know how to find their way around towns and cities with which

³⁴ Ryle, 'Knowing How And Knowing That' 9

they are familiar without being able to impart this knowledge to others, or to frame such knowledge for themselves in a propositional sense. I may, for example, know the route from the central square to the restaurant and yet be unable to explain it to a stranger, or to draw it accurately on a map. The path can be walked, and perhaps traced in mind, but the route is not easily elucidated. I have here a form of rule-governed know-how – I know in the moment to turn left then right and to keep on for a certain amount of time – which is not also a form of theoretical knowledge of the rules that I go by, although with exertion I may hope to convert the former into the latter.

Consider next an instance closer to the legal case: our grammatical abilities with regard to the formation of sentences in natural language. The ordinary speaker of English knows, for example, that the plural of a common noun is usually formed by adding 's' to the relevant word, and that there are a number of exceptions to this rule, including the words 'man' and 'sheep'.³⁵ The competent speaker can recognize sentences properly and improperly formed, although they may not be able to state the relevant rule. As Nagel notes:

We might verify [the ascription of knowledge of the grammar of common nouns] by finding that the individual can actually state the rule, but someone can possess general knowledge of the rule without being able to state it. He may never have heard of the words "plural" and "noun", for example, and may be unable to formulate the principle in any other way. When we come to the more complicated principles to which grammatical English

³⁵ The example comes from Nagel, *Other Minds : Critical Essays 1969-1994* 59

speech conforms, that will be the usual situation. Only professional grammarians will be able to state those rules, and sometimes even that may not be true.³⁶

The speaker of grammatical English has a practical ability with regard to the rules that determine composition in the language. But this need not, and often is not, accompanied by the ability to describe these rules.

This form of explanation naturally extends beyond the rules for the composition of clauses and sentences to the criteria for the use of concepts within them.³⁷ Knowledge 'how', or practical knowledge, is taken, on this conception, to be the ordinary means of concept possession, and it is demonstrated in the ability to deploy particular concepts in accordance with the rules for their use. It is this form of understanding, I am going to suggest, that the competent institutional actor has in relation to law. The claim is that legal actors, and those otherwise familiar with the institution, have the concepts which allow for law's existence, and for our proper cognizance of it, in the practical sense, i.e. they know how to act relative to the demands of the institution, or how to understand its most basic requirements, without necessarily being aware of this structure from a theoretical perspective. To return to Ryle's definition, the expertise of the judge, lawyer or person

³⁶ Ibid 59

³⁷ Michael Devitt suggests, for example, that linguistic competence is to be thought of as a as an 'ability or skill: a piece of knowledge how, not knowledge that.' See Michael Devitt, *Coming To Our Senses : A Naturalistic Program For Semantic Localism* (Cambridge University Press 1996) 50

otherwise competent in relation to the law 'is not exercised... in the propounding of propositions... [Their] intelligence is exhibited by deeds, not by internal or external dicta...'.³⁸

How does an explanation of this type help us to understand the problems of opacity and disagreement in relation to our concepts? Just as the person who knows their way around town may instruct a tourist badly, or the competent speaker may have no theory of the grammar of their language, so concept possession may be accompanied by a deficient theory, or no real theory at all. Consider, in this regard, the commonly held 'explicit theory', or dictionary definition of bachelorhood, on which a person is considered to be a bachelor if they are an unmarried man. This conception, it has been noted, is incomplete and subject to counterexamples. Gilbert Harman makes the point:

'Speakers do not consider the Pope a bachelor. People will not apply the term "bachelor" to a man who lives with the same woman over a long enough period of time even if they are not married. Society pages in newspapers will identify as eligible "bachelors" men who are in the process of being divorced but are still married.'³⁹

What we are seeing here is a gap between the practical and the theoretical, between what is recognized in action and what is available from a more theoretical perspective. It is not merely that the concept of a bachelor is a

³⁸ Ryle, 'Knowing How And Knowing That' 8-9

³⁹ See Gilbert Harman, 'Doubts About Conceptual Analysis' in Michaelis Michael and John Hawthorne (eds), *Philosophy In Mind : The Place Of Philosophy In The Study Of Mind* (Kluwer Academic Publishers 1994) 45

vague one, that at the borderline reasonable people may diverge in application, although that is obviously true. We agree that the Pope is no bachelor and so a different explanation of the fact is called for. Instead, we should say that what is known in the theoretical sense is crude, i.e. that the best theory of the concept is opaque to us, and the fact that our practical capacity in the use of the concept of bachelorhood is more discriminating is shown in our responses as speakers to particular cases including that of the Pope. Indeed, it is because we are able to recognize in practice that the concept of bachelorhood includes as a criterion for its application romantic availability that we acknowledge our current theory to be imperfect when presented with the right examples and arguments.

Harman takes doubts about the standard theory of bachelorhood, amongst other concepts, to suggest that the method of 'conceptual analysis' fails to deliver and ought to be abandoned in favor of a different kind of philosophical approach. But the fact that the most widely accepted 'folk theories' of concepts such as this one are subject to doubt does not imply the bankruptcy of conceptual theory. The better inference is that forming a sound understanding of our conceptual geography is, as I am here suggesting, a difficult task, and that our use of concepts is much more nuanced than our 'folk theories' commonly allow.

This distinction – between what is understood from the perspective of action, and what is theoretically available – also exhibits itself in the legal

case. We see the co-existence of practical competence and theoretic failing both in 'folk theory' and at many points in the history of jurisprudence. It is common in everyday conversation, for example, for law to be subsumed under the category of legislation, to the exclusion of custom and judge-made law. This is a conceptual mistake, and it exhibits a failure to come to terms with the possibilities secured by our common practices. But misunderstandings also arise amongst professionals. One famous example, to which we referred in chapter one, concerns the claims of certain American Legal Realists – themselves judges, lawyers and theorists – who, in the sway of a then fashionable empiricist movement in philosophy, urged the thesis that the ascription of a legal right was to be treated not as specifying a normative relation between subjects but as representing a more scientifically cognizable or empirically respectable type of fact.⁴⁰ Convinced that the characterization of a legal right as an abstract relationship involved a commitment to metaphysics ill at ease with the modern scientific outlook, they sought to tie the concept more closely to human behavior. A claim of legal right was, on this view, to be understood not as an entitlement that *ought* to be enforced but as a *prediction* of a judicial decision in a person's favor. The assertion that Jones has a right at law was taken by the realist as a prophecy of a future fact, rather like the claim that the sun will rise again tomorrow.⁴¹

⁴⁰ For a different interpretation see Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* ch 2. I discuss Leiter's reading in chapter seven.

⁴¹ See, for example, Felix Cohen's claim that 'a theory of the nature of legal

Such a conception cannot be maintained. Two points in particular are worth reminding ourselves of.⁴² First, the theory fails to deliver any account of a statement of right on the lips of a judge, for a judge's assertion that a particular individual has a legal right cannot be a prediction that they will likely find in favor of the individual; by declaring the rights of the parties they make their decision.⁴³ Second, such a theory misconstrues the grammar of rights claims outside of the courtroom. For, just as the judge often aims to state the law as it currently exists, we take our claims of legal right, in many cases, to be claims about present states of affairs – we say that we are now *entitled* to certain rights under the first amendment, not merely that it is likely that our claims will be upheld – assertions which may be assessed as right or wrong in the moment, not merely as expected to be proved at some future time. And even with regard to claims urging a change in the law, i.e. future-oriented rights claims, the theory fails. An argument in favor of the recognition of a new legal right is an assertion that a particular legal result should occur, not a prediction that it will.

roles, legal concepts, and legal questions. Its essence is the definition of law as a function of judicial decisions.' Felix S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia Law Review 809

⁴² These are detailed in chapter one.

⁴³ See, on this point, Hart, *The Concept of Law* 136-141 and Kelsen, *Pure Theory of Law* 85-89

The theory is to be rejected, but those who adhered to it were not in doubt about how to use language; they were not incompetent speakers stumbling over words or failing in practice. Felix Cohen, the most vocal defender of this form of realism, was a practicing lawyer and quite capable of recognizing as coherent the claims of judges and other lawyers, despite it being an implication of the theory he endorsed that they were, in the case of the judge often incoherent or, in the case of the lawyer, inappositely considered to be true or false in the moment. Even more impressive as a lawyer and as a judge was Oliver Wendell Holmes, but he too was drawn to this form of false reductionism: 'a legal duty so called' he said 'is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.'⁴⁴

Here, as with a range of concepts, there is a gap between our ability to competently deploy such concepts and our ability to form a conception thereof. The explanation depends upon the fact that the former ability is a type of practical knowledge and the latter a form of propositional or theoretical understanding, the two of which need not, and often do not, come together. The realist is in the position of the competent speaker but poor grammatical theorist, or the person who knows their way around the city but is unable to explain the route to the restaurant.

⁴⁴ See Oliver Wendell Jr. Holmes, 'The Path of the Law' 10 Harvard Law Review 457 457

We are now in a position to tackle the problems with which we began – legal concepts may be opaque in the sense that those who possess them, despite knowing how to deploy them in a practical context, need not have theoretic understanding of the rules for their use. It is the latter form of knowledge that we lack when explanation is not at hand. Lawyers, judges and others with legal competence know how to speak the language of the law, but not, simply by virtue of that fact, how also to give an account of their competence. This is the distinct task of theory.⁴⁵ The problem of disagreement is also explicable: we disagree philosophically about the best explanation of our practical competences. Just as grammarians disagree about the composition of their common language – for example, about the split infinitive, or the generic ‘you’ – so theorists and philosophers of the law disagree about the rules for the use of concepts over which they have practical mastery. Indeed, such competences form the *object* of their disagreement; they are the material to which divergent interpretations are oriented.⁴⁶

⁴⁵ The distinction, apart from showing us that we may be ensnared in our own language, also implies a hope. The fact that we are able to accredit institutional agents with concepts despite their theoretic failings suggests that such actors are always in a position to be able to recognize good theory relative to their own competence. We would hope to persuade the realists, for example, to abandon their defective conceptions and to recognize explanations more in keeping with their practical competence.

⁴⁶ For an interesting discussion of the relation between practical know-how and theory in the context of legal concepts, especially evaluative legal concepts, see Waldron, ‘Is the Rule of Law an Essentially Contested Concept (In Florida)?’ 160-163

It is worth noting that because this form of explanation allows that false theory may accompany concept possession in the full, albeit practical, sense, it improves upon the doctrine of the division of linguistic labor that we considered earlier. Recall that the theory of deference licensed opacity in understanding but only amongst those members of the community who are not to be considered experts on the relevant matter. This we said would not do as an explanation of our disagreements about law, because these occur as between experts – lawyers, judges and philosophers – who engage competently with or act so as to maintain the institution. The distinction between practical and theoretic capacity, by way of contrast, allows that anyone may hold a false theory, even if properly possessing the relevant concepts. So a distinction of the kind made famous by Ryle has a definite appeal for those who wish to suggest that the theory of law owes itself to our ordinary language, and our competences with regard to the use of institutional concepts, whilst still accepting the difficulty of the task.

The division between practical and theoretical knowledge has not, however, been universally accepted amongst philosophers, at least not in the way that it has been deployed here, and we ought to consider several objections to the model as an explanation of the opacity of conceptual truth in the case of law. The first concerns the possible range of practical knowledge that we may admit is not accompanied by theory. The second suggests that the conception has us committed to the following thesis: that we both do and do not know our own language and this, it is suggested, is unpalatable.

Objections

First the issue of range. Granted, it is suggested, certain kinds of know-how, e.g. riding a bike or making soup, need not be accompanied by the explicit cognizance of rules regulating such undertakings, i.e. by theoretical knowledge of the norms controlling such activities. Expertise at the pedals or in culinary matters need not be accompanied by such knowledge, but this, our objector suggests, is because these activities are not rule-governed. To be sure, there are better and worse ways of riding a bike or preparing soup, but beyond the absolute basics – that one must propel oneself of one's own volition on a bike, that soup needs to have a savory element and to be liquid – it would be wrong to suggest that there are in these cases rules governing the capacity. It would be strange to say, for example, of the person who could not keep from crashing into pedestrians, or the chef who made an inedible broth, that they had failed to accord with the rules regulating such activities. Their failure is in performance, and this is not regulated in a way that is amenable to description on a purely formal basis. Practical knowledge need not be accompanied by propositional knowledge of rules governing certain activities, it is suggested, in cases such as these where there are no such rules. Where, by way of contrast, people engage in practices that are governed by rules, their actions must be accompanied by a theory or explicit understanding of such standards and principles, for it is only by having such standards in mind that one can be guided by them. Given that law is a rule-

governed institution, our interlocutor concludes, there is no space allowing for practical competence apart from theory.⁴⁷

The point about the chef and the cyclist is well taken. It would be strange to describe their expertise in performance as being governed by rules. But even in these cases, where excellence is not properly described as being regulated in such a way, there are still some more basic principles. If a chef bakes a sweet dessert it is not that they have made a bad soup but that they have made no soup at all, and if the cyclist were not even to attempt to pedal but were more interested in throwing their vehicle across town, they would not have begun to cycle, however badly. So, even if excellence in both these cases is a matter of degree, not regulated by rules, there remain criteria for entry into performance, and the competent chef and cyclist know this much, if only in a practical sense.

⁴⁷ For an argument that at least certain aspects of legal practice are *not* rule-governed see A. W. Brian Simpson, 'The Common Law and Legal Theory' in A. W. Brian Simpson (ed), *Oxford Essays In Jurisprudence (Second Series)* (Clarendon Press 1973). Simpson's argument is against a view of the common law as existing under the rubric of 'official rules' for the reason that 'legal life is far too untidy'. Simpson's own preferred account fails, however, to deliver on the felt need for a genuinely 'untidy' theory. He says that the common law:

consists of a body of practices observed and ideas received by a caste of lawyers, these ideas being used by them as providing guidance in... the rational determination of disputes litigated before them

But this is just to say that the rules of the common law are such because accepted by legal officials according to the criteria of validity operative within their system, and this is a statement of this aspect of legal practice as subject to regulative rules. See *ibid* 94.

The next step involves noting that the other intuitive examples of practical knowledge that we have considered are rule-governed – clear cases here are of the person who knows one particular route through town, and of the grammatically competent but theoretically impotent speaker. In both of these situations there are rules regulating how to get from a to b, or how to form sentences grammatically. And if we are to admit that people have practical knowledge, that is not at the same time theoretical understanding of the rules governing these activities, then the argument we are considering gives us no principled reason not to also include the case of law.

A second common complaint against the distinction we are drawing, between practical competence and theoretical ability, is that it has us committed to the thesis that those to whom it applies both know and do not know the rules for the use of their concepts. The idea is that this is a kind of having one's cake and eating it. The cake is had by claiming that we may guide ourselves in speech and action according to the rules that our legal concepts furnish and it is eaten by claiming that, despite this fact, they remain unavailable to us. How can it be, for example, that the realists knew how to act in accordance with the demands of law, how to recognize rights and obligations, whilst not knowing, in a fundamental sense, about the concepts that guided them?

The argument presupposes the very picture being opposed. The concern about knowing and not knowing at the same time only has traction if we assume an equivalence of sense, that the type of knowledge specified in each of its occurrences is the same. But here we are saying that the types of knowledge that those who possess concepts must have and that which they need not have are of different forms. Competent speakers and agents know the rules for the use of legal concepts in the practical sense, but they need not in the theoretic sense. It is the latter form of understanding that legal philosophy seeks to achieve, and in doing so it works on the capacities which evidence the former. The objection, as a flat denial of the conception here developed, has no independent force.

Conclusion

The aim of this chapter has been to suggest a model that allows that jurisprudence is responsible to our common language, and to the forms of behavior licensed by the concepts which feature as the basis of our social practices, whilst still admitting that the task of forming a conception of law is a demanding one. We need to allow that legal concepts are theoretically opaque, and that we disagree about the best accounts thereof, sometimes deeply. This, it has been suggested, is not because the best account is known only by a range of experts, or else is buried in the subconscious aspect of our mind, but because a practical ability in the use of particular concepts does not either presuppose or imply theoretical understanding of them.

Chapter Six: Externalism and the Limits of Analysis

Introduction

The previous five chapters developed a picture of the relation between language, legal concepts and practices, and, ultimately, the standards for a successful jurisprudence. I have argued that legal philosophy has as its ultimate concern the rules for the use of certain basic legal concepts, for it is these which furnish the basis of the institutional actions which give rise to law as a kind of political institution. In this and the following chapter, I will move to consider the two most pressing alternate models of success in legal theory, models which compete in important ways with the conception which I have defended. Before doing so, however, we would do well to take stock of what, more precisely, has been established.

