SOME REFLECTIONS ON METHODOLOGY IN JURISPRUDENCE

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SUMMARY: I. *Introducction.* II. *Objetives.* III. *General Jurisprudence*, *Conceptual Analysis*, *and* "*Necessity*". IV. *The Challenge of Naturalism.* V. *Description and Selection.* VI. *The Internal Point of View*, *and the Challenge of Ideology.* VII. *Legal Positivism* vs. *Natural Law.* VIII. *Kelsen and Normative Logic.* IX. *Truth and Nature of Law.* X. *Conclusion.* XI. *Bibliography.*

I. INTRODUCTION

For much of the twentieth century, from the time of the American legal realists through the work of H. L. A. Hart, most of the important works in legal theory[1] were written by lawyers, though lawyers who had some interest in, and perhaps some basic training in, philosophy. More recently, many, perhaps most, of those working in English-language legal theory

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[1] "Legal theory" in this paper is to be understood narrowly, as referring to the abstract theorizing about the nature of law, the nature of particular legal concepts, legal reasoning, etcetera. It does not refer to the mid-range theories used to defend and rationally reconstruct areas of doctrine within particular legal systems.

have doctorates in philosophy or other significant philosophical training. It may thus be unsurprising that more and more sophisticated theoretical machinery is being brought to bear on jurisprudential topics, and more attention is being given to questions of philosophical methodology.

Legal philosophy is a broad category, and the portion of it with which I will be concerned is one with a long tradition, but an area which nonetheless still seems unusual to most readers of American law journals, and is poorly understood by many legal scholars. I will be focusing on analytical jurisprudence, and within analytical jurisprudence, theories about the nature of law. Analytical jurisprudence offers to analyze the basic nature of law and legal concepts (*e. g.*, 'rights', 'duty'), in contrast to the motivation in discussing legal questions that predominated both in classical times and in more recent work: that of viewing law as one more forum for considering the moral question of how individuals should act (*e. g.*, the proper response to immoral laws, or the question of how legislators could improve the law).

This paper offers an overview of methodological issues connected with theories about the nature of law, and it is important to note early on how the methodological questions for this sort of inquiry diverge from the methodological concerns for critical theories (about how to improve law), or sociological or historical theories (relating to the causes and effects of legal rules). With questions regarding, say, judicial behavior, the methodological ones are the familiar ones within the social sciences: *e. g.*, the extent to which the participants' perspectives must be incorporated into accounts of social actions, whether explanation is best offered at the level of individuals or structures, the extent to which participant perceptions can or must be incorporated into claims of causation, etcetera.[2] To state the obvious: theories that purport to describe or explain the nature of law seem to be doing something quite different from standard social science theories (and distinctly different from theories of the physical sciences).

The discussion that follows will focus primarily on the basic methodological assumptions assertions within analytical theories about the nature of law, and possible criticisms of those positions, particularly relating to the role of general jurisprudence and conceptual analysis.

[2] Lucy, W., *Understanding and Explaining Adjudication*, Oxford, Oxford University Press, 1999, pp. 17-32.

Additionally, at the end, there will be brief discussions of related issues regarding the debate between legal positivism and natural law theory, Kelsen's distinctive theory of law, and the problem of truth in law.

II. OBJECTIVES

What do we expect theories about the nature of law *to do*? How can we distinguish good theories of this type from bad ones? We cannot test theories about the nature of law the way we test scientific theories: by setting up controlled experiments to see if the events predicted by the theory come about or not. Nor can we even apply the test of historical theories: judging theories by the extent to which they match with the facts in the past. Neither conventional approach to verification or falsification works with theories about the nature of law, because such theories do not purport to be (merely) empirical theories, but rather conceptual claims, claims about what is "essential" to the concept (or "our concept" of) "law".

A good theory about the nature of law (or the nature of any other concept or practice) *explains*. A good theory would be one that tells us something significant – that says something interesting about the category of phenomenon we call "law". Even if it is not a claim that can be verified or falsified, one can still feel that a theory either does or does not give us an insight onto the practice or phenomenon that we did not have before. A theory that offers to tell us something about the "nature of law" needs, of course, to reflect, to a substantial extent, the way citizens and lawyers perceive and practice law – it must "fit" our legal practice, though the fit need not be perfect, though significant deviations from the participants' understanding of a practice must be justified by some insight offered. This relates to the second point: a theory should offer more than general descriptive fit – it should also tell us something about the practice that even regular participants in the practice might not have been able to articulate, but which they would recognize when confronted with the theory.

These are perhaps vague standards, but it is not clear that "explanation" or the role of theory generally, could be reduced to more precise terms, one it is understood that we are (or at least might be) separated from the more concrete tethering of prediction or simple falsifiability.

III. General Jurisprudence, Conceptual Analysis, and "Necessity"

References to theories about the nature of law implicitly assume that it makes sense to have a *general* theory of law (as contrasted to a theory of a particular legal system or group of legal systems, or sociological or historical investigations tied to a particular legal system or group of systems). This assumption is neither obvious or uncontested. This question is often equated with or transformed into a second – whether it makes sense to speak of "the concept of law" or "the («essential») nature of law". (There are aspects of the debate about the possibility of general jurisprudence that are not entirely covered by discussions about "necessity" and "conceptual analysis"; these will be discussed later in this paper).

References to "necessary" or to "essential" properties were traditional within classical philosophy. However, to modern sensibilities, such references seem out of place, at least when discussing a social practice or a social institution. Talk of necessity sounds of abstract and eternal Platonic Ideas; but if legal practices and institutions are human products, can we not define them as we like? And if "law" just is whatever we say it is, there seems little room for the kind of conceptual analysis Joseph Raz and H. L. A. Hart, and most other prominent analytical legal theorists, purport to do.

Is there a place for "necessity" within discussions of law? Some philosophers have argued for 'necessity' in the definition of certain terms, when those terms denote some category whose boundaries are arguably set out by "the way the world is". These are 'natural kind' terms, like "water" and "gold", and the debate within the literature, at least initially, was addressed to the question of whether terms of this kind have their reference determined by people's beliefs about the item's nature or by the way the world is.[3] Whatever the merit of a 'natural kinds' analysis for terms that refer to natural or physical entities, its applicability to human institutions and social practices would

[3] See generally Putnam, "The Meaning of Meaning", *Mind, Language and Reality: Philosoplical Papers*, Cambridge, Cambridge University Press, 1975, vol. 2. For a critical analysis of attempts to apply 'natural kinds' theories to law, see Bix, Brian, *Law, Language and Legal Determinacy*, Oxford, Oxford University Press, 1993, pp. 157-173.

seem to be much more problematic. "Gold" may be a category whose boundaries are set by the world, and its essence estimated by the best scientific theory we currently have; there is, however, little reason to think that a similar approach would work for 'baseball' or for "law". In what way could 'the world' be said to delimit what does and does not count as "law"?, and what would it mean to have a "scientific theory" of the nature of law?[4]

Another analogy within the philosophical literature might be Saul Kripke's idea[5] of rigid designators: that in counterfactuals, singular terms are intended to have the same reference in all possible worlds. Again, while the analysis is arguably persuasive as regards proper names, it would be awkward, at best, if applied to a social practice or social institution like law.[6] In the context of theories about the nature of law, and the use of 'necessity' within such discussions, the Kripke-Putnam theories about reference and semantics do not seem helpful, except perhaps by broad analogy.[7]

1. *Conceptual Analysis and Jurisprudence*

One likely response to the discussion up to this point would be: "Of course, a jurisprudential discussion about the nature of law is not an analysis of logical necessity, or even of a natural kind. It is a *conceptual* analysis, and whatever "necessary" or "essential" claims involved are those of the inquiry into concepts".[8] Philosophical analysis of concepts

4 Moore, Michael ("Hart's Concluding Scientific Postscript", *Legal Theory*, num. 4, 1998, p. 312) suggests that H. L. A. Hart's legal theory could be seen as *implying* something analogous —"just as there are 'natural kinds' in the natural world, so there are 'social kinds' in the social world, and law is one of them"— but this still leaves us with the question of what it would mean for there to be 'social kinds'.