The first chapter of the thesis argued for a connection between the understanding of legal concepts and linguistic analysis. In what way, I asked, does our comprehension of such concepts relate to language? Need we, for example, frame our debates in jurisprudence in terms of the forms of description that we would use in the context of law or ought we, perhaps, to hammer away at the definition of certain fundamental legal terms? Neither of these options, it was suggested, prove promising, the first because such a mode of argument seems unnecessary, and the second because the concern of the philosopher is not with the surface aspects of language, but with

fundamental conceptual truths. Nonetheless, an essential connection between law and language exists. Because legal concepts necessarily find their expression on a linguistic basis, I suggested, so an investigation into their general structure involves close attention to the forms of language in which they manifest, to the rules for their use in the context of law.

Chapters two and three sought to explain the way in which an understanding of basic legal concepts allows for insight into the institutional reality of law and legal systems. Legal claims and assertions presuppose, I suggested, the existence of an institutional context, that provided by the actions of the courts; it is only against such a backdrop that we are able to make sense of the demands and privileges that make up the content of the law in any given jurisdiction, and so too our claims and contestations concerning these matters. The identity and existence of the courts, I argued, depends upon the rule-following practices of their agents; broadly, those described by Hart's doctrine of recognition. In turn, institutional practices of this type depend upon the conceptual competences of the actors who take part in them; the rules that they act in accordance with, I suggested, are furnished by the concepts that they possess. So the very idea that law could exist in a society not familiar with fundamental legal concepts is an impossibility. General jurisprudence takes as its object the concepts that necessarily underwrite the existence of law.

In chapters four and five I moved to consider whether either the practices of lawyers, judges and laypeople arguing about the law, or philosophers and theorists disagreeing about the general nature of legal concepts, stood in the way of this picture of legal practice, as bound by the rules for the use of concepts possessed by all with legal competence, and the implied conception of theory, as responsive to these rules. With regard to the first issue, I suggested that the nature of legal disagreement – that is, disagreement about particular cases, and about controversial points of law – does not imply disagreement about the criteria for the use of basic legal concepts. Indeed, the intelligibility of such disagreements as *legal* disagreements depends upon the fact that they occur against a backdrop of agreement in the rules for the use of such concepts. Second, the obvious difficulty of forming a conception of legal concepts and our disagreements about their general nature – as are widespread both within legal philosophy and more broadly – do not show that we do not share in the rules for the use of such concepts, only that concept possession is a practical ability – a matter of know-how – which does not imply theoretical understanding. It is the central task of legal philosophy to develop the latter form of understanding in a way that is true to the former ability, and the undertaking is not an easy one.

There are various ways in which pressure might be put on a conception of jurisprudence of the kind here developed, and the understanding of law and legal institutions that it implies. Some suggest that

a view of this type, which places first emphasis on the internal structure of our social practices, interpreted apart from a broader understanding of the ends to which they could valuably be used, leaves aside the essentially moral character of law and question of the reasons we might have for honoring its demands.¹ But before knowing how we ought to act in relation to law, and what ends it might be used to further, we need a sound understanding of the type of institution that it is, and here we must start with the practices that give rise to it.²

Others have raised concerns about whether the resources inherent in our social practices, and by implication those involved in the interpretation of such practices, are sufficient by themselves to provide an understanding of why, for example, acts of legislating and passing judgment in particular cases count towards the content of the law within particular jurisdictions.³ For these activities are themselves the creatures of social practice, and we need principles that determine *why* these aspects of our politics are legally significant, principles that are not of the same kind as the objects which they

¹ This is the later view of John Finnis. See Finnis, 'Law and What I Should Truly Decide'

² See, on the first of these two points, Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 166-171

³ See Mark Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157 and Nicos Stavropoulos, 'Words and Obligations' in Luis Duarte d'Almeida, James R. Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's 'The Concept of Law'* (2013)

act upon. The enactments of our political institutions cannot, for example, claim legal relevance for themselves, and so we need criteria that operate at a different level in order to make the difference. Further appeal to facts about our social practices, so the argument goes, will not break us out of the circle.

But this argument ignores the fact that action in the context of institutions – the actions of passing bills or of rendering judgment in particular cases – occurs against a backdrop of rules that do not function at the same level of generality as these individual acts. To take an example from another context, our acts of declaring that we will do things for each other count as promises and are understood to incur obligations because they occur against the backdrop of a general understanding concerning the nature of promising, and invoke a set of social rules which determine the relevance of such particular social acts. These criteria operate at a different level of generality from the speech acts that compose individual promises, but we do not need to look beyond our social practices to understand them.

There are, however, several more fundamental objections or, perhaps better, alternatives to the picture of jurisprudence, and of jurisprudential method that I have here developed, and we will spend the final two chapters of the thesis exploring them. The first focuses on the question of the limits of philosophical analysis, and on the claim that it is in our common language and existent conceptual practices that the standards of correctness for the philosophical theory of law are to be found. The view that there is more to our

concepts and philosophical categories than is present in language has both ancient as well as recent pedigree, and it has in its contemporary guise – dubbed in the literature ‘externalism’ about linguistic or mental contents – impressed many legal theorists.⁴ Arguments in favor of such a theory, which attempt to expand the possibilities for conceptual interpretation beyond the bounds suggested by our overall conception of method, and as is implied by our understanding of the nature of legal institutions, form the subject matter of this chapter.

But we will turn in the following chapter to consider what is, in some senses, a more radical alternative to that considered here. For whilst the externalist wishes to expand upon the possibilities for legal theory as compared with our own understanding, they do so whilst maintaining the philosophical approach – their central claim being that philosophy answers, finally, to standards beyond those which feature in our common language. The jurisprudential naturalist, by way of contrast, urges that we ought to replace the philosophical approach to understanding law outright – which they view as, alternately, epistemologically bankrupt or in need of serious empirical support – with a socio-scientific investigation. Deeply impressed by the explanatory power of the sciences in many other domains of human thought, and skeptical about the independent worth of the philosophical

⁴ See Stavropoulos, *Objectivity in Law*, Brink, ‘Legal Theory, Legal Interpretation, And Judicial Review’ and Moore, ‘A Natural Law Theory of Interpretation’

method as a means to understanding human culture, they wish to bring jurisprudence under the dominion of a more naturalistic approach. It is to an argument of this type that we will turn in the final chapter.

The Limits of Language, and the Limits of Law

I have argued in this thesis that the responsibility of the theorist in forming an understanding of law is owed, in the last, to the structures of thought and action that find their final expression in our existent social practices, in the language of lawyers, judges and others with competence in relation to law. It is the standards which underwrite their actions, I have said, that form the final limit on philosophical explanation in law. There is a long tradition in philosophy of opposition to such an understanding of the limits of analysis – as determined by our ordinary practices of language use. Both Plato’s realism and the Aristotelian conception of essence, which is subject to a *de re* as opposed to a *de dicto* interpretation,⁵ involve a picture of the possibilities for philosophical insight that transcend our ordinary practices. In the first case, reference is to an aspect of reality that is beyond the physical – the forms, perfect representations of the categories of thought of which earthly examples, including human law, are degenerate instances; and in the second, to the abstract properties of objects conceived of apart from language. Few people, however, are now willing to invest in the extravagant ontology

⁵ *De re* meaning of the object, and *de dicto* meaning of the word.

required by Plato's theory of the forms. And many have also put pressure on Aristotle's metaphysical conception of essence, as treating that which is a matter of projection as a form of introjection.⁶

More recently, however, a number of legal theorists have sought to suggest alternate ways in which philosophical analysis may involve the denial of the authority of language, and of our ordinary use of concepts, over theory.⁷ The focus has not been explicitly on the metaphysical concerns of the Platonist and Aristotelian, but on the philosophy of mind and language, and more particularly on debates between so called 'internalists' and 'externalists' about concepts and word meanings. Simplifying somewhat, internalism is the view that an understanding of the concepts expressed in thought or language depends, most fundamentally, on the intentionality of the subject, their dispositions, capacities, etc. This claim can be localized to an individual or

⁶ 'Essence' Wittgenstein famously argued 'is expressed in grammar...' See Wittgenstein, *Philosophical Investigations* s 371. The urge to conceive of the philosopher's task as involving the specification of the essential nature of things apart from language results, he suggested, from a failure to understand the way in which the latter necessarily imposes upon our interactions with the former, the way in which language casts a shadow over experience. See, on this point, Gordon P. Baker and P. M. S. Hacker, *Wittgenstein-- Rules, Grammar, And Necessity : Essays And Exegesis Of 185-242* (2nd, Extensively Rev. edn, Wiley-Blackwell 2009) 332-338: 'What we call 'the essence' or 'the a priori nature' of something is not a *reflection* of language-independent natures of things. It is the shadow cast by grammar on the world.'

⁷ See, in particular, Stavropoulos, *Objectivity in Law*, Brink, 'Legal Theory, Legal Interpretation, And Judicial Review' and Moore, 'A Natural Law Theory of Interpretation'

else, in the case of a public language, generalized to involve the competences of a community. The important point, in each case, is that content is taken to supervene on the psychology of the relevant subject: it depends on resources internal to them. The proponent of externalism, by way of contrast, holds that our concepts are fixed not at the psychological level, but depend crucially on aspects of the external environment to which we, in our use of words, defer. David Brink, a proponent of externalism in its linguistic form, characterizes the view as follows:

The meaning of a term, on [this] view, is not given by the set of properties which any individual or group associates with that term. The meaning of our words depends, instead, at least in part upon the facts about the nature of things in the world which we use our words to try to describe and with which we and others have interacted.⁸

Nicos Stavropoulos offers a similar interpretation:

[Such a theory suggests] a picture of [meaning] being effected through (direct or indirect) transactions with the relevant object, with speakers beliefs being about it by virtue of the transactions, rather than by virtue of the further fact that the object conforms to some object independent specification contained in [their] beliefs.⁹

The aim of such a theory is to draw a distinction between that which is directly available to an individual or linguistic community – that which comprises their cognitive state or linguistic competence – and the content of

⁸ Brink, 'Legal Theory, Legal Interpretation, And Judicial Review' 118

⁹ Stavropoulos, *Objectivity in Law* 38

their concepts – which are taken to be determined, in part, by the nature of the objects to which they refer, specified apart from the former constraints. The first aspect, which has a psychological basis, is involved in a preliminary reference-fixing role whereas the latter environmental aspect plays an essential meaning-determining role. So Hilary Putnam, a famous defender of linguistic externalism, sums up the position with the following rough slogan: ‘meanings just ain’t in the head’.¹⁰

In what way does externalism challenge the argument of this thesis? I have claimed that an understanding of basic legal concepts depends upon a careful analysis of the rules for their use, such rules being manifest in the language and actions of those with competence in relation to law. On this view, an understanding of the nature of legal authority, for example, is achieved by considering the way in which legal actors ordinarily use the concept, the way in which it is deployed in speech and in action. This suggests, ultimately, a psychological basis for analysis. What externalism does is deny that the contours of our concepts are fixed so as to be properly cognizable from this perspective. We will not understand legal concepts by focusing only on our language, the externalist claims, because this method of

¹⁰ Putnam, ‘Meaning and Reference’ 704. There are, in fact, two ways of putting this point. It can either be said that, on the externalist picture, meaning is determined outside of language, or that language outstrips the competence of speakers. Given the picture of language with which we have been working, whereby the competence of speakers plays a foundational role, it is better to use the former interpretation.

understanding, which has a basis in our intentional content, will not necessarily track the real nature of the objects to which we in our use of words refer, the social kinds with which we interact. Further facts, having to do with the real nature of the relevant objects, are taken to play an essential role.

Why might legal theorists be inclined to defend an externalist understanding of concepts? Motivation is to be found in an old idea, a form of theory that conceives of law as existing apart from the conventions, intentions and actions of its makers: natural law.¹¹ Classical natural law doctrine involved an understanding of law as having a 'reality' distinct from the activities of institutions, as an ideal framework, the telos for the imperfect human endeavor to rule in accordance with right reason. The modern externalist view, by way of contrast, focuses not on the notion of the ideal, but on the possibilities for the interpretation of the concepts that feature in our

¹¹ This motivation is noted in Andrei Marmor's critical discussion of externalism. See Andrei Marmor, *Interpretation And Legal Theory* (2nd edn, Hart 2005) 71-78:

Establishing [externalism about law] would give meaning to the age-old idea that there is more to discover about the nature of law, as it were, than is perspicuous in the rules and conventions themselves, and the practices of applying them. In other words, [externalism] would support the age-old natural-law doctrine, that the law can be discovered.

Michael Moore, a prominent defender of externalism in the case of law, calls his theory 'a natural law theory of interpretation'. See Moore, 'A Natural Law Theory of Interpretation'.

existent social practices. Here too, however, a moral understanding of law provides the background.

The impetus for the conception has been to support, with first philosophy, Ronald Dworkin's contention that it is in the nature of legal concepts that the best understanding thereof does not respond to the criteria employed by lawyers and judges in their use – indeed, it is famously part of his view that they share no such criteria¹² – but is instead a matter determined by political and ethical considerations which provide the best moral justification for their use. Legal philosophers, Dworkin says, 'cannot expose the common criteria or ground rules lawyers follow for pinning legal labels onto facts, for there are no such rules'.¹³ Interpretation in law, he argues, develops not in response to linguistic or mental constraints, but instead to considerations that go to the supposed justificatory point or purpose of law. It is concerns of this type, and not matters of linguistic etiquette, that limit conceptual interpretation:

General theories of law... are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve

¹² In chapter 4 I criticized Dworkin's argument that the nature of legal practice shows that lawyers and judges do not share criteria for the use of legal concepts.

¹³ Dworkin, *Law's Empire* 90

equilibrium between legal practice as they find it and the best justification of that practice.¹⁴

It is the possibility of such an understanding of our legal practices, one that dispenses with the notion that interpretation is responsive to 'common criteria' for the use of legal concepts and invites us instead to seek a 'constructive interpretation' of law, that the modern externalist wishes to render plausible.¹⁵

It must be said that the connection between Dworkin's new natural law and externalism is in no sense automatic. Most fundamentally, establishing externalism about law does not itself imply that moral considerations of the kind which Dworkin thinks essential to understanding the legal domain are

¹⁴ See *ibid* 90, chs 1, 2 and 3 and Dworkin, *Justice for Hedgehogs* ch 8. Many, of course, have rejected the claim that law has any philosophically important justifying purpose. Hart said, for example:

I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards for criticism of such conduct.

See Hart, *The Concept of Law* 248-249

¹⁵ This, at any rate, is the diagnostic aim of both Stavropoulos' and Brink's arguments. Moore, another prominent externalist understands his own project as distinct from Dworkin's, although he too supports a moralized conception of the subject. See Moore, 'A Natural Law Theory of Interpretation'. For Dworkin's understanding of the relation between his theory and natural law doctrine see Ronald Dworkin, 'Natural Law Revisited' (1981) 34 *University of Florida Law Review* 165

appropriate constraints on analysis.¹⁶ All that is shown, if externalism is true, is that interpretation in law does not owe itself to the resources contained in language or to our competences with regard to the use of concepts. But despite this distance, it should be obvious why those attracted to Dworkin's conception of legal theory – as an exercise in 'constructive interpretation' – have sought to support it with such considerations. Dworkin's argument depends on the view that interpretation in law outruns the resources inherent in our common practices, and externalism, if true, allows this possibility in the conceptual case. It suggests that those who oppose Dworkin's methodological stance *a priori*, and because of his rejection of a psychological basis for analysis, are operating under the spell of a dogma, and that we ought to be open to the possibility that his own theory of interpretation, as conceptual but not linguistic, could be made out. Externalism, then, can be taken as attempting to make space for such an understanding of law and our aim will be to show that the theory cannot succeed.