5 Kripke, S. A., *Naming and Necessity*, Cambridge, Harvard University Press, 1972.

6 One can accept Kripke and Putnam's positions on a more general level, that meaning has a *social* dimension, and is not individualistic ('in the mind'), even if one does not accept that 'the world' determines the meaning of our concepts. Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison", *Legal Theory*, num. 4, 1998, pp. 262-264 & num. 26. The significance of this 'compromise position' for the present analysis will become clearer later in the paper.

7 See num. 4 above.

8 Of course, when the classical philosophers wrote of essential and accidental properties, they were usually referring to the essential and accidental properties of *things*, not of concepts. See, *e. g.*, Aristotle, "Metaphysics," Book VII, chapter 4, in Barnes, J. (ed.),

is, of course, nothing new. For example, there was a long-standing debate about whether knowledge should be defined as "justified true belief".[9] Philosophers frequently do believe that we can sensibly analyze our concepts, and, at least sometimes, determine what their essential (and accidental) attributes are.[10] Also, conceptual analysis is certainly nothing new for jurisprudence either: arguably the most important jurisprudential text published in English in the last century was described by its title as being *about a concept*, H. L. A. Hart's *The Concept of Law*.[11]

However, one might ask, why should we study *the concept* if we can study *the thing itself* (the practice, the type of institution) instead? This may seem like an empiricist's (or an anti-intellectual's) response to impractical, overly abstract philosophers. At *that* level, the proper response is that conceptual analysis is a prior inquiry – we cannot study law until we know *what we mean by* "*law*."[12] Some might persist that the proper study of law —a social institution— is through social theory. Law is a set of social practices, the argument would go, so its nature is best discovered, not by armchair reflections, but by an investigation of the actual practices (a view that will be considered at greater length below). However, should someone suggest that the investigation of the nature of law be *purely* empirical/sociological, that claim would be vulnerable to the argument just offered: how can one have a "sociological theory of law" if one does not have at least a rough prior notion of what is or is not 'law'?[13]

Aristotle, *The Complete Works of Aristotle*, Princeton, Princeton University Press, 1984, pp. 1625-1627.

9 Gettier, E. L., "Is Justified True Belief Knowledge?, *Analysis*, num. 23, 1963.

10 *Cfr*. Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison", *Legal Theory*, num. 4, p. 273, num. 38, where Raz distinguishes "those features of law which are general, *i.e.*, shared by all legal systems" and the "essential features of law, features without which it would not be law."

11 Hart, *The Concept of Law*, 2nd. ed., Oxford, Clarendon Press, 1994; see also Raz, *The Concept of a Legal System*, 2nd. ed., Oxford, Clarendon Press, 1980.

12 See, *e. g.*, Jackson, F., *From Metaphysics to Ethics: A deference of Conceptual Analysis*, Oxford, Clarendon Press, 2000, pp. 30 & 31; *cfr.* Coleman, J. L., "Methodology", in Coleman J. L. & Shapiro, Scott (eds.), *Handbook of Jurisprudence and Legal Philosophy*, 2002, pp. 3473-3551) (offering a similar response to a naturalist critique of conceptual analysis).