It should be made it clear, however, that the purpose of this discussion is not to defend the positive details of an 'internalist' theory of concepts. The reasons for this are threefold. First, the dialectic concerning these issues has developed in such a way as to leave the issue of internalism largely unspecified. Externalist theorists have argued that an internalist picture is taken for granted by the vast majority of philosophers and their work has

¹⁶ Indeed, I will suggest later that the interpretation of our moral concepts does not itself have an externalist basis.

consisted largely in the provision of counterexamples.¹⁷ Internalists, in turn, have sought to dispute the veracity of these examples, or to suggest ways in which they might be accommodated within a more traditional framework.¹⁸ The nature of the assumed picture – an internalist or psychological theory of the basis of thought and language – remains largely in the background, as the setting for argument rather than its subject. It is not within the confines of this thesis to develop such a theory. Second, where specific efforts have been made to specify an internalistic understanding of meaning, what has resulted either rests at the level of platitude – i.e. by suggesting that what we mean depends, in some sense, upon what is in our heads – or else is plainly false.¹⁹ Adopting the title may, in such circumstances, prove unhelpful. Finally, and most importantly, the task of this chapter is primarily a negative one. The aim is to show only that the arguments of those who wish to extend the possibilities for conceptual interpretation in law beyond language cannot

¹⁷ See, for example, Putnam, 'Meaning and Reference', Tyler Burge, 'Intellectual Norms And Foundations Of Mind' (1986) 83 *Journal of Philosophy* 697 and Stavropoulos, *Objectivity in Law* ch 1

¹⁸ Such an approach is evident in both John R. Searle, *Intentionality : An Essay in the Philosophy of Mind* (Cambridge University Press 1983) chs 8 and 9 as well as Frank Jackson, 'Reference and Description Revisited' (1998) 12 *Philosophical Perspectives* 201

¹⁹ The association between linguistic internalism and individualism about the meaning of terms in a public language, i.e. the view that our use of shared concepts does not owe itself to any community standard, being one such specification. For criticism see Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 62-67

stand. Our own positive task, of providing an understanding of the place and nature of legal concepts in relation to the reality of law, lies behind us.

In the first section, I discuss the leading argument for externalism as a theory applicable to general terms, Hilary Putnam's Twin Earth thought experiment.²⁰ Here I suggest that his argument, which is intended to show that words which refer to natural kinds take their meanings from their referents, as opposed to having their sense determined in language, incorporates a faulty intuition. In the second section I consider Tyler Burge's argument for social externalism, a view that suggests that social factors external to the individual play a fundamental role in individuating the content of their thoughts.²¹ Two points are made in response. First, that contrary to his assertion, aspects internal to the individual do play an essential role in the case Burge considers. Second, even allowing his interpretation, Burge's theory, which takes conceptual content to be fixed at the level of the community and not at the level of individual thought, is compatible with the view that conceptual interpretation in law owes itself to our common practices. In the final section I consider the plausibility of applying an externalist analysis to law, assuming, for the sake of argument,

²⁰ See Putnam, 'Meaning and Reference' and Hilary Putnam, 'The Meaning of 'Meaning'' (1975) 7 *Minnesota Studies in the Philosophy of Science* 131

²¹ See Burge, 'Individualism And The Mental'

that the theory is well motivated in other domains.²² Here I discuss Brian Leiter's recent argument against such a conception before going on to provide other reasons for rejecting the form of moral externalism that has been developed in the literature.²³

Natural Kinds and Constraints

Contemporary externalism about language begins with Saul Kripke's *Naming and Necessity*.²⁴ He argued that the reference of proper names is determined by causal and historical factors tying such words to the real nature of their referents, and not the ideas associated with them in language. The name Aristotle, for example, he argued to 'rigidly designate' its bearer in any

²² This is, in a sense, a clumsy way of putting the matter. If it is true that externalism is made out for any particular domain, this implies that internalism as a general theory of meaning must be false. If the meaning of certain words is not given by what is in the head then *a fortiori* meaning, as a general category, is not given by what is in the head. The claim may, however, be reformulated. Assuming for the purposes of argument that non-psychological factors are the ultimate determinants of meaning, these aspects may themselves give internalistic criteria a prominent role in determining the bounds of interpretation in specific domains. In other words, even if we are to assume that A type facts fix meaning then these facts may themselves, in particular cases, give B type facts a role for the purposes of interpretation. The question then becomes, on the supposition that externalism is made out, whether the theory blocks the import of internalistic criteria in the legal case.

²³ See Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31 *Oxford Journal of Legal Studies* 663

²⁴ Saul A. Kripke, *Naming and Necessity* (Harvard University Press 1980) chs 1 and 2

possible world: 'Aristotle' refers to Aristotle whoever he actually happens to be and whatever psychological connections have been made with the name. It may turn out, for example, despite strong associations between the name 'Aristotle' and the description 'author of the Nicomachean ethics', that Aristotle did not write the book. Reference is secured in the case of proper names, Kripke argued, not on the basis of psychology, but by a causal chain linking the initial use of the word, a baptizing ceremony, to our current uses. Many, of course, worried that this argument moved too fast. We may grant, for example, that certain psychological associations with a name are merely contingent, including the association between Aristotle and certain famous books, whilst holding that a more minimal set of conditions, conditions that must be understood by competent users, form the necessary reference-securing backbone of a proper name.²⁵

It is in Hilary Putnam's work on natural kind terms, i.e. terms that denote substances and types that are subject to scientific individuation, however, that we find the clearest argument for linguistic externalism as it relates to general concepts.²⁶ Putnam's claim is that, in certain types of case, the very meaning of a community's terms, the content of their concepts, is

²⁵ For criticism on Kripke's argument see Searle, *Intentionality : An Essay in the Philosophy of Mind* ch 9. In response to this type of argument see Stavropoulos, *Objectivity in Law* 21-22

²⁶ See Putnam, 'Meaning and Reference' and Putnam, 'The Meaning of 'Meaning''. Kripke also discusses natural kinds in his work, although the argument is less explicit. See Kripke, *Naming and Necessity* ch 3

given by the real structure of the kinds they refer to, even when the community is ignorant of these aspects.²⁷

Putnam begins his discussion by suggesting that the 'traditional theory of meaning' rests on two 'unchallenged assumptions':

- 1) That knowing the meaning of a term is just a matter of being in a certain psychological state....
- 2) That the meaning of a term determines its extension.²⁸

His aim is to show, by the process of a 'science fiction' example, that these two desiderata, which he takes to comprise an internalist theory of meaning and reference, cannot be jointly satisfied. Putnam asks us to imagine a near exact physical, historical and cultural duplicate of our planet, subject to one important difference. On 'Twin Earth', the fictional counterpart, the liquid which covers most of the globe and which is referred to using the word 'water', has a different chemical composition - XYZ as opposed to H₂O. It

²⁷ Whilst the conception has been developed with reference to natural kinds, Putnam himself has extended the view also to include artifact terms and other general concepts. For Putnam's extension of the claim see Putnam, 'The Meaning of 'Meaning'' 160-163. The argument has found favor amongst a number of legal theorists inclined to deny the final authority of language over meaning. See, for example, Moore, 'A Natural Law Theory of Interpretation', Brink, 'Legal Theory, Legal Interpretation, And Judicial Review' and Stavropoulos, *Objectivity in Law* 29-34. For discussions of Twin Earth outside of the legal context see Jackson, *From Metaphysics to Ethics : A Defence of Conceptual Analysis* chs 2 and 3, and Searle, *Intentionality : An Essay in the Philosophy of Mind* 200-208

²⁸ Putnam, 'Meaning and Reference' 700

rains XYZ on Twin Earth, XYZ is drunk by its inhabitants, etc. and despite differences in basic structure, XYZ is indistinguishable from water at normal temperatures and pressures.

The first part of the thought experiment involves noting that the word 'water', as contemporarily used, is understood to have a different meaning on earth as compared with Twin Earth. We would, for example, consider it wrong to use the earth word 'water' to refer to XYZ, and inhabitants of Twin Earth would be mistaken if they applied the term to the substance that has the chemical composition H₂O. This divergence can, of course, be accommodated within an internalist framework – in each community, and consequent upon discoveries about chemical structure, different criteria have been adopted for the use of the word. We treat it as a rule for the use of the term that it only apply to H₂O, whereas what those living on Twin Earth mean by 'water' is XYZ.

It is the next part of Putnam's argument that is taken to establish externalist consequences. He asks us to consider the situation in 1750 when the inhabitants of earth, 'did not know that water consisted of hydrogen and oxygen, and the typical twin earthian speaker of English did not know that 'water' consisted in XYZ...'.²⁹ Putnam's claim is that, despite ignorance of the real structure, its referent, the word 'water', referred on earth to H₂O only,

²⁹ Ibid 701

and on Twin Earth only to XYZ. He asks us to agree, for example, that earth's inhabitants would have been wrong in 1750 to use the word 'water' to refer to XYZ, and vice versa for the inhabitants of Twin Earth. Putnam suggests:

The extension of the term 'water' was just as much H₂O on Earth in 1750 as in 1950; and the extension of the term 'water' was just as much XYZ on Twin Earth in 1750 as in 1950.³⁰

What does Putnam take to be established by these claims? First, that the reference of the term 'water' was not fixed, in 1750, by that which happened to be linguistically available i.e. the perceptibly indistinguishable qualities of water and XYZ. Second, that the proper application of the term was determined, instead, by the real nature of its referent i.e. by the fact that water, on earth, is actually comprised of H₂O, similarly for Twin Earth and XYZ. It is this aspect, Putnam suggests, that allows us to say that for us the word 'water' did not refer historically to XYZ and vice versa for Twin Earth.

These claims, if true, require that one reject as false either the first limb of the traditional theory of meaning as Putnam has it – that knowing the meaning of a term involves being in a certain psychological state – or the second – that meaning determines reference. This is so because the Twin Earth thought experiment is taken to involve psychological duplicates whose terms have different references. Which aspect of the traditional theory ought to be rejected? Putnam, holding that the 'preanalytic usage' of the concept

³⁰ Ibid 702

suggests that the meaning of the relevant terms differ in each case, prefers the first option.³¹ The following sets out, most clearly, the radical nature of his conclusion:

[Members of each speech community] understood the term 'water' differently in 1750 although.... given the state of science at the time, it would have taken their scientific communities about fifty years to discover that they understood the term 'water' differently.³²

Meaning is, on such a picture, taken to be established by the real nature of the liquid referred to as 'water' – H₂O or XYZ in each case – even though it would take time, both on earth and Twin Earth, for the proper sense of the term to be discovered. What has been said about water may also be said, Putnam argues, about the use of concepts such as 'gold', 'aluminum' and other words that refer to objects of scientific study. 'Gold', for example, he suggests to have always referred to the metal with the chemical number 79 and not fools gold or any other superficially similar metal; the meaning of the term was, even before the development of modern chemistry, determined by the real nature of its referent.

³¹ Ibid 702. He provides the following argument in favor of the interpretation:

Suppose 'water' has the same meaning on Earth and on Twin Earth. Now, let the word 'water' become phonemically different on Twin Earth-say, it becomes 'quaxel'. Presumably, this is not a change in meaning per se, on any view. So 'water' and 'quaxel' have the same meaning (although they refer to different liquids). But this is highly counterintuitive.

Ibid 710 fn 2.

³² Ibid 702

It should be clear now why Putnam's discussion of natural kinds has found favor with legal philosophers who wish to deny the authority of language over theory. Recall that Dworkin's conception of legal concepts has it that interpretation is responsive to considerations of political morality that do not feature as aspects of the ordinary use of such concepts. The Twin Earth case is one in which the language of the relevant community, the criteria which they employ in the use of concepts, is thought also not to determine the meaning of their terms. Dworkin himself makes clear the analogy:

Just as a scientist can aim, as a distinct kind of project, to expose the very nature of a tiger or gold by exposing the basic physical structure of these entities, so a political philosopher can aim to reveal the very nature of [law] by exposing its normative core.³³

On this view, just as a scientific discovery may improve upon conventional constraints in the case of natural kind concepts, so political considerations may eclipse the criteria inherent in the use of legal language by revealing the 'normative core' of the institution.³⁴

How persuasive, however, is Putnam's thought experiment? His argument about the meaning of the term 'water' in 1750 is motivated by an understanding of what we would say about appropriate and inappropriate

³³ See Dworkin, *Justice In Robes* 155 Dworkin considers analogies and dis-analogies between his theory of legal concepts and Putnam's account of natural kinds in *ibid* 152-155

³⁴ Stavropoulos, *Objectivity in Law* 38

uses of the word relative to the described set of conditions. The revealed intuition – that it referred on earth to H₂O and not XYZ in 1750, and vice versa for Twin Earth – whilst initially appealing, involves a sleight of hand that, once revealed, renders it much less persuasive. The point that I will be making is that our intuitions about correctness in the use of terms are naturally grounded in our existent linguistic competences: i.e. facts about how we contemporarily use words. When we ask what we would say about possibilities, in other words, we are asking questions about rightness and wrongness in *our* language, and not, crucially, the language of speakers in 1750. The belief that the meaning of the word ‘water’ was in 1750 responsible to the chemical composition of its referent is, so I will argue, a consequence of our failure to grasp that in considering the hypothetical we are holding the relevant speakers to the wrong set of standards, to the norms which structure our modern scientific definitions and not the rules which determined the meaning of their terms.

To see the basic point we might consider Edmund Gettier’s famous argument against the analysis of knowledge as justified true belief.³⁵ Gettier suggested to us a range of situations in which we would ascribe to someone a justified belief that happened, coincidentally, to be true. One such example is the following: a person sees in the distance an outline which looks very much

³⁵ Edmund Gettier, ‘Is Justified True Belief Knowledge’ (1963) 23 *Analysis* 121. This interpretation of Gettier’s work owes much to Jackson, *From Metaphysics to Ethics : A Defence of Conceptual Analysis* ch 2

like a sheep standing in a field and comes to form the belief that there is a sheep in the field. Unbeknown to them the outline is actually that of a dog, but their belief turns out true because, just out of view, there is a sheep standing in another part of the field. Such a belief, Gettier invited us to agree, does not count as knowledge: the subject does not know that there is a sheep in the field, and yet they have a true justified belief that there is. We agreed with Gettier that true-by-luck cases do not count as knowledge – that the concept does not license the description – and were therefore led to reject at least a simple version of the thesis that knowledge consists in justified true belief. In this way the thought experiment operated on our competences with regard to the use of the concept: our agreement was secured by considering the case in light of the concept we have and deploy.

But now imagine we are asked to consider the question, not of ourselves, but of some historical community. Would they also be wrong to describe the situation as one involving ‘knowledge’? The intuitive answer is that they would: just as we should not designate the case as such, nor should they. What, however, is the basis of this conclusion? Being unable to consult the relevant historical community, we rely upon our own competence in the use of the term and judge them in accordance with it. We arrive, in other words, at the answer that those in the historical situation ought not use the word in a way that allows Gettier cases to be subsumed under it by consulting our own linguistic capacities.

Putnam's thought experiment exploits this fact. When he asks about whether it would be mistaken, relative to 1750, to use the word 'water' to refer to XYZ, we consider that which is licensed by the concept with which we are familiar. As a result, the question we come to consider for the purposes of the 'science fiction example' is whether certain uses of the term 'water' would be accurate to *our* linguistic competences. And, of course, judged relative to the criteria that we use – criteria that incorporate scientific findings about water as rules for the use of the relevant word – we come to the conclusion that it would be wrong for those on earth to apply the term to the chemical type XYZ, and vice versa for the inhabitants of Twin Earth. But this, of course, does not imply that the meaning of the term in 1750 was then sensitive to the 'real nature' of water, only that we have judged those present in 1750 by the standards for word use in contemporary language, standards which incorporate our best scientific understanding of the substance. The case involves, in other words, a retrospective imposition.

Frank Jackson, as part of his important discussion of Putnam's work, highlights, but does not draw out, the implications of this point. He says, for example, that:

[Putnam] told stories about... Twin Earth, and invited us to agree with him that what counted as water on Twin Earth was not the stuff on Twin Earth with the famous superficial properties of water – being a clear potable liquid and all that; for short, being watery – but rather the stuff that on Earth made up (most of) the watery samples that we were acquainted with when the term 'water' was introduced. We agreed with Putnam. But we were not under external instruction from some linguistic

dictator to agree with him. Our agreement was endogenous. It, therefore, reflected *our* [concept] of water.³⁶

Here Jackson notes that Putnam's experiment reveals 'our' linguistic intuitions about the use of the word 'water', that it reflects our 'endogenous' agreement. We, of course, use the term in accordance with its scientific definition and discard the 'superficial properties' of water as identifying criteria. But it is quite a different matter whether those present in 1750 used the term such that it referred to the deep structure of the stuff rather than its perceptual properties, and this important distinction is not noted.

In considering whether externalism is made out in the example, then, we must ask a different set of questions. These do not concern what *we* would say about the appropriate uses of the word 'water' in the relevant hypothetical circumstances, but must instead be explicitly asked of its historical use. The matter needs to be considered, in other words, not by consulting our competences, but by considering, as best we can, how those in 1750 would respond to various possibilities. And if we explicitly consider issues of this type, support for Putnam's conclusion quickly evaporates. Would those present in 1750, for example, characterize the discovery that water is H₂O as revealing an important truth about the meaning of their words? The answer must be that they would not. A scientific discovery is never met with the response 'now we know what we mean by our terms', but

³⁶ Jackson, *From Metaphysics to Ethics : A Defence of Conceptual Analysis* 38-39 emphasis added

instead with the acknowledgement that more is now known about the world. Another question: would those present on earth in 1750 consider the meaning of the term 'water' to be altered if, counterfactually, the watery substance they were acquainted with was XYZ, and this fact was revealed by *a posteriori* findings? Again, they would not. The hypothetical would not be considered to alter word meaning but instead to make different the standard of correctness for a scientific theory of the relevant object, and for the definition of any word which might be fashioned – *ex post facto* – off the back of such findings. What we take as a statement of word meaning – i.e. that 'water' is H₂O – would be understood by those in the relevant historical case to play a different role, and this shows our initial characterization of the situation to be inaccurate.

These considerations lend support to the supposition that in 1750 the meaning of the word 'water' was determined not by the real nature of the substance but by its perceptual properties as determined by the criteria for use then present in language. So at the time, the word 'water' had the same meaning on earth and Twin Earth. Resultantly, and upon discovering that the liquid has a certain composition, we were, as John Searle puts the point, faced with a choice:

We could define 'water' as H₂O, which is what we have, in fact, done; or we could just say that there are two kinds of water, and that water on Twin Earth is constructed differently from water on earth.³⁷

³⁷ Searle presents a different hypothetical in support of this intuition:

Those present at the point of discovery were, in other words, confronted with the requirement for a linguistic decision: to maintain their conventional definition or to adopt the findings of science as part of the criteria for the use of the word. It was the latter course that was chosen, and so the word came, only at this point, to have its modern meaning.³⁸

Once we have disposed with the faulty intuition that enables the thought experiment to gain persuasive authority, the question becomes

Suppose, for example, that there had been a great deal of going and coming between earth and Twin Earth, so that speakers were likely to have encountered both [H₂O and XYZ]. Then it seems likely that we would construe water as we now construe Jade. Just as there are two kinds of jade, nephrite and jadeite.. so there would be two kinds of water, H₂O and XYZ.

See Searle, *Intentionality : An Essay in the Philosophy of Mind* 203. Curiously, the argument is from Putnam. See Putnam, 'The Meaning of 'Meaning'' 160

³⁸ Peter Hacker and Gordon Baker explain the differences which the statement 'water is H₂O' exhibits in each context:

What may appear to be an a posteriori necessary truth (e.g. 'Water is - consists of -H₂O') is no more than an empirical proposition that has *hardened into a rule*. Then, and only then, does it play a role in concept-determination. For accordingly we (chemists) would not *call* anything 'water' unless it consisted of two parts hydrogen and one part oxygen in chemical combination. But now the proposition is no longer an a posteriori truth at all, any more than is the Pythagorean theorem. The error is to suppose that the sentence 'Water is H₂O', used first as a true or false description and later as the expression of a rule for the use of the word 'water', is one and the same instrument in the language-game.

See Baker and Hacker, *Wittgenstein-- Rules, Grammar, And Necessity : Essays And Exegesis Of* 185-242 260

whether there are any objections to the interpretation on which meaning does not, in Putnam's example, outstrip competence. The main argument against the view that the meaning of the term 'water' has varied over time, rather than it having always been the case that in some mysterious way it took its meaning from aspects of the physical world, is that it doing so would have involved, at the point of linguistic innovation, a change of subject. The claim is that if the word 'water' had a different meaning in 1750, as compared with now, then we cannot have been talking about the same thing in each case: those in 1750 meant one thing by the term, and we mean another. But this seems wrong. The discovery concerning chemical structure was, after all, about *water*. Externalism, which holds that meaning remains fixed across contexts, does not engender the same problem.

The first point to note in response is that we can use words with two different meanings to refer to the same object. So, for example, the phrase 'the evening star' and the phrase 'the morning star' refer to the same entity, although the meanings of the relevant words differ.³⁹ Someone who was, prior to modern astronomic developments, talking about the evening star might not have realized that they were referring to one and the same celestial object as someone discussing the morning star, despite the fact that they were both competent users of language. In such a case, our imagined couple shares

³⁹ The example is from Frege. See Gottlob Frege, *Translations from the Philosophical Writings of Gottlob Frege* (P. T. Geach and Max Black eds, 3rd edn, Barnes & Noble 1988) ch 3

a subject, not by virtue of the fact that their words mean the same thing, but by virtue of the fact that they agree in reference. So the fact that the word 'water' meant a different thing in 1750 as compared with now does not necessarily imply that a different subject would be under consideration in each case.

The objection may be refined. The claim, it might be suggested, is not that different word meaning entails a change of subject, but that in absence of agreement in meaning there must at least be agreement in reference for two people to be interpreted as sharing a subject. The 1750 criteria for the use of the phrase 'water' – i.e. it being a clear potable liquid – simply do not have the same unique reference as the modern scientific definition does. This much, so the argument goes, may be taken to be shown by the Twin Earth thought experiment, even once shorn of its intended import: 'water' as clear potable liquid differs in its scope from 'water' defined as H₂O. If the 1750 meaning of the term is taken to be fixed by conventional constraints, as I have argued it ought to be, then the word referred to both H₂O and, hypothetically, XYZ, whereas the modern use has as its extension only H₂O. Those in 1750 were, if the meaning of their terms is taken to be determined in language, referring to something quite different from that to which we currently refer.

The notion of agreement in reference is, however, ambiguous, and the reformulated argument plays on this ambiguity. For we may agree on a referent either *actually* or *hypothetically* and the former is sufficient for the

purposes of sharing a subject in a normal conversational context. To understand the distinction, consider the concept of a featherless biped and the concept of a human. These concepts agree in reference in the former sense but not the latter. This is so for the reason that the only featherless bipeds with which we are actually acquainted are also humans. So we may say that the person discussing featherless bipeds shares a subject with another talking about humans. This agreement in reference remains the case despite the fact that, hypothetically, we can imagine featherless bipeds that are not also humans and so, strictly speaking, the two concepts may range over different cases. Whilst meaning and hypothetical reference differ, agreement is secured by sharing an actual referent.⁴⁰

It is, then, actual agreement in reference that holds between the 1750 concept of water and the modern concept, even though we can imagine possible divergences in reference in hypothetical cases, such as that provoked by Twin Earth (the concept of a clear potable liquid having a different hypothetical reference to H₂O). Such challenges do not block agreement in subject so long as it is understood conversationally that reference is restricted to familiar rather than merely possible incidences. The fact that the word water had a different meaning in 1750, as well as a different possible range of reference, does not mean that people were then talking about a different thing

⁴⁰ The same is true, to use an example from Putnam, of the concepts 'creature with a kidney' and 'creature with a heart'. See Putnam, 'Meaning and Reference' 700

from that which we mean to refer to when using the word in accordance with its modern scientific definition. Twin Earth, then, does not support the view that meaning may outrun linguistic competence.

The Social Case

An argument for a more limited form of externalism, relating to the place of social institutions in the individuation of thought, has been provided by Tyler Burge.⁴¹ Burge's argument involves a similar structure to Putnam's but has a different target. Putnam's claim focused on the nature of terms in a public language, and he argued that natural aspects of the world play a role in determining the meaning of the words that we use to refer to them. Burge's argument, by way of contrast, focuses specifically on the contents of thought, and attempts to put pressure on the notion that its individuation has a psychological basis. The suggestion is that the social context in which an individual is situated in plays an essential role in fixing what they are thinking about, the concepts that they are entertaining.

Burge asks us to imagine a situation in which a particular person, Jane, comes to believe that she has the disease arthritis in her thigh. Jane, not being a medical professional, is unaware of the fact that arthritis is an ailment only of the joints. When she lays claim to having the disease in her left thigh, then,

⁴¹ See Burge, 'Individualism And The Mental'

she expresses a false belief. The next step involves imagining a Twin Earth comparator case where the relevant variation is that the word 'arthritis' is generally used by the community, not to refer to an ailment of the joints, but a different disease – tharthritis – that affects both the joints and the limbs. In this situation, Burge argues, Twin Earth Jane, if she were to claim to have 'arthritis' of the thigh, would express a true belief about tharthritis and not a false belief about arthritis. Burge suggests the following interpretation:

The upshot of these reflections is that the patient's mental contents differ while [their] entire physical and non-intentional mental histories, considered in isolation from their social context, remain the same.... The differences seem to stem from differences "outside" the patient considered as an isolated physical organism, causal mechanism, or seat of consciousness. The difference in [their] mental content is attributed to a difference in their social environment.⁴²

Jane and Twin Earth Jane have different beliefs, and consequently different contents, Burge argues, despite being in exactly the same intrinsic state. The individuation of their attitudes depends, in other words, upon factors external to their psychology; here, the institutions and shared language of their community.⁴³

⁴² Ibid 79

⁴³ Ibid 77-79. The argument, unlike Putnam's, is not intuitively linked to the special nature of the domain under consideration:

...[the claim] does not depend, for example, on the kind of word 'arthritis' is. We could have used an artifact term, an ordinary natural kind word, a color adjective, a social role term, a term for a historical style, an abstract noun, an action verb, a physical movement verb, or any of other various sorts of words.

Burge's conclusion, however, is not quite right. Despite his claim that none exists, there is an important psychological difference between Jane and Twin Earth Jane that suggests, contrary to his interpretation, a criterion internal to the individual which matters for the purposes of the individuation of the concepts that they entertain: both Jane and Twin Earth Jane intend, in their thought and communication, to use the concepts that feature in the language of their particular communities. Jane intends her usage to be responsible to the concepts that feature in the linguistic practices of her community – which include the concept of arthritis – and Twin Earth Jane intends the same with reference to her community. There being a conceptual variation between the two communities, small but important for present purposes, Jane and Twin Earth Jane intend to speak *different* languages, to use concepts with *different* content. Jane intends to think with and to express herself using concepts that feature in the English language, whereas Twin Earth Jane intends to use the concepts that feature in Twin Earth English. To be sure, the *content* of each language is external to the individual, as are the norms that regulate the use of the concepts that they intend to use but are not yet familiar with, but their intention to speak the relevant language – Earth or Twin Earth English – is internal to them.⁴⁴ Burge's interpretation, which denies factors of this type a role, cannot be maintained.

Ibid 79

⁴⁴ A similar interpretation is to be found in Raz, *Between Authority and Interpretation : On the Theory of Law and Practical Reason* 62-67

But we can set this issue aside. The central point to be made in relation to Burge's thought experiment, even assuming his externalist claim about the relation between the individual and their concepts to be true, is that it is too limited to stand in the way of the conception of analysis defended in this thesis. I have argued that understanding in law owes itself to the concepts which feature in our common legal practices, the rules for their use as manifested in the actions of law-applying institutions and others with legal competence. Assuming that the individuation of concepts as they feature in the thoughts of particular individuals owes itself to communal standards and not to their psychology, this does not impact upon our general claim. Burge's argument, in other words, does not cut against an internalistic, or intentional, understanding of conceptual interpretation, where the object of interpretation is understood to be fixed at the communal level. It is at this level, I have suggested, that the institutional concepts with which we are concerned standardly manifest: our interest is in the concepts possessed by those with competence in relation to law, and these people form a community.⁴⁵

⁴⁵ It should be noted that Burge has more recently argued for a form of social externalism that does not make communal standards the benchmark of interpretation. His new argument relies upon the fact that people may entertain non-standard theories of particular social concepts, i.e. theories that diverge in content from communal criteria, whilst still being heralded as competent speakers. Someone may, as per Burge's example, argue that sofas are not objects intended to be sat upon whilst still being accredited with the concept. But the ability of individuals to hold false theories of particular concepts, I argued in chapter five, may stand alongside their practical competences in the use of such concepts and it is the latter, not the former,

Externalism in the Case of Law

I have suggested that neither Putnam's nor Burge's thought experiments provide support for an externalist understanding of concepts, the view that interpretation may outrun the resources present in language. Putnam's claim involves a faulty intuition and Burge's argument, which focuses on the relation between the individual and the concepts of the community, is too limited to allow for the possibility. But there are others who have been impressed by the arguments for externalism, in particular Putnam's, and so we may consider, on the assumption that the model provides a viable explanation of other domains, whether such a conception, on which non-linguistic constraints are taken as the final determinants of meaning, could have application in the case of law.⁴⁶ The question, then, is whether we might be able to draw a distinction, as Dworkin suggests, between what is linguistically available within a community, the boundaries set by

which matters both for the purposes of attribution and interpretation. See Burge, 'Intellectual Norms And Foundations Of Mind'. For discussion of Burge's work in the legal context see Stavropoulos, *Objectivity in Law* 34-38. A similar use of non-standard theory to motivate a rejection of linguistic constraints on philosophical theorizing features in Williamson, *The Philosophy of Philosophy* ch 4

⁴⁶ Both Andrei Marmor and Brian Bix, for example, attack linguistic externalism as it applies to law on the assumption that Putnam's argument goes through with regard to natural kinds. See Marmor, *Interpretation And Legal Theory* 71-74 and Brian Bix, *Law, Language and Legal Determinacy* (Clarendon Press 1993) 168-172

intentionalistic aspects of our conceptual practices in relation to law, and the true contents or 'real nature' of the concepts that populate the domain. There are a number of good objections to a view of this type, but we ought to consider first a recent criticism of externalism in the case of law, suggested by Brian Leiter, as a way of sharpening the focus of our own discussion.

Leiter's argument against the view that externalism can be made out in the legal domain has to do with the fact that, by his lights, such a theory requires an 'implicit essentialism':

Granting... the correctness of [externalism], it is not obvious how it helps in the case of law. After all, [such a] theory always seemed most plausible for a limited class of expressions: proper names and natural kind terms. The reason has to do with the implicit essentialism required for the new theory: unless referents have *essential* characteristics – just as "water" has a distinctive and essential molecular constitution – they cannot fix meanings... But what is the 'essential' nature of the many artifact terms that populate legal rules...?⁴⁷

It is because the referents of legal concepts do not have essential features, Leiter argues, that externalism cannot be made out in the domain of law. Natural kind terms have real properties, essential aspects of their constitution, which play a role, on the externalist picture, in fixing the meaning of the words we use to refer to them. There is no equivalent aspect in the nature of

⁴⁷ See Brian Leiter, 'Naturalism In Legal Philosophy' <plato.stanford.edu/entries/lawphil-naturalism/> accessed 14th July 2014. Leiter's anti-essentialist argument, as it applies to law, is made more fully in Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism'

legal kinds Leiter argues, no essential characteristics of our legal practices and categories and hence no possibility for a similar analysis thereof.

Why does Leiter believe law to resist analysis in terms of its essential features? 'The concept of law' he says is an artifact concept, an artifact being 'something that necessarily owes its existence to human activities intended to create that artifact'.⁴⁸ Such objects, he claims:

are notoriously resistant to analyses in terms of their essential attributes, both because they are hostage to changing human ends and purposes and because they cannot be individuated by their natural properties - unlike, say, water which just is H₂O.⁴⁹

The suggestion that the referents of such terms have essential properties, Leiter argues, would require extravagant 'metaphysical commitments' concerning social and artifact kinds, commitments that should be the subject of 'a psychological and not philosophical investigation'.⁵⁰

The commitment to law having essential features, however, need not involve such extravagance, only the recognition of the fact that essence is the reflection of the rules for the use of our concepts, the essential nature of law being, on this picture, an expression of the criteria for the concept's

⁴⁸ Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' 666

⁴⁹ Ibid 666

⁵⁰ Ibid 666

application.⁵¹ The claim that 'essence' can in the social case only be the product of a metaphysical conception of a world sorted into types and kinds independent of 'human ends and purposes' results from a failure to note the way in which our concepts, legal and otherwise, manifest themselves as part of our worldview. We see, and in the institutional case act, through the lens of our concepts; the rules for their use in language express the *de dicto* necessities for their application and the *de re* properties of their referents.⁵²

Now Leiter would want to say that this merely pushes the matter one step further back: the claim that there exist conceptual necessities concerning law, he would say, is equally as remarkable as the claim that legal systems have essential properties. The concept of law, too, is a social construct, subject to the pressures of culture and the vicissitudes of time. Talk of necessity is, in such a context, just as much out of place. But, as I argued in chapter one, because concepts are to be identified by the rules for their use, a difference in use indicates a difference in concept. Conceptual necessities, as functions of the rules for the use of concepts, depend for their recognition upon nothing more than an acknowledgement that if one changes the rules, one is playing a different game.

⁵¹ See Wittgenstein, *Philosophical Investigations* s 371

⁵² Does this claim help the externalist? It does not for it suggests that the essential nature of law finds expression in language, and externalism requires that the nature of law find expression apart from such constraints.