13 One possible response is that while a prior notion of 'law' is needed before beginning other (empirical) work, simple intuitions and linguistic usage patterns would be sufficient for that purpose. No thicker *conceptual* analysis is needed (or, some commenta-

There is thus a sense in which conceptual work *must* be prior to empirical work.[14] For the focus is inevitably on the boundaries of the category – here, what makes something 'law' or "not law"? We are not asking empirical questions about *particular* institutions: *e. g*., about the historical origins of common law reasoning in the English legal system, or the interpretive practices of American judges when construing statutes. Questions about specific institutional practices would be social theory inquiries which would call for some combination of model building, observation, and statistical analysis. However, as mentioned earlier, the more general discussion of the nature of law, if such discussion has any place at all, is not a *comparably* empirical inquiry.[15]

One might point out that if it would be mistaken to try to ground a theory of the nature of law *solely* on empirical or sociological grounds, without reference to conceptual analysis, it would be equally mistaken to ground such a theory solely on conceptual analysis, without reference to empirical and sociological truths.[16] Indeed, what sense or value could there be to a purported "«concept of "law»" if that concept had no relation whatsoever to the practices we associate with legal systems? Raz's own view[17] is that the concept of law is grounded on the perceptions and self-understandings of people – self-understandings which, in turn, one presumes, reflect the social practices that help to constitute the social

tors might add, possible). Leiter, B., "Naturalism in Legal Philosophy", in Zalta, E. N. (ed.), *Stanford Encyclopedia of Philosophy*, 2003.

[14] However, there is also a sense in which the theorist doing conceptual analysis must defer to the way the world is, at least in those cases where the theorist is investigating the nature of an *already-existing* concept. The matter would be different if we were positing some *new* concept or category, and then considering what empirical claims could be made about that concept. Raz, J., *Ethics in the Public Domain*, Oxford, Clarendon Press, 1994, p. 221.

[15] None of this is to claim that sociological inquiry must be subordinate to conceptual analysis. The fact that we have a rough sense of (*e. g.*) what is and what is not 'law' does not mean that social theories must be built on categories that track those concepts.

[16] Tamanaha, B. Z., *Realistic Socio-Legal Theory: Pragmatism and Social Theory of Law*, Oxford, Clarendon Press, 1997; *id.*, "Conceptual Analysis, Continental Social Theory, and CLS: A response to Bix, Rubin and Livingston", *Rutgers Law Journal*, num. 32, 2000; and "Socio-Legal Positivism and a General Jurisprudence", *Oxford Journal of Legal Studies*, num. 21, 2001, pp. 1-32.

[17] Raz, "On The Nature of Law" (Kobe Lectures of 1994), *Archiv für Rechts- und Sozial-Philosophie*, num. 82, 1996, pp. 5 & 6.

institution. The connection between conceptual analysis and empirical truths will be discussed further, below.

2. *Family Resemblance*

Ludwig Wittgenstein[18] famously introduced the notion of "family resemblance" as a shorthand for the way that some concepts and categories (Wittgenstein used the examples "language", "game" and 'number') cannot be understood in terms of necessary and sufficient conditions, but rather have a variety of different and overlapping criteria.[19] Wittgenstein was not claiming that *all* concepts were family resemblance concepts, only that some were, and therefore it would be a mistake to assume that there would always be necessary and sufficient conditions for every concept[20] A number of writers have suggested that "law" *might* be such a family resemblance concept, with instantiations having no feature in common – and thus no "necessary" features.[21] Hart himself suggested[22] that the notion of "family resemblance" might be particularly relevant to legal terms, and he broadly hinted early in *The Concept of Law*[23] that "law" might well best be understood in this way, though later in the same book he offered what appeared to be a set of necessary and sufficient conditions for that term.[24]

That noted, because no one claims that *all* concepts are family-resemblance concepts, even if one accepts that *some* are, analysis and debate must be developed concept by concept. One way to "disprove" that "law" is a family resemblance concept is to provide an analysis in terms of necessary and sufficient conditions, as Raz and others have attempted

18 *Philosophical Investigation*, 3rd. ed., Oxford, Basil Blackwell, 1958, §§ 65-68.
19 Glock, H. J., *A Wittgenstein Dictionary*, Oxford, Blackwell, 1996, pp. 120-124.
20 Glock, *op. cit*., footnote 19, pp. 123 & 124.
21 Burton, S. J., "Law, Ob1igation and a Good Faith Claim of Justice", *California Law Review*, num 73, 1985, pp. 1979 & 1980; Lyons, D., "Book Review", *Cornell Law Review*, num. 68, 1983, p. 259.
22 Hart, *The Concept of Law*, 2nd. ed., Oxford, Clarendon Press, 1994, pp. 279 & 280.
23 *Ibidem*, pp. 15 & 16.
24 *Ibidem*, p. 81.