So we ought to reject Leiter's anti-essentialist argument as both misconceived – for the view that law has essential properties does not require externalism – and overly broad – for such an objection would apply equally as well to an understanding which ties law to our existent conceptual and linguistic practices.⁵³ But there are better objections to an externalist conception of jurisprudence, objections that exist quite apart from the fact that the general arguments in favor of such a view fail. These involve, not skepticism about the nature of law, but arguments having to do with the specific form of analysis preferred by the proponents of externalism concerning law, and their claim, in particular, that interpretation in law involves reference to evaluative considerations which enable the 'constructive interpretation' of our legal practices.

Recall that the aim of the conception is to support Dworkin's aspirational account of conceptual understanding, an account that aims to identify the justifying purpose of law, and thereby to show our legal practices

⁵³ Indeed, as Endicott notes, Leiter himself does not manage to hold to the anti-essentialist line, claiming, as he does, that 'the concept of law is the concept... of something that necessarily owes its existence to human activities intended to create that artifact.' See Timothy Endicott, 'The Generality Of Law' in Luís Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing 2013) 31-33. Leiter's anti-essentialist argument is also criticized in Leslie Green, 'The Morality In Law' in Luís Duarte d'Almeida, James Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing 2013) 199-203

in their 'best', viz. most morally appealing, light.⁵⁴ The claim is not merely that legal concepts have important political ends which restrict their scope – and we may have good reason to doubt that even this is true, at least with regard to the most basic such concepts⁵⁵ – but that a proper understanding of such ends need not be built into the practices of their use. How plausible is it, then, to believe that law's 'real' nature could be revealed by a theory of this type? Three points, in particular, are worth noting.

The first has to do with the radical distinction suggested by such a theory, as between the institutional and conceptual aspects of law. For, like all natural law theories that came before it, the modern interpretive turn fails to accredit those whose actions together form the legal system, those who make up the institutions that comprise law, with mastery of the concepts that they have and use every day. Law, such a theory suggests, may be mysterious to lawyers, judges and others with legal competence, not simply for the reason that they are unable to account for their practices in a theoretically rigorous manner, but for the reason that their practices, dispositions, capacities etc., do

⁵⁴ See Dworkin, *Law's Empire* 90, chs 1, 2 and 3 and Dworkin, *Justice for Hedgehogs* ch 8

⁵⁵ As we noted earlier many, including Hart, have rejected the claim that law has any philosophically important justifying purpose. Indeed, there is a strong and insightful tradition reaching back to Kelsen which views the institution as being identified primarily as a social means rather than according to its ends. See, on this issue, Leslie Green, 'Law as a Means' in Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing 2010) and Hart, *The Concept of Law* 248-249

not capture the real nature of the concepts with which they are, nonetheless, intimately concerned. We allowed the former possibility in chapter five where we distinguished between the practical capacity in the use of legal concepts and the ability to explain use: lawyers and judges, I suggested, have the former ability, but need not have the latter. Externalism goes further. It is not, on this picture, merely that the law's agents do not fully understand their concepts in a theoretical sense – that they competently use, for example, the concepts of law, right and legal system, but are unable to provide a philosophical account of them – but that their conceptual competences fail to capture that which they, on a natural reading, contain. For the externalist, lawyers and judges may fail to grasp, even in a practical manner, the real nature of the practices to which they contribute, and so their uses of basic legal concepts may stand in need of correction by standards not currently recognized as their own. Without such agents there could be no law, and yet externalism suggests that the best interpretation of the institution outpaces them. In this regard, the modern form of natural law is as problematic as its more traditional forbearers. Each denies the institutional basis of the domain, and the form of dominion over legal concepts on the part of institutional actors that this implies.

The second point has to do with the particular constraints on interpretation suggested by the externalist model. For whilst it is conceivable that ethical considerations of the kind which Dworkin commends might be pertinent to the understanding of certain of legal concepts – for example the

concepts of equality, justice or good faith in law – it seems intuitively obvious that many other legal concepts, including, importantly, the concept of law itself, are not themselves ethical or evaluative in nature.⁵⁶ The concept of a contract, for example, does not appear to name an arrangement that could itself be the subject of a general justificatory account, although of course the range of agreements deemed suitable to be upheld in any single jurisdiction will affect its moral profile.⁵⁷ It is, in other words, a moral matter which contracts ought to be enforced but not, or at least not obviously, what a contract is.

The problem extends further, for many concepts that are traditionally conceived of as requiring moral interpretation take on in law a specialized or technical meaning, the understanding of which requires not moral theory but a sound grasp of legal doctrine. Leslie Green notes:

What sounds like moral reasoning in the courts is sometimes really source-based reasoning. For example, when the Supreme Court of Canada says that a publication is criminally “obscene” only if it is harmful, it is not applying J.S. Mill's harm principle,

⁵⁶ Dworkin tacitly recognized as much when he conceded that the object of interest for the purposes of his jurisprudence was not really the concept of law as such, but the concept of legality, or the rule of law. The latter, unlike the former, is an evaluative concept. See Dworkin, *Justice In Robes* 168-183

⁵⁷ For discussion of the distinction between the application of general legal concepts and system specific rules which determine the breadth of enforceability in particular jurisdictions see Endicott, ‘Law and Language’

for what that court means by “harmful” is that it is regarded by the community as degrading or intolerable.⁵⁸

Understanding whether a publication is obscene according to Canadian law does not depend upon the best ethical theory of obscenity, but on an understanding of how the courts in that jurisdiction have fashioned a specific technical meaning of the term ‘harm’. And whilst it may seem a moral mistake to replace a substantive question concerning obscenity with a sociological question concerning local limits on toleration, it is not, as Canadian law currently stands, a legal mistake.

One final argument against the view that the ‘real’ nature of legal concepts may be determined by justificatory or ethical standards that exist apart from our existent linguistic and conceptual practices. This concerns the conception of theory upon which externalism depends. Recall that such a view relies upon the notion that the real nature of our concepts is determined by considerations that stand apart from that which is known *a priori* on the basis of linguistic competence. Putnam’s scientific example allows for such a conception of theory: as revealing language-independent truths about, for example, water. It is clear, in other words, that scientific theory has truth conditions which enable it to exist apart from and, on the assumption that Putnam is right, act as an authority over that which is given about the

⁵⁸ See Leslie Green, ‘Legal Positivism’ <<http://plato.stanford.edu/entries/legal-positivism/>> accessed 8th November 2012

meaning of our terms in language. But the same is not obviously true of moral theory, and this puts pressure on the view that it could be said to play an analogous role.

When we reflect on the demands of justice in political communities, for example, we do not set aside our linguistic and mental competences but actively engage them. Questions of fair treatment in the distribution of resources are determined both by consulting possible cases and by attempting to elicit, via argument, the principles which lie behind our judgments that certain situations do, and certain do not, accord with our sense of justice.⁵⁹ The results of such inquiries are, resultantly, not 'discoveries' but, instead, represent a deeper understanding of the attitudes that, present in the mind and therefore knowable *a priori*, ought to mediate our interpersonal interactions with others. Peter Hacker makes the point:

The form of knowledge [achieved in philosophy] unlike that achieved by the natural sciences, is not that of observation, detection or experimental discovery, but of *realization*... That is why the characteristic reaction to an advance in scientific knowledge is "Goodness me, who would have thought of that!",

⁵⁹ The view that thought experiments and philosophical examples play, in morality, an analogous role to scientific experiments as genuinely *a posteriori*, depends on a misunderstanding of the role of samples in each case. In moral theory possible cases are used to provoke a way of seeing already imminent in us and not as a means of accessing that which is, absent worldly interactions, beyond our grasp. For a contrasting view, on which thought experiments are understood to be more closely analogous to scientific experiments, see Williamson, *The Philosophy of Philosophy* ch 6

whereas the characteristic response to a philosophical insight is “Of course, I should have thought of that!”.⁶⁰

Ethics, on a natural interpretation, does not inform us of new facts, or rewrite the rules for the use of language, but, by drawing upon our conceptual competences, reveals more about that to which we are, at a deep level, already committed. This, of course, is not to say that morality comprises nothing more than our often-tainted beliefs and judgments, but to say that improvement in our moral situation depends upon the notion of understanding and not that of discovery.⁶¹ Moral theory does not, in other words, appear to play the role that the externalist needs it to – as an improvement upon that which can be accessed by reflecting on competence, conscience and conviction – for crucially it depends upon the latter.

Conclusion

⁶⁰ Hacker, ‘Philosophy: A Contribution, not to Human Knowledge, but to Human Understanding’ 147-148

⁶¹ The picture is sometimes thought of as complicated by that fact that moral judgment supervenes on natural facts, facts about which we can make discoveries. So, for example, when we learn that certain animals have greater intelligence, or capacity to feel pain than we otherwise thought, this naturally alters the ways we feel they ought to be treated. But although such a change would improve the overall situation, it would not be the case that if we changed our behaviors we would, by virtue of that fact, have become morally better people, or have acquired a better view of the nature of morality, only that we would better understand the range of application of our ethical principles.

In this chapter I have argued against an externalist understanding of legal concepts. To this end, both Putnam's highly influential argument for such a view of the meaning of general terms and Burge's social externalism were considered. Neither type of view, I suggested, succeeds as a challenge to the form of conceptual interpretation defended in this thesis. But we also considered the merits of extending the model, on the assumption that it was valid for other domains, to the case of law. Here, I criticized the particular form of externalism developed in the legal philosophical literature, a view that ties legal concepts to evaluative constraints established outside of the bounds of language. Having here considered and rejected a conception which ties this new theory of the nature of concepts with an ancient view of law – as dependent in a certain sense, upon morality – we will move in the next chapter to consider the force of a distinctly modern approach to jurisprudence, one which associates understanding within the domain most closely with scientific forms of inquiry.

Chapter Seven: Is there a Naturalistic Alternative?

Realism, Replacement and the Theory of Adjudication

Introduction

In the previous chapter I argued against an expansive conception of philosophical inquiry, one which suggested that legal theory owed its resources to concepts and objects grasped only imperfectly in the ordinary discourse and practices of lawyers, judges and others with legal competence. Conceptual understanding owes itself to the standards which structure our existent social practices, and it has no higher authority. Externalism, the subject of the last chapter, is a thesis about the aims and limits of the philosophical method, and it presents us with an alternate picture of philosophical progress to that which I have suggested. But there exists a more radical form of criticism of the kind of theory that I have been developing; one that suggests that the standards for a successful understanding of the nature of law are ultimately not themselves philosophical, at least not as traditionally conceived, but emanate from a quite different discipline: the sciences. Deeply impressed by the epistemic and then ontological successes of scientific forms of understanding in other domains of human thought and inquiry, the defenders of this type of approach wish to apply its methods also to legal theory. The argument of the jurisprudential naturalist is not merely that we have misunderstood the philosophical approach as it applies in the legal

domain, but that we ought to engage in quite a different form of inquiry if we are to achieve an epistemically respectable understanding of law.

Naturalism is the name of a broad church whose central figures share an underlying belief that philosophy ought to be allied more closely with the sciences, most commonly with the aims and methods of the natural sciences.¹ And whilst a great variety of attitudes have been claimed to correctly summarize the naturalistic approach, from the mundane – for example, the claim that philosophical theories ought not to call into question the most uncontroversial scientific truths, or to doubt wholesale the scientific method – through to the truly outlandish – that scientific forms of understanding, for example, constitute the only true forms of understanding² – it is in the work of W.V.O. Quine that naturalistic philosophy has found its most mature and abrasive modern formulation.

Quine is most famous, perhaps, for the several arguments that comprise *Two Dogmas of Empiricism*: first, his argument against the view that there exists a distinct domain of conceptual truths, not answerable for their veracity to broader claims about the natural world and, second, in favor of a holistic picture of confirmation according to which statements should be held to be true, and perhaps even meaningful, only when they cohere with a

¹ See Papineau, 'Naturalism'

² Such an argument is, of course, self-refuting, for the claim cannot itself be characterized as scientific.

broader set of statements known to be scientifically respectable.³ Doubts have been raised both about the impressiveness of Quine's initial argument, his claim being that the notion of conceptual or 'analytic' truth cannot be explained apart from a circle of other terms related to that notion, such as that of synonymy and definition (indeed, we might expect as much given that each of these terms bears a close *conceptual* connection to the other), as well as his own positive alternative. How, we might ask, does the claim that bachelorhood is a concept that applies properly only to unmarried men, for example, depend for its truth upon any range of scientifically respectable statements?⁴

But Quine also produced more restricted arguments that attempted to *show* the ascendancy of the scientific method in relation to specific areas of philosophy, particularly epistemology, and it is this more programmatic element of his work that has furnished the best understanding of what a truly naturalistic approach might look like.⁵ It is also, importantly, the aspect of Quine's philosophy that has played the central role in galvanizing modern jurisprudential naturalism. What, then, was Quine's argument? On the

³ Quine, 'Main Trends in Recent Philosophy: Two Dogmas of Empiricism'

⁴ See, for criticism, Himma, 'Conceptual Analysis, the Naturalistic Turn, and Legal Philosophy', P. M. S. Hacker, 'Passing by the Naturalistic Turn: On Quine's Cul-de-Sac' (2006) 81 *Philosophy* 231 and H. P. Grice and P. F. Strawson, 'In Defense of a Dogma' (1956) 65 *Philosophical Review* 141

⁵ W. V. Quine, *Ontological Relativity and Other Essays* (Columbia University Press 1969) ch 3

standard reading, he is taken to have argued against a normative conception of epistemology – an understanding that takes the theory of knowledge to be centrally concerned with the concept of justification insofar as it relates to our beliefs – and in favor of an investigation into the psychology of belief formation, the latter being an issue of causation.⁶ He asked us to substitute, in place of the question concerning the conditions under which we *should* believe, the question of *how* we come to believe.

There exists, as many commentators have noted, a radical distinction between these two projects: the former is concerned with warrant – what is it which makes a certain subset of our beliefs respectable? – and the latter with derivation – how is it that beliefs, respectable and unrespectable, are psychologically arrived at?⁷ As such, the conditions on the acceptability of the argument for replacement are particularly demanding. We need reason both to reject as plausible a conception of epistemology as concerned with

⁶ He said of his preferred approach:

[This is a project which] studies a natural phenomenon, viz., a physical human subject. This human subject is accorded a certain experimentally controlled input – certain patterns of irradiation in assorted frequencies, for instance – and in the fullness of time the subject delivers as output a description of the three dimensional external world and its history.

Ibid 82-83. Although, in his later years Quine relaxed the view. See W. V. Quine, *Pursuit Of Truth* (Rev. ed edn, Harvard University Press 1992) 19-21

⁷ See, in particular, Jaegwon Kim, 'What Is "Naturalized Epistemology?"' (1988) 2 *Philosophical Perspectives* 381 and Hilary Putnam, 'Why Reason Can't Be Naturalized' (1982) 52 *Synthese* 3

justification and, by implication, with knowledge – when many of us are disposed to the view that epistemology *just is* a philosophical investigation into these concepts – and to accept the discussion of causes as a worthy substitute.

We should not dwell here on the substance of Quine’s argument, for our concern is not with its specific application in the case of epistemology but instead with its general structure: the rejection of a conceptual project in favor of empirical investigation.⁸ This form of argument has come to be known as ‘replacement naturalism’: ‘replacement’ because substituting a question of a different form, ‘naturalism’ because favoring the empirically cognizable as opposed to the philosophical. In what follows, I consider the way in which Brian Leiter has developed such an approach within the domain of legal theory.

Leiter’s work stands as the most developed contemporary attempt to defend a more scientific understanding of jurisprudence. And so, much like Quine’s, his work provides us with a test case for the general kind of theory of which his forms an example, a modern skepticism about the worth of the

⁸ We might, however, note in passing that even if we come to find Quine’s argument persuasive – that is, if we come to view ourselves as having *reason* to accept it – we will, by virtue of this very process, remain shackled to the possibility of normativity in the sphere of epistemology – that is, by the prospects of there being *good* reason to accept a particular conclusion – and it will again call for philosophical explanation. The normative project seems inescapable. See Nagel, *The Last Word* ch 2

philosophical method, and in particular conceptual or linguistic analysis, as a means of developing an understanding of law.⁹ To be sure, Leiter's is not the first overtly naturalistic treatment of the subject. It was, for example, preceded by over half a century by that of the Scandinavian Legal Realists. But their arguments, focused around the attempt to find a scientifically respectable account of the content of a range of basic legal concepts, feature now, as per Leiter's description, more as 'museum piece[s]' than a credible aspect of the jurisprudential landscape.¹⁰ Their arguments failed in part because they attempted to achieve a scientifically cognizable understanding of law on the basis of a deeply unscientific method and in part because the resultant analyses involved behavioristic and psychological distortions of the concepts they wished to explain.¹¹ Leiter's argument, by way of contrast, involves no such simple mistake, for he explicitly argues not for the reduction of conceptual terms such that they form part of a scientifically respectable language, but for the displacement of conceptual or philosophical concerns in favor of an attempt to understand law based explicitly on a more scientific approach. His, as with Quine's work in epistemology, is a methodological kind of naturalism.

⁹ Such an approach, Leiter says, is 'skeptical about intuition driven methods of philosophy and conceptual analysis [and] takes philosophy to be continuous with empirical science.' See Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 4

¹⁰ Leiter, 'Naturalism In Legal Philosophy'

¹¹ See, on this matter, Hart, *Essays in Jurisprudence and Philosophy* ch 6

What, then, is the position? Leiter's argument consists in a distinctive reading of the American Legal Realists and, in particular, their ambitions for the theory of adjudication. In a series of articles dating back to 1997, he has urged that we understand the realists to be recommending, in close analogy with the Quinean program, the replacement of philosophical questions concerning the relation between law and justified judicial decision with a causal explanation of judicial behavior.¹² Under the dictates of this form of replacement naturalism, legal philosophers are to stop asking questions concerning the concept of justification in law – i.e. what would it be for a judicial decision to be legally justified? – and instead to ask questions of the form 'How *do* judges decide cases?', or at the very least to pay serious attention to those predisposed to ask such questions. It is a project which, in Leiter's own words, is aimed at '*replacing... philosophical questions with meaningful empirical questions*'.¹³ Here is how he draws the analogy:

...Quine's replacement naturalism moved in two steps. Step one was *anti-foundationalism*... Step two was *replacement*: since no foundational story can be told about the relation between input (evidence) and output (theory), why not replace the normative program with a purely descriptive inquiry e.g. the psychological study of what input causes what output. [The] theory of adjudication is concerned not with the relation between "evidence" and "scientific theory" but rather with the justificatory relationship between "legal reasons" (the input, as

¹² These articles are collected in Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy*. See, in particular, chapters 1, 2, the postscript to part one and ch 4

¹³ Ibid 117

it were) and judicial decisions (the output). The Realists are “anti-foundationalists” about judicial decisions [i.e. they reject the fruitfulness of normative theorizing within the domain]... The Realists also take the second step that Quine takes: replacement.... Jurisprudence – or, more precisely, the theory of adjudication – is “naturalized” because it falls into place, for the Realist, as a chapter of psychology (or anthropology or sociology). Moreover, it does so for essentially Quinean reasons: because the [philosophical] account of adjudication is a failure....¹⁴

In the epistemological case we are, but Quine tells us we should not be, looking for a unified theory that explains what it is for belief to be justified. The jurisprudential analogue is a theory that explains what it is for a judicial decision to be legally justified.

What factor motivates replacement in the jurisprudential case? The realists offer a thesis concerning the indeterminacy of law which shows us that ‘the class of legitimate reasons a judge may offer for a decision’ does not always provide for the resolution of particular disputes one way or another i.e. that the law is sometimes open to various possibilities.¹⁵ This ‘failing’ paves the way for a more naturalistic approach:

According to the Realist... legal reasons underdetermine judicial decisions, meaning that the... theory of adjudication is impossible. Why not replace, then, the sterile foundational program... with a descriptive/explanatory account of what inputs (that is, what combination of facts and reasons) produces what output (i.e. what judicial decision)?¹⁶

¹⁴ Ibid 39-40

¹⁵ Ibid 9

¹⁶ Ibid 40

This, much like Quine's treatment of epistemology, is a far-reaching attempt at reorientation of the agenda – the rejection of the philosophical in favor of the psychological. The notion to stress here is that of replacement. For it may well be that a sufficiently abstract socio-scientific account of judicial decision-making, one which makes reference to, for example, the 'ideological attitudes' of judges, generalizes in a statistically significant manner.¹⁷ That is to say, it may be true that ideology plays a major part in the causal explanation of judicial decision-making. And we should on no account say that the psychological explanation of the exercise of political power is unimportant. But – and this is the important point – we might also want to say that there remains, after all the psychology has been done, a distinct and perhaps equally important subject to be discussed: the matter of what it is, conceptually speaking, for a decision to be in accordance with law. Leiter wants us to forgo philosophical reflection on this matter and to replace it with *a posteriori* theory which best explains what judges *actually do* in particular classes of cases. Intuitively, one would have thought that we could have both forms of inquiry. It is his claim that we cannot.

Leiter's interpretation of the realists, then, stands as a challenge to the conception of jurisprudence recommended in this thesis. It aims at the

¹⁷ Leiter discusses a general model of this form: *ibid* 187-189. There exists a burgeoning literature. See Thomas J Miles and Cass R Sunstein, 'The New Legal Realism' (2008) 75 *The University of Chicago Law Review* 831

replacement, at least in certain cases, of the form of understanding that I have defended as appropriate to law, an approach which takes as its basic aim the understanding of legal concepts as manifest in ordinary language, with a socio-scientific or naturalistic study of the causes of action. Instead of asking directly about the ways in which concepts feature in and underwrite our common practices, Leiter wants us to ask questions about the psychological causes of behavior, as understood from an empirical perspective; the latter and not the former, he argues, to allow for a more epistemologically credible interpretation of law.

In the first two sections I consider the nature and scope of the realist's indeterminacy thesis. Here I say not only that the thesis presupposes a controversial philosophical account of the relation between law and language, but that its scope is sufficiently limited to rebut a thoroughgoing skepticism about the possibility of a justificatory account of adjudication. Neither of these observations tells in favor of the thesis as motivating a more naturalistic picture. In the third section I subject Leiter's understanding of the 'theory of adjudication' to critical scrutiny and suggest that his argument for its 'failure' is incomplete in the following way: it is against a bad kind of philosophical theory, and leaves scope for a better account. In the final section, the argument for the 'replacement' of a philosophical understanding of justification in law with a causal/ explanatory account is considered.

A note on the realists: in what follows I set aside the various interpretive questions which arise out of Leiter's account of American Legal Realism. I will not here question his understanding of the movement or the justifiability of describing its members as 'replacement naturalists' in the Quineian spirit. The reasons are twofold. First, these interpretive questions have already been addressed by a substantial secondary literature.¹⁸ Second, and perhaps more importantly, there is a danger in attempting to wrestle with both the views of one person and an entire intellectual movement; this is that neither will receive serious treatment. So here I focus on the substance of Leiter's view accepting *arguendo* his particular interpretation.

The Status of the Indeterminacy Thesis

Consider a paradigmatic example of a standard that might be thought to introduce indeterminacy into the law, such as a statutory rule against careless

¹⁸See Michael S Moore, *Educating Oneself In Public : Critical Essays In Jurisprudence* (Oxford University Press 2000) ch 1 Mark Greenberg, 'Naturalism in Epistemology and the Philosophy of Law' (2011) 30 *Law and Philosophy* 419, Mark Greenberg, 'Implications of Indeterminacy: Naturalism in Epistemology and the Philosophy of Law II' (2011) 30 *Law and Philosophy* 453, Michael Steven Green, 'Leiter on the Legal Realists' (2011) 30 *Law and Philosophy* 381 and Leslie Green, 'Law and the Causes of Judicial Decisions' <<http://ssrn.com/paper=1374608>> accessed 13 December 2014. Leiter responds to Moore and Greenberg in Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 103-108 and 112-117. Greenberg and M.S. Green's claims are treated in Brian Leiter, 'Naturalized Jurisprudence and American Legal Realism Revisited' (2011) 30 *Law and Philosophy* 499

driving. The standard is such that we can imagine clear cases to which it applies, such as that of a driver attempting to light a cigarette whilst handling the wheel, and we can also imagine clear cases where it does not. But there will also be situations where, all facts in hand, there exists room for legitimate disagreement about whether a particular person's conduct is to be classified as careless. Here we might be tempted to say that the law allows for interpretive latitude, that in cases like these the law does not justify a particular result even though a decision must be made. It is a description of this type, one which admits the law's 'rational indeterminacy', which forms the foundation of Leiter's and the realist's anti-philosophic attitude.¹⁹

According to the Realist indeterminacy thesis, legal reasons underdetermine judicial decisions, meaning that the foundationalist enterprise of theory of adjudication [sic] is impossible.²⁰

And there are those who disagree. Ronald Dworkin, for example, suggests that in law we must distinguish between the 'fact and consequence of vagueness'.²¹ Indeterminacy in the social standards with which law-applying

¹⁹ Leiter defines rational indeterminacy as follows: 'the law on some point is *rationaly indeterminate* if the Class [of legal reasons] (on some conception) is insufficient to justify only one outcome in that case.' Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 9-10. He has a further story to tell about the realist take on the sources of indeterminacy, but this does not matter for the purposes of our argument. See *ibid* 74-75

²⁰ *Ibid* 40

²¹ Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) 128

institutions are intimately concerned does not entail indeterminacy in law because, for Dworkin, the state of the law on a particular matter does not depend in any direct sense upon such standards. Rather, it depends upon the best justification that can be found for the bearing of these aspects of our political history upon the subject's *real* rights. The question is not 'How does the standard of carefulness apply in this particular case?' but rather 'What is the best justification that can be found for the settled aspects of political history which surround the case, including the fact that this statute was enacted?'

The change of subject opens up space for the distinction that Dworkin is after – between social act and its consequence for the state of the law– and determinacy is secured by a further argument – that moral questions have, or nearly always have, right answers. On Dworkin's view, legal indeterminacy loses its substantive meaning and becomes, instead, an epistemological burden that must be shouldered as part of the task of determining what the law truly requires, which is a process of constructive interpretation:²²

[The judge] struggles towards a set of principles he can offer to integrity, a scheme for transforming the varied links in the chain of law into a vision of government now speaking with one voice... He might fail... but his failure is not ensured by anything even the most careful and sensitive history teaches.²³

²² See Dworkin, *Taking Rights Seriously* ch 13 and 331-338

²³ Dworkin, *Law's Empire* 273

Dworkin's understanding, then, is one that stands in opposition to the central assumption of Leiter's argument. Leiter commends the indeterminacy thesis whereas Dworkin thinks it wrong when forming part of an account of law.

The question is whether this matters. All theories of law contain a number of controversial premises, and assume many more. On this count Leiter's appears no different from any other. The problem, however, is that the realist indeterminacy thesis is offered as part of an anti-philosophical argument.²⁴ It is meant to form the basis of a departure, but it contains a picture of the relation between law and social act – one on which indeterminacy at the level of language, convention, etc. entails indeterminacy at the level of legal right and obligation – that is subject to genuine theoretical dispute. There is here a kind of having one's cake and eating it: the cake is had by assuming a philosophical position concerning the nature of law and it is eaten by using an implication of the position as part of an argument against the approach. The realist story begins not with the failure of theory in the philosophical sense, but with an answer in the background.²⁵

²⁴ A similar argument is made in Greenberg, 'Implications of Indeterminacy: Naturalism in Epistemology and the Philosophy of Law II'

²⁵ As Leiter notes, to the extent that the realists could be said to have held an *explicit* theory of law and adjudication, it was often a crude one. He notes, for example, the tendency on their part to assume that only legislation and precedent count as sources of law to the exclusion of legally recognized customary practices. See, Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 45 footnote 138.

Leiter himself recognizes the problem – that his central premise is not in any obvious sense naturalistic – and attempted in his earlier work to circumvent it. He noted that ‘it is impossible to formulate an argument for rational indeterminacy of law without presupposing certain... views about the criteria of legal validity’ i.e. about what it is for there to be law on a particular matter.²⁶ This was not an issue according to Leiter because the realists called only for the naturalization of the theory of adjudication and not ‘jurisprudence *per se*’.²⁷ The ‘realists *naturalize* [the] theory of adjudication, but that still leaves conventionally philosophical work to be done in the broader field of jurisprudence.’²⁸ But this will not do. Any plausible understanding of the adjudicative task will presuppose a conception of legal validity or, as Dworkin put it, the grounds of law – a view about the criteria which determine what counts towards the legal position – and that account will circumscribe the resultant picture. This is so for the reason that any non-skeptical theory of adjudication will hold it to be a judge’s job to apply the law, at least *prima facie*, and so an understanding of what valid law *is* will form a major part of such an account: a view about the ‘broader field’ is far from neutral in the adjudicative case.²⁹

²⁶ Ibid 45

²⁷ Ibid 46

²⁸ Ibid 46

²⁹ It does not follow, of course, that the theory of validity completely determines one’s understanding of adjudication. Indeed, it was one of Dworkin’s least charitable criticisms of Hart’s work that his conception of

Consider, in this regard, Dworkin's theory. His understanding of reasoning within the law can only get off the ground when accompanied by a particular account of law's resources. It is only because his theory appeals to a particular conception of law or, perhaps more accurately, of legal reasoning – as holistic and aspirational – that he is able to hold the view that there is always something determinate that the law requires of us, that it is never silent, or uncertain, and never speaks with contradictory voice. To deny him his account of validity, his account of what it is for there to be law on a matter, is to deny him the possibility of his understanding of justification in law.³⁰

The realists' view, by way of contrast, is one that is premised upon the imperfection and incompleteness of law's resources. It assumes a conception of validity premised upon the idea of law not as the idealized moral effect of institutional action, but as properly a social construct, carrying with it the shortfalls and limits of its makers and their tools. Law, having a basis in the imperfectly coordinated actions of institutional actors and being made

legal validity was to be read as a complete theory of adjudication. See Hart, *The Concept of Law* 238-244

³⁰ Dworkin, in his later work, came to doubt the importance of the concept of legal validity for a developed jurisprudence. The question of what standards were appropriately classified as legal – validity being the mode of existence of legal norms – was, he thought, philosophically uninteresting. And so he might have refused our characterization of his view. Dworkin's earlier arguments, on which our attribution is premised, suggest a less revisionist approach. Contrast Dworkin, *Taking Rights Seriously* chapter 2 and Dworkin, *Justice In Robes* 4-5 and 232-234

through the use of natural language, inherits various forms of indeterminacy. But this position is itself controversial. Most importantly, the presupposition that the law is indeterminate cannot form the basis of an argument against philosophical reflection on the nature of adjudication: it is a substantive thesis that forms part of a particular philosophical account. As such, it calls for defense in the usual way. The point is that Leiter's realists cannot be understood to be impartial, and for this reason they cannot be seen to have shown us away from philosophical reflection on the matter of adjudication.³¹ We should allow Dworkin at least this much: 'The argument that I am wrong must... be a philosophical argument.... It must provide and defend some idea of skepticism, or of indeterminacy [in law].'³² To provide such an argument, needless to say, is to join in debate.

The argument for partial naturalization does not avoid our criticism. But Leiter's faith in the resources of the naturalistic method has increased over time and he now argues that a fully socio-scientific theory of law might be able to proceed without the support of the traditional conceptual argument

³¹ Quine's epistemological position exhibits a similar flaw. His arguments against philosophic theories of knowledge were themselves philosophical in the ordinary sense. He asked us to leave behind normative explanation by engaging in normative argument.

³² Ronald Dworkin, 'No Right Answer?' (1978) 53 *New York University Law Review* 1 32

on the matter of legal validity.³³ His claim is that a particular conception of legal validity – here, that presupposed by the realists – may be vindicated not by argument, but by its *use in a posteriori* theory. If such a claim were correct then the account would avoid the charge of duplicity; there would be no need to resort to non-naturalistic methods and assumptions in motivating the realist premise.

The argument begins by noticing that social scientists concerned to produce generalizations about human behavior will need to delimit their particular field of study. If a theorist is interested in, say, whether official duties and responsibilities or private interests better explain the motivations of political actors they will need, at least, a practical understanding of the distinction between official and private action. That is to say, they will need to have at their disposal criteria, termed in the literature a ‘model’, for comprehending their chosen field of study and deciding upon appropriate methods of comparison. This is so also in the case of the socio-scientific study of law.