to do. If the analysis succeeds, that suffices to show that 'law' is *not* a family resemblance concept.[25]

3. *The Connection with Practice and the Number of Concepts*

To say that conceptual analysis *is* connected with lived experience in some ways leads reasonably to the question —a surprisingly difficult one— of what that connection is.[26] Raz[27] suggests the following: "The concept of law is a historical product, changing over the years, and the concept as we have it is more recent than the institution it is used to single out".

But the concept of law is not a product of the theory of law. It is a concept that evolved historically, under the influences of legal practice, and other cultural influences, including the influence of the legal theory of the day.

In other words, today's concept of law is different from the concept of law of some generations or centuries in the past. This in turn raises the question of the quantity of concepts of law (more than one over time?, more than one at any given time?), and their parochial or universal nature.

When we are analyzing the concept 'law,' the modifier we place in the description can be crucial. Are we describing, as in the title to H. L. A. Hart's book, *The Concept of Law*, implying that there is (and has always been) only one? Or are we merely offering "*a* concept of law", implying that this is merely one possible concept among many.[28] Also, even if it is only one possible concept among many (and thus, in a sense, "contingent", not "necessary"), is the focus on this concept non-arbitrary —that is, is there some good reason why we should look to *this* concept rather than another? For example, might one argue that we are focusing on a particular concept among different possible concepts because it is

[25] Although, of course, the opposite is not the case: the failure of a particular necessary-and-sufficient-conditions analysis does not prove that 'law' *is* a family resemblance concept, though it may help to fuel doubt in that direction.

[26] I discuss the issue in Bix, "Conceptual Jurisprudence and Socio-Legal Studies", *Rutgers Law Journal*, num. 32, 2000.

[27] *Op. cit.*, note 10, pp. 280 & 281.

[28] Someone once suggested that the two books, Hart, *The Concept of Law*, *op. cit.*, note 11; and Rawls, J., *A Theory of Justice*, Cambridge, Harvard University Press, 1999, might have usefully exchanged articles.

"*our* concept of law"— though contingent, in the sense that there are *other* concepts of law, this is the one that matches our community's linguistic practices or general self-understanding?

Jules Coleman, in a recent article,[29] has advocated thinking in terms of "*our* concept of law", tying that position to a somewhat deflationary notion of necessity:

> The descriptive project of jurisprudence is to identify the essential or necessary features of *our* concept of law. No serious analytical philosopher... believes that the prevailing concept of law is in any sense necessary: that no other concept is logically or otherwise possible. Nor do we believe that our concept of law can never be subject to revision. Quite the contrary. Technology may someday require us to revise our concept in any number of ways. Still, there is a difference between the claim that a particular concept is necessary and the claim that there are necessary features of an admittedly contingent concept.[30]

Raz similarly writes of a concept of law that seems to be both contingent and necessary (or, in his somewhat different terminology, both "partial" and "universal").[31] According to Raz: (1) *we* have a concept of law; (2) based on our society's self-understanding; and (3) our concept of law has changed over time, in response to changes in institutions, practices, attitudes, and even philosophical theories.[32]

Let us look more closely at these notions within Raz's analysis. Raz is not a Platonist, and therefore does not believe that the concept of law is some eternal Platonist Idea, which would be the same for all people or for all times.[33] Therefore, it is natural to suspect that the concept we in-

29 "Incorporationism, Conventionality, and the Practical Difference Thesis", *Legal Theory*, num. 59, 1998, p. 393.

30 While I am not entirely sure what Coleman means by technology requiring the revision of a/our concept, the notion of a *contingent* concept, on its own, seems understandable.

31 Raz, *op. cit.*, note 17, pp. 1-7.

32 Raz, "On the Nature of Law", *Archiv für Rechts und Sozial-Philosophie*, 1996; "Two Views of the Nature of the Theory of Law: A Partial Comparison", *Legal Theory*, num. 4, 1998; and, "Legal Theory", in Golding, M. P. & Edmundson, W. A. (eds.), *Blackwell Guide to ThePhilosophy of Law and Legal Theory* (forthcoming, Oxford, Blackwell, 2004).

33 Contrast Cicero's comments on "natural law":

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting... And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times...

vestigate is "our concept", "the product of a specific culture" – our own.[34] And since what counts as "law" (under our concept) is independent of a society's possessing that concept, there were likely earlier cultures or alien cultures that did not or do not "share" or "have" our concept, yet still had law.[35]

While the concept of law has changed over time—not some unchanging Idea we are "discovering"—Raz treats the/our concept of law as something unique, a matter about which we can be right or wrong in our descriptions, and which we cannot simply re-invent for our own purposes (though he does note that since concepts of law are in flux, our theories of law, even mistaken theories, could influence the concept of law future generations have).[36] Similarly, Raz rejects the notion that we (as theorists) can choose a concept of law based, say, on its fruitfulness in further research,[37] or even according to its simplicity or elegance;[38] rather, it is a concept already present, already part of our self-under-

Marcus Tullius Cicero, "The Republic," Book III, xxii, in Cicero, *De Re Publica, De legibus*, Keyes, W., trans., Cambridge, Harvard University Press 1928, p. 211. I do not mean to imply that Cicero's view of an ideal law, or an eternal standard for morally judging all positive laws, is the same as modern conceptual analyses of 'law.' I use Cicero's language only to exemplify a view of something unchanging over time and independent of experience.

34 Raz, "On The Nature of Law", *Archiv für Rechts un Sozialphilosophie*, num. 82, 1996, p. 5.

35 *Ibidem*, pp. 4, 5 and 6.

36 *Ibidem*, p. 7.

37 See, *e. g.*, Raz, *Ethics in the Public Domain*, Oxford, Clarendon Press, p. 221.

"[I]t would be wrong to conclude... that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that, unlike concepts like 'mass' or 'electron', 'the law' is a concept used by people to understand themselves. We are not free to pick on any fruitful concepts. It is a major task of legal theory to advance our understanding of society by helping us understand how people understand themselves".

Among those who appear to take a contrary view regarding choosing concepts according to usefulness, see, *e. g.*, Leiter, "Realism, Hard Positivism, and Conceptual Analysis", *Legal Theory*, num. 4, 1998; Lyons, D., *The Ethics and the Rule of Law*, Cambridge, Cambridge University Press, 1983, pp. 57-59; Tamanaha, B. Z., "Conceptual Analysis, Continental Social Theory, and CLS: A response to Bix, Rubin and Livingston", *Rutgers Law Journal*, num 32, 2000, pp. 283-288. In another work (Bix, *Jurisprudence: Theory and Context*, 3rd. ed., London, Sweet & Maxwell, 2003, pp. 9-29), I also seem to endorse a contrary view, but I was, and am, more agnostic on this subject than that text might imply.

38 Raz, "Legal Theory", in Golding, M. P. & Edmundson, W. A. (eds.), *Blackwell Guide to The Philosopy of Law and Legal Theory*, Oxford, Blackwell, 2004.

standing. Raz refers repeatedly to "*the* concept of law" which "exists independently" of the legal philosophy which attempts to explain it,[39] and "*the* nature of law" which general theories of law must strive to elucidate.[40] When these aspects of Raz's view of the concept of law are combined, they result in a position which might seem problematic in two different ways. First, under Raz's analysis, the concept may apply to societies who do not or did not have the concept.[41] Raz emphasizes that nothing radical is implied or assumed by this position: only that some ways of articulating our understanding of ourselves develop slowly, as do concepts for understanding alien cultures (such understanding requiring the development of concepts which allow us to relate those cultures' understanding of their practices to our understanding of our own practices).[42] As Raz points out, we seem untroubled by this sort of analysis elsewhere: for example, we can talk about the "standard of living" of a society which existed long before that concept had been articulated.[43]

The second problem is one that some might find harder to shake off: the way Raz combines references to "necessity" with talk of historical contingency. This can be confusing, given the connections, mentioned earlier, within normal philosophical discourse between "necessity" and "the way things must be" or "the way things must be in all possible world". The "necessity" in conceptual analysis – at least in Raz's conceptual analysis – is of a "softer" kind, as it were. It means only that these are connections internal to the concept in question (*e. g.*, to be a legal system is to claim authoritative status), a concept which is itself contingent and may be tied to a particular community and time-period. It is perhaps a more Wittgensteinian (or Hegelian) notion, a necessity relative to a society and a time or a "way of life".

39 Raz, *op. cit.*, note 10, pp. 280 and 281 (emphasis added).

40 Raz, "Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment," *Legal Theory*, num. 4, 1998, p. 2 [emphasis added]; see also Raz, "Legal Theory", *op. cit.*, note 38.

41 See, *e. g.*, Raz, "On The Nature of Law", *Archiv für Rechts un Sozialphilosophie*, num. 82, p. 4. "The concept of law is itself a product of a specific culture, a concept which was not available to members of earlier cultures which in fact lived under a legal system".

42 Raz, "Postema on Law", *op. cit.*, note 40, pp. 4 and 5.

43 Raz, "Legal Theory", *op. cit.*, note 38.

4. *Nominalism and Pluralism*

As discussed above, there is a strong connection between the view that one can and should offer conceptual analysis of law and the view that general jurisprudence is both possible and valuable. However, as will be seen in the coming sections, one can deny the first and still affirm the second.

Some theorists argue that there is no single concept of law, or at least none that should be given priority over all the others. This view is well-presented by Brian Tamanaha's comment:

The project to devise a scientific concept of law was based upon the misguided belief that law comprises a fundamental category. To the contrary, law is thoroughly a cultural construct, lacking any universal nature. Law *is* whatever we attach the label *law* to.[44]

This can be seen to be a nominalist attack on conceptual theory: there is no category (natural or otherwise) "law" "law" is whatever we want it to be, so it is a strange exercise at best to wonder about the 'nature' or 'essential nature' of something we have constructed (and could construct a different way if we so choose). Perhaps jurisprudence can only be, in a phrase used by one commentator, "a conjunction of lexicography with local history, or... a juxtaposition of all lexicographies conjoined with all local histories".[45]

One response to this sort of nominalism (though one more modest or minimalist than Raz would likely offer) is that one need not posit any sort of metaphysical grouping to justify theorizing about concepts. However arbitrary the inclusion or exclusion of items in our category 'law', if there is something interesting that can be said about all (and perhaps only) the items in that category, the process of theorizing will have value.[46] (One could also come at the question from the other direction, as

[44] Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* Oxford, Clarendon Press, 1997, p. 128.

[45] Finnis, J., *Natural Law and Natural Rights*, Oxford, Clarendon Press, 1980, p. 4. Finnis's position, of course, is that Jurisprudence *is* more than just such a conjunction. See *id.* at pp. 3-18.

[46] Bix, "Conceptual Jurisprudence and Socio-Legal Studies," *Rutgers Law Journal*, num. 32, 2000, p. 231.

Frederick Schauer[47] did, and offer the suggestion that maybe there is a single concept, 'law', but nothing interesting can be said about it).[48]

One can invert the prior point: not that there should be more-or-less arbitrary categories, about which there may or may not be something interesting to say, but rather that we should "build" or "select" the categories which will have the best practical consequences.[49] Frederick Schauer, controversially, associates that position with both H. L. A. Hart and Lon Fuller: "Both Fuller and Hart appear equally