³³ See, for the new argument, Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 184-189. For worries of a similar sort to the ones aired here see Julie Dickson, ‘On Naturalizing Jurisprudence: Some Comments on Brian Leiter’s View of What Jurisprudence Should Become’ (2011) 30 *Law and Philosophy* 477 and for Leiter’s response see Leiter, ‘Naturalized Jurisprudence and American Legal Realism Revisited’

The focus of Leiter's argument is on research by Jeffrey Segal and Howard Spaeth that has explored the relative efficacy of law and political affiliation as influences on the decisions of the US Supreme Court.³⁴ Such a study, he notes, must proceed on the basis of an understanding of what counts as a valid legal reason in making clear the claim – that ideology matters more than applicable law – and appropriate types of comparison in order to 'test' the hypothesis. That is to say, the authors must have a sound understanding of the legal context and the type of constraint imposed by the institution if they are to make their comparison in an intelligible way. They must employ a 'model' of law. Leiter interprets Segal and Spaeth's as positivistic and realist in spirit:

For the [authors' contention] to be true and explanatory, there has to be, among other things, a clear demarcation between the ideological attitudes of judges (which are causally effective in determining the decisions) and the valid sources of law which are central to the Legal Model's competing explanation of judicial decision. Thus, implicit in [their study] is quite plainly a concept of law as exhausted by authoritative texts (precedents, statutes, constitutions) which are the raw material of the competing [model], and which exclude the ideological attitudes central to the [authors' explanation].³⁵

The argument is that the fact of use in an *a posteriori* investigation of this type should give us reason to favor the authors' chosen 'model' of law, to adopt it as the best theoretical explanation of the relevant aspect of our jurisprudence,

³⁴ See Jeffrey Allan Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002)

³⁵ Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 188-189

in this case the concept of legal validity. The suggestion is 'naturalistic' for the reason that the model is employed in giving content to a possible explanans which is subject to empirical investigation in terms of its comparative predictive power. On this view, we need not argue for a conception in the traditional philosophical way but must, instead, look to see which is being employed by social scientists in their studies.

The proposal is unsettled by a number of questions. What if the understanding of law adopted as part of the study is clearly absurd? What if distinct studies employ different conceptions? What if, as is quite likely, a social scientist's 'model' of law is cast at a sufficiently platitudinous level so as to accommodate multiple, conflicting, jurisprudential theories?³⁶ The only possibility here is argument of the traditional philosophical variety. The fact that a theory is used, if one can really be said to be used, as an explanation of an unverifiable premise in a socio-scientific study is neither here nor there when the question is which conception is right. A sound understanding of the matter forms a precursor to the relevant empirical investigation, and consequently any account 'contained' therein cannot win its *bona fides* from

³⁶ This may be the best interpretation of Segal and Spaeth's 'legal model' which is, in many senses, crude. Leiter admits that 'for the purposes of presentation' he has improved upon it. In fact he has cleaned up their position considerably. From unsystematic references to 'statutes' and 'precedents' Leiter implies adherence to 'hard positivism', a theory of law developed most persuasively by Joseph Raz. Given the complexity of Raz's theory, and the fact that all theories of law take it upon themselves to explain the importance of precedent and statute, it is hard to see why this particular conception is the one to be attributed. See *ibid* 187-189 and footnote 21

the use to which we later happen to put it. Our question was either properly formed or it wasn't and the socio-scientific use to which we put a particular 'model' won't change this. Leiter's old admission was, in other words, better than his new proposal.³⁷

The Scope of the Thesis

There is a further problem with treating the indeterminacy thesis as motivating a break from a philosophical approach and this has to do with its scope. Leiter reads the realists as holding that the law is indeterminate only in certain types of case.³⁸ In his terminology, the law is not 'globally' but only

³⁷ It is a common complaint on the part of social scientists that the analyses and theories of philosophers of law are not 'empirically grounded' and should, after having been formed be 'tested'. How one would 'test' Rawls' theory of justice, or Hart's theory of law, though, is hard to understand. A currently fashionable suggestion is that we question people about philosophical possibilities in survey form: this approach is known as experimental philosophy. The aim is to present the general public with famous hypotheticals which have been taken to motivate particular theoretical positions and then to record their responses. The proposal suffers a number of problems, two of which are particularly important. First, the use of hypotheticals, or 'thought experiments' as they are sometimes known, forms only one part of the philosophical method and it is hard see how one could 'test' other more direct forms of argument. Second, thought experiments that may be taken, unreflectively, to suggest a particular theory are often unclean, i.e. they contain extraneous factors which suggest the result favored by a theory but not the theory itself. Here again careful philosophical work is required if we are to see the light through the trees. Surveys based on unreflexive judgment are a poor substitute.

³⁸ The reading is a charitable one, and many of the realists appear to go further. For Felix Cohen reference to legal rules as providing reason for

'locally indeterminate'.³⁹ So whilst the category of hard cases is the focus, Leiter's realists admit that easy cases exist to which their thesis does not apply: 'The realists... do not claim that the class of legal reasons fails to justify a unique outcome in all cases; rather it fails to do so 'locally' i.e. in a particular range of cases (e.g. the cases that reach the stage of appellate review).'⁴⁰

Indeed, Leiter himself is no stranger to the pervasiveness of law's determinacy. He writes, in another context, about legal agreement:

...[T]here is massive and pervasive agreement about the law throughout the system. It is precisely because just about everyone agrees about the law that lawyers can tell most prospective clients who wander through the doors that they have no claim and should go home; it is precisely because just about everyone agrees about the law that most cases settle after discovery, since by then the facts are clear and both sides know what the legally required result will be (and so the only question is putting a price tag on the resolution); it is precisely because just about everyone agrees about the law that most cases are not appealed...⁴¹

judicial decisions was to be thought of as a form of 'transcendental nonsense'. And he considered it to be of '...some practical importance [that we should recognize] that the traditional language of argument and opinion [does not justify] court decisions.' Herman Oliphant was similarly dismissive of the 'over general and outworn abstractions in opinions and treatises.' The admonition was to leave the jurists 'haven of concepts', having realized that it was a place *only* of appearances, and this is a general claim. See Cohen, 'Transcendental Nonsense and the Functional Approach' and Herman Oliphant, 'A Return To Stare Decisis' (1928) 14 American Bar Association Journal 75

³⁹ Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 41

⁴⁰ Ibid 41. See Leiter, 'Explaining Theoretical Disagreement' at 1226-1228

⁴¹ Leiter, 'Explaining Theoretical Disagreement' 1227

And whilst the point is made in the epistemic mode, it is fair to say that Leiter would allow the fact of agreement to stand as good evidence of legal determinacy, determinacy being an important part of the story about *why* lawyers agree.

The thesis, then, has only a partial nature and this must come as a further disappointment for those hoping for a thoroughgoing naturalistic treatment of the domain. For if there are clear examples to which we can apply the concept of justification in law – and there are because no sound jurisprudence should deny the category of easy cases – then we know that there is scope for a theory that explains the criteria for the concept's application, such a task being philosophical in the ordinary sense. That is, if there are controversies, the resolution of which is provided for by the law, then we know that there is opportunity for an account that explains what it is for this to be the case.

In the same way, and returning to Quine's initial example, because we can secure knowledge in various domains – the scientific, mathematical and historical for example – we know that there must be a systematic way of explaining at least those clear cases of knowledge that we do have. This is one way to refuse Quine's admonition to abandon epistemology, conceived of as an investigation into the principles of justified belief. We have knowledge of various aspects of our world and so the concept, which has real application,

calls for analysis. The fact of knowledge is sufficient to rebut thoroughgoing skepticism about the possibility of a philosophical account thereof, and the same is true of justification in law.

Now Leiter, following Quine, is famously hostile to the appeal to analysis in philosophy. He would find much to dislike in what I have said in the previous paragraphs about the importance of the concepts of justification in law and epistemology, especially in light of his more recent approach.⁴² But if the realists insist, as Leiter suggests they do, on a measure of legal determinacy, on a range of cases for which there are clearly justified legal results, then we must be able to tell a story about what makes this the case. It is hard to see how one would do so without appeal, in the standard philosophical sense, to the concepts manifest in legal thought and action.

Justification and the Limits of Law

We must turn to consider Leiter's treatment of the concept of justification in law. The concern, as we noted earlier, is '... with the justificatory relationship between 'legal reasons'... and judicial decision' and the aim is to show us away from philosophic reflection on the matter.⁴³ Leiter has as his target 'the

⁴² See Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 175-178.

⁴³ *Ibid* 39

theory of adjudication' and he gives the phrase a distinctive meaning. The theory of adjudication, he says, 'tells judges how they ought to justify their decisions i.e. it seeks to 'ground' judicial decision-making in reasons that require unique outcomes'.⁴⁴ In the face of legal indeterminacy, Leiter concludes, such a theory must fail. Happily, we may join him in his conclusion. But there is no reason in this to abandon philosophic reflection on the justificatory relation between the law and judicial decision. The kind of theory which Leiter has as his target is deeply flawed. A sound understanding of the concept of justification in law, by way of contrast, not only evades but incorporates his criticism.

The first point to notice is that the concept is broader than Leiter's description allows: a decision at law may be justified if either required or permitted, whereas he only countenances a theory which allows the former. Leiter treats as equivalent in his understanding of the 'theory of adjudication' the question of legal justification and the notion of the law necessitating an outcome. A judicial decision is on this view 'grounded' if we can say that the law 'requires' it: '[The] theory of adjudication... seeks to "ground" judicial decision-making in reasons that require unique outcomes.'⁴⁵ But this is a misunderstanding of justification in law, one that unfairly circumscribes the judicial role. For whilst it is true that one way in which a decision may be

⁴⁴ Ibid 39

⁴⁵ Ibid 39

legally justified is if it is mandated – say if a court is required to apply a statute in the resolution of the case before it – it may also be merely permitted. If, for example, a judge were prized with an equitable jurisdiction to depart from the existing law on a particular matter then they would be allowed more than one option, both the decision to apply the law and the decision to remake it, by recognizing a new equitable right being legally justified.

There are, of course, theorists both old and new who have opposed this permissive understanding of the judicial role, an understanding that allows that judges may sometimes exercise creative as opposed to merely declarative power.⁴⁶ The crudest of their arguments come in the form of political objections to the desirability of judicial law-making. But an argument about desirability is not an argument about possibility. More impressive is the claim that the admission of judicial power obliterates the conceptual distinction between legislative and judicial branches of government. To acknowledge that the judge may be permitted to depart from existing law in making a decision is, it is said, to subsume the institution of the judiciary under the category of legislature – both as lawmakers – despite the fact that we commonly distinguish between the two. But the argument is flawed, for it assumes that if judges may make law then their law-making capacity must be of the same kind as that of a legislature and this is not true. Whilst legislative organs have, subject only to jurisdictional constraints, free reign over the legal

⁴⁶ Perhaps the most important modern critic is Ronald Dworkin. See Dworkin, *Taking Rights Seriously* ch 2

landscape, a court only has dominion over those aspects of law raised by the case in front of it. As Hart noted, '...the judge's powers are exercised only to dispose of particular instant cases... he cannot use these to introduce large-scale reforms or new codes'.⁴⁷ The court, unlike the legislature, must always consider how its decision will cohere those other legal aspects to which it bears close relation, but which it is unable to reform.

We can say, then, that a judicial decision is legally justified in cases where the law either requires or permits it, the latter type of case encompassing the possibility of judicial law-making. The following is an important consequence; we have here, and quite apart from the matter of indeterminacy, a reason to give up on the aspiration for an account that grounds uniquely correct answers in particular cases: the fact that the law may empower a court to make several possible decisions is opposed to the requirement of uniqueness that Leiter places upon a theoretical account. For if a court has the power to decide either that p or not p then neither result will be uniquely warranted. Both will be ex-ante justifiable, and the one that is chosen will be ex-post justified.

Now, one reason that the point may be overlooked is if the 'normative theory of adjudication' is cast, as Leiter sees it being, in terms of 'reasons' for

⁴⁷ Hart, *The Concept of Law* 273. The difference between judge made law and legislation is also explored by John Gardner in Gardner, *Law as a Leap of Faith : Essays on Law in General* 37-43

decision. A power to perform some action (ϕ) does not count in favor of one performing that action. This contrasts with a rule requiring one ϕ which has normative force in relation to its object, and in this sense counts as a 'reason' to ϕ . Does the fact that a power lacks the force of a mandatory rule render it sterile as part of a justificatory account? It does not. For a start, a power grants some person the ability to perform some action that they would not, apart from the power, have. Further, a judicial power typically includes only a limited set of options (a judge may decide that A, B, or C, but not that D), and in this way it circumscribes possibilities. A philosophical account of justification in law which sought to 'ground judicial decision-making in reasons that require unique outcomes' would have to ignore these important aspects of the legal landscape and in doing so it would involve a mistake.⁴⁸

The same would be true of a conception that failed to take account of legal indeterminacy. Leiter is right to suggest that a theory that aims to show judicial decisions to be uniquely grounded would fail to incorporate this fact. But a sound philosophical account *should* include an understanding of indeterminacy, for the law is indeterminate, both by virtue of the possibility of unresolved conflict between rules within the system – as all good lawyers know, it does not take long to find contradiction between precedents of equal

⁴⁸ Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 39. I thank Les Green for suggesting the point.

standing – and by virtue of its being composed in part by vague standards.⁴⁹ If, for example, we are faced with interpreting and applying the standard of reasonableness, we know that there will exist a range of cases in which the law tolerates divergent application.

Theories which challenge this view fail to take seriously law's basic nature as institution and artifact. To be told that situated within the law already, even in cases of gross uncertainty and conflict, are right answers to legal questions is comparable to being told that the vagueness evident in natural language is only an epistemic matter, that despite appearances there is an exact answer to the question as to when a person becomes bald and to the question of when a heap of sand ceases to be (if only we knew with the loss of which hair and with the removal of which grain of sand!).⁵⁰ But there can be no looking *through* language in its normal appearance to secure such a standard, and there can be no looking *through* the law to find that it contains substantive answers when it is in important respects incomplete.⁵¹

⁴⁹ The former source of indeterminacy forms only a contingent aspect of law, the latter a necessary part. See, on the latter, Timothy Endicott, 'Law Is Necessarily Vague' 7 *Legal Theory* 379

⁵⁰ For the classic defense of the epistemic theory of vagueness see Timothy Williamson, *Vagueness* (Routledge 1994). It is interesting to note that both Dworkin's and Williamson's views are motivated in part by the application of bivalent logic to declarative sentences framed in natural language. See Dworkin, 'No Right Answer?' 1-5

⁵¹ This is, by some way, the most important lesson to be learnt about the transition in thought from Wittgenstein's *Tractatus* through to his mature

Allowing the thesis that law is indeterminate in a range of cases, what follows for an account of the concept of justification? Leiter's claim is that it should be abandoned, but the better response is to suggest that it must make sense of the notion of indeterminacy and show its proper place. For whilst it is true that the admission of legal indeterminacy rules out as plausible a number of conceptions of the relation between law and justified decision, there are others left untouched. Dworkin's theory cannot stand – for it just is the theory that in law there are always right answers, which the judge must strive to respect⁵² – and the same is true of the famous formalisms of the past, formalism being a theory which treats legal reasoning always as an exercise in deduction.⁵³ But these are false theories, in part because they will not admit

view in *The Philosophical Investigations*. See, on this point, Baker and Hacker, *Wittgenstein: Understanding and Meaning. Part I, Essays* chs 13 and 14

⁵² Recently Mark Greenberg has argued that Dworkin's theory, or at least many of its most central elements remain intact even if the right answer thesis is abandoned. Greenberg's central claim is that this thesis lies downstream of Dworkin's views about the relation between law and morality, and that one might abandon his holistic understanding of morality without thereby abandoning his conception of the relation. This is true enough, but many of the arguments that Dworkin uses against alternate theories and in favor of his own rely on a determinate view of morality. If the grounds of law are indeterminate it follows, for example, that judges have discretion in the application of law – i.e. they must make active choices not determined in advance by legal standards – and one of Dworkin's central arguments against positivism and in favor of his own conception of law was that this cannot be. See Greenberg, 'Implications of Indeterminacy: Naturalism in Epistemology and the Philosophy of Law II' 466-468

⁵³ Formalism requires legal determinacy because if it is a live question whether a particular standard applies (either because there exists a

indeterminacy as a real issue. A better theory will do so. It will clarify the sources of indeterminacy, the real scope of the concept and its impact upon the legitimacy of the judicial role.⁵⁴

What does Leiter have to say about a philosophical theory with more limited aspirations, one that does not seek to 'ground' judicial decisions in reasons requiring 'unique outcomes'?⁵⁵ He allows that such a theory is itself conceivable but questions its pragmatic worth:

Does [such a conception] provide the normative guidance to judges we want from a theory? Does a theory that tells judges they would be justified (on the basis of the class of legal reasons) in deciding for the plaintiff... or the defendant... really provide normative guidance for judges worth having? My lawyerly intuition is that normative guidance like this (which underdetermines the final outcome) is not much value to judges or lawyers....⁵⁶

contradictory legal standard of equal standing or because the standard is a vague one) then legal reasoning will also encompass a decision on the matter. Such a decision would, needless to say, not be deductive in nature.

⁵⁴ The best modern account is Timothy Endicott, *Vagueness In Law* (Oxford University Press 2000)

⁵⁵ Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 41

⁵⁶ Ibid 42. This conception of theory has a surprising resemblance to Dworkin's. For Dworkin claimed that that the theory of law should 'speak for... all [those] whose fate depends on novel claims about what the law... is. Or, [if it] can't speak for them, at least speak to them, and explain why they have no right to what they ask.' Dworkin, *Justice In Robes* 186

And if a conceptual understanding of justification in law were aimed at providing 'normative guidance to judges', we would surely be disappointed by this fact. But a philosophical account of law is not of this type. The aim is to improve insight into the nature of legal practice, not to provide a specific test for application by practitioners. To think otherwise is not only to confuse explanans and explanandum - we are out to explain the norms of competent judicial decision-making, not to constitute them - but also to mistake the import of the general principles, such as those which comprise the concepts of justification and validity, which a good legal theory will operate on. In drawing these out we can no more act as a guide in specific cases than those who are familiar with the general techniques of mapmaking can direct us when we are lost.⁵⁷

It is telling that American Legal Realism is commonly interpreted as a response to formalist theories and their excesses, one which inherited its own failings - an unrealistic emphasis on legal indeterminacy, and a skeptical

⁵⁷ On the limits of philosophical understanding of adjudicatory practice see Raz, *The Authority of Law : Essays on Law and Morality* 206-207. It is striking that even Dworkin's expansive conception is not intended as a concrete guide in actual cases. His argument is not that by taking up his theory anew judges will come to make the right call in circumstances of controversy, but that they are already committed to the form of reasoning that he describes and that they cannot help but try - however imperfect their actual reasoning might be - to find the right answer in hard cases. Dworkin is quite clear that even on his theory 'any judge... might well be wrong in his political judgments, and that he should... decide hard cases with humility.' Dworkin, *Taking Rights Seriously* 130

conception of reasoning in the law – by exaggerating its own insights. Hart saw this as a plausible interpretation of the place of the realists in early twentieth century American jurisprudence, and he described the dialectic in which they were involved with the metaphor of ‘The Nightmare and the Noble Dream’.⁵⁸ The nightmare was ‘the view that judges always make and never find the law they impose on litigants’.⁵⁹ It was a view inspired by the crudest of the realists’ writings, and a response to the opposing view that judges never made law; this was the claim of the formalist. Here is what Hart thought of the opposition:

Like any other nightmare and any other dream, these two are, in my view, illusions, though they have much of value to teach the jurist in his waking hours. The truth, perhaps unexciting, is that sometimes judges do one and sometimes the other.⁶⁰

The point is that neither the nightmare nor the noble dream completely captured the spirit of reasoning within the law but, focusing for now on one aspect, the lessons to be learnt from the realist’s ‘nightmare’ were sufficient to dispel the myth of the formalist’s ‘dream’, to remind us of the political power of the judge and of the incompleteness of law.

⁵⁸ H. L. A. Hart, ‘American Jurisprudence Through English Eyes: The Nightmare and The Noble Dream’ (1976) 11 *Georgia Law Review* 969. See also Hart, *The Concept of Law* (n 20) 124-141. For Leiter’s response see Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* ch 2

⁵⁹ Hart, ‘American Jurisprudence Through English Eyes: The Nightmare and The Noble Dream’ 989

⁶⁰ *Ibid* 989

Perhaps Leiter's defense should be read in a similar manner: his realism, with its emphasis on indeterminacy in law, can be used to show that crude formalistic, or heavily deterministic, theories of adjudication fail. But this leaves more than enough room for other plausible contenders which do not attempt to show the way to particular outcomes in actual cases, or even to hold on to the thesis that, in hard cases, right legal answers are waiting to be found as opposed to decisions waiting to be made.⁶¹ And, as we have noted, it is in part because such a theory would recognize these impossibilities, that it would constitute, as a *good theory*. The 'failure' of the theory of adjudication to achieve an incredible aim points not to its irrelevance or 'impossibility' but to its health.

The Argument for Replacement

⁶¹ In a recent response to Mark Greenberg Leiter has suggested that he meant the phrase 'theory of adjudication' to apply only to theories which do attempt to ground judicial decision-making in a determinate manner. In doing so he preserves – by stipulation – his conclusion that 'the normative theory of adjudication' fails, but at a deeper level the argument remains incomplete (why, after all, is a theoretical understanding of legal justification which concedes indeterminacy not equally entitled to the label?). Frank Jackson has noted the danger in cases like this of turning 'interesting philosophical debates into easy exercises in deductions from stipulative definitions together with accepted facts.' For Leiter's argument see Leiter, 'Naturalized Jurisprudence and American Legal Realism Revisited' 506-508 and for Jackson's worried about this way of proceeding see Jackson, *From Metaphysics to Ethics : A Defence of Conceptual Analysis* 30-31

In this final section I consider briefly Leiter's argument for the naturalistic program that he favors: a predictive science of judicial behavior. It is important to remember that we are not simply looking for a claim which vindicates as useful a causal account of the activities of judges, for we might concede as much whilst still maintaining the importance of conceptual inquiry into the justification of legal decisions: these being, on the standard view, separate and compatible programs of research – the former sociological and the latter philosophical.⁶² What we need is an argument that suggests that the predictive theory should replace a normative account of adjudication, that it be seen as a worthy successor. The basic idea is that:

...if we take seriously the pragmatic ambition of the Realists – to enable lawyers to predict what courts will do – then formulating a... normative theory of adjudication will be inadequate, precisely because it provides the lawyer with insufficient tools for predicting the actual decision in the case at hand.⁶³

We should notice here an immediate disconnect between the argument for the failure of philosophical theories of justification in law, and the argument in favor of the realist's project. The philosophical campaign is deemed wrongheaded because it does not have the resources to justify unique

⁶² Although Leiter himself would want to eschew any such distinction as ultimately plausible. He follows Quine in understanding philosophy as the abstract and reflective branch of the sciences including, in Leiter's case, the social sciences.

⁶³ Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 42

outcomes in actual cases, but the realist's interest is in the prediction of decisions, and this is a separate matter.

To see this let us consider Leiter's category of easy cases to which he admits the concept of justification in law has application. Would a justificatory account of these cases sate the realist? No, because how a judge *should* decide – assuming there to be a determinate answer to that question – and how a judge *does* actually decide may well come apart. Both the possibility of judicial mistake and of intentional illegality render the disconnect between *justified action* and *actual behavior* real even in cases where the law does determine an outcome. By Leiter's own standard for the 'success' of the 'theory of adjudication', the realist would want an answer to a different question. There is a gap between what motivates criticism and what is sought in the aftermath.

Indeed, we can well admit that a complex psychological account of judicial decision-making is much more likely to be of use in predicting how judges decide cases than a credible philosophical theory of the kind sketched in the last section.⁶⁴ But this is just to make clear that a conceptual understanding of adjudication does not set out to achieve what a predictive account does. Similarly, we might concede that a normative epistemology – one which seeks to make explicit the rules which govern the formation of

⁶⁴ See Miles and Sunstein, 'The New Legal Realism'

justified belief – fails by the standards of success set by Quine’s naturalized account: it does not explain the psychology of belief formation, but this just makes clear the difference between the two.

The question is whether there is some further constraint implied by the ‘pragmatism’ of the realists which is sufficient to direct us towards the sociological. What is it to take this ambition seriously?

[The] pragmatism we find in [the writings of the realists]... reflects the basic pragmatic commitment to make theorizing relevant to practice... just as philosophical pragmatism holds that it is a criterion of acceptability for particular epistemic norms that they work for us... so too it is a criterion of acceptability for a theory of adjudication for the Realists that it work for lawyers. Work for lawyers, for the Realists, means it enables them to predict what courts will do.⁶⁵

But this, again, is just a reassertion of a programmatic interest, not an argument in its favor and most certainly not an argument for its domination over other kinds of understanding. We need independent *reason* to think that the ‘lawyer’s question’ is the only one worth asking. Assertion, without more, will not do.

It is worth noting that, although many differences exist between their philosophical outlooks, Leiter can be seen here to ally himself with Ronald Dworkin in his lawyerly impatience with the more abstract elements of

⁶⁵ Leiter, *Naturalizing Jurisprudence : Essays on American Legal Realism and Naturalism in Legal Philosophy* 52

jurisprudence.⁶⁶ Dworkin, especially in his later works, insisted that the philosophy of law be about the best way to resolve actual cases, and that it be such on pain of redundancy. There was no space, on his view, for a general, clarificatory approach; progress occurred when one joined in legal argument, rather than when one attempted to understand it from a more detached perspective. Leiter disagrees, of course, about the importance of justification in law.⁶⁷ Nonetheless, he shares the ‘practice-oriented’ disposition. Whilst Dworkin famously held that jurisprudence was to be understood only as the ‘general part of adjudication, silent prologue to any decision at law’, by Leiter’s lights, theory only has a proper place as explanatory epilogue.⁶⁸ There is room for a different perspective.

Conclusion

In this chapter I have considered Leiter’s argument for ‘replacement naturalism’ in the domain of adjudication. His claim is that, in light of legal indeterminacy, we should replace the philosophical project of understanding justification in law with *a posteriori* theory that accurately predicts judicial behavior. But indeterminacy, I have argued, does not imply the failure of the

⁶⁶ See Dworkin, *Justice In Robes* chapters 6, 7, and Dworkin, ‘Hart and the Concepts of Law’

⁶⁷ See, in particular, Brian Leiter, ‘In Praise of Realism (and against Nonsense Jurisprudence)’ (2011) 100 *Georgetown Law Journal* 865

⁶⁸ Dworkin, *Law's Empire* 90

philosophical approach. It marks, instead, a limit on the application of the concept of justification in law, a limit that should be explicated as part of a sound philosophical conception. Indeed, the conceptual approach is inevitable: law is a rule bounded social practice and so any attempt to form a conception of its general nature must pay direct attention to the concepts which form its basis. Naturalism as a doctrine may have its adherents, but it does not, in jurisprudence, find the support it requires.

Conclusion

I began this thesis by noting the way in which Hart described the jurisprudential project he undertook in *The Concept of Law*.¹ It was, he said, an investigation into ‘the general framework of legal thought,’ one which had ‘raised questions which may well be said to be about the meanings of words.’² What I have done is attempt to make sense of and defend the broad outlines of an approach to legal philosophy that takes seriously our capacity, as competent users of language, to reflect upon the uses of legal concepts as a means of understanding the nature of the most powerful and pervasive modern political institution. The aim has been to suggest that jurisprudence owes itself, ultimately, to the standards that make possible these practices.

It is hard to know how much of what has been said here Hart would have accepted, but it was not the aim to make clear his argument on the matter of the appropriate philosophical approach to understanding law.³ Instead, the objective of the thesis has been to develop a conception of jurisprudential methodology that took inspiration from that which seems right in Hart’s work, and in Wittgenstein’s before him: that philosophical

¹ Hart, *The Concept of Law* preface and ch 1

² Ibid vi

³ See, on this matter, ibid postscript, and the new introduction by Leslie Green.

forms of insight bear close connection to our ordinary linguistic and conceptual practices, whilst allowing us to gain insight into various fundamental social aspects of the world in which we live, including law.

To this end I developed, in the first three chapters of the thesis, an argument relating, first, the understanding of legal concepts to language, and then the rule-bounded nature of such concepts to the practices that give rise to the institutional reality of law. Because our concepts necessarily manifest in language, and because the legal system is borne out of the shared use of institutional concepts on the part of those who make up its law-applying institutions, i.e. the courts, so an investigation into the nature of law is appropriately thought of as having a conceptual or linguistic basis. These claims were tested in chapter three by considering Joseph Raz's argument that law may exist in a society that does not have the concept of law.

In chapter four I took up Ronald Dworkin's claim about legal disagreement. His argument being that the practice of law cannot be thought of as framed by rules or criteria for the use of concepts, because legal controversies and disagreements show practitioners to be committed in use to different understandings or conceptions of law. But this argument, I suggested, both distorts the scope of theory – the concepts with which the legal philosopher is concerned only circumscribe the possibilities for legal practice, and do not adjudicate between competing legal claims – as well as

failing to note the way in which our commitment in use, to the same concepts, renders us intelligible to each other when disagreeing about law.

The next chapter addressed a basic epistemic problem faced by an account such as that developed in this thesis, one which takes jurisprudence to be concerned, ultimately, with the interpretation of our ordinary uses of legal concepts: if lawyers, judges and others with legal competence share, as the basic part of their practices, in rules for the use of basic legal concepts, then why is the theory of law consumed by controversy? If, in other words, the answers to the most central questions of legal philosophy are to be found by consulting our shared language, then why are they, in a certain sense, opaque to us? The reason for this, I suggested, is that conceptual competence is a practical ability, whereas the ability to form a philosophical conception of law requires theoretical comprehension of our concepts, and this involves a different type of understanding. The ability to use a concept does not, in other words, entail the ability to explain use.

In the final two chapters of the thesis I moved to address alternate conceptions of method in legal theory: externalism and jurisprudential naturalism. Externalism is the view that the interpretation of our concepts owes itself to constraints other than those that feature as part of our common practices and uses of language. In law, such a theory has been used to suggest, with Dworkin, that conceptual understanding involves an importantly aspirational element, an attempt to realize the political values to

which our legal practices are oriented but do not themselves contain. But the famous arguments for philosophical externalism, I suggested, do not go through. Moreover, the suggestion that moral interpretation, in particular, plays a role in mediating our use of legal concepts fails to reckon with both the fact that many such concepts do not have an evaluative basis, as well as the fact that moral reasoning involves the use of standards which are internal to our conceptual practices, as opposed to principles which stand outside of them.

In the final chapter I assessed the plausibility of a naturalistic, viz. scientific, alternative to the conception of inquiry suggested in the thesis. In particular I considered the details of an argument made by Brian Leiter and inspired by the American Legal Realists, one that aimed at replacing philosophical questions concerning the justification of judicial decisions with a causal or predictive account of the behavior of judges. This naturalistic alternative, I suggested, fails, both because the arguments used to support it depend upon a bad understanding of the philosophical approach to adjudication and because any conception of law – be this scientific or otherwise – will either invoke or depend upon the concepts that feature as the basis of the institution.

This thesis has argued for a particular understanding of method in legal philosophy, but it should be conceded that a fuller defense of its central claim – that jurisprudence ought to proceed by way of attention to the

ordinary use of legal concepts, the criteria by which they are deployed in practice – might have involved more in the way of conceptual argument concerning a range of central issues within the discipline. It is one thing, after all, to defend a particular method in theory, and quite another to show its worth in practice.⁴ And so it might be thought of as an omission that the argument has been devoted primarily at the former, and that less time was given to showing how an investigation into the ordinary uses of legal concepts actually settles various famous disputes concerning law. It is worth noting, however, that the thesis *does* contain a number of conceptual arguments relating to the nature of law.⁵ More importantly, there are too many important objections to the picture of methodology that I have here defended, objections that needed to be met in argument, for a substantial amount of space to have been devoted also to a different task. Our argument has been about the importance of conceptual forms of understanding in jurisprudence.⁶ It leaves the matter of using this method in order to settle the

⁴ An excellent example of a work which does manage both is Jackson, *From Metaphysics to Ethics : A Defence of Conceptual Analysis*

⁵ The argument for the centrality of the courts to our understanding of law in chapter two, the claim about the way in which their actions depend upon the use of various basic legal concepts in chapters two and three, and the analysis of the concept of justification in law in chapter seven form the three most obvious examples.

⁶ It should also be acknowledged that what has been said in the thesis relies upon, but does not fully defend, a controversial theory of concepts. Much that could have been said in defense of such a conception from the perspective of the philosophy of concepts has been omitted. But a conception of methodology in jurisprudence cannot also include a general theory of a

many other important controversies concerning the nature of law for another day.

Finally, it should be noted that the arguments presented in this thesis represent what is now a minority view within philosophy. The discipline has shifted in its self-conception away from hermeneutic concerns, either, in the guise of metaphysics,⁷ as an attempt to improve upon or critique ordinary language, or, in its naturalistic guise, as a fundamentally reformed discipline which concerns itself not with the meaning of social actions, but with the prediction and control of human behavior, never mind the intrinsic significance of that which passes under such a mechanism. The value of an approach that takes seriously the wealth of resources available from the first person perspective – our ability to reflect upon and find meaning in the concepts we have and use every day – has been seriously undervalued, as has the fundamental contribution of our common language and social practices to our understanding of ourselves, and of our place in the world. This thesis has attempted, for the domain of jurisprudence, to show the worth of such a method, and the essential contribution that linguistic and conceptual aspects

different type. Many issues that could have been discussed if the thesis had a different emphasis must, instead, be left untreated. See, for a good overview of the literature Margolis and Laurence, *Concepts : Core Readings*

⁷ It should be noted that this metaphysical revivalism has been inspired in no small part by the doctrines of semantic and content externalism, surveyed in chapter six.

of our behavior make to the context in which we live. The hope is that many more will see what Hart, and Wittgenstein before him, saw so clearly.

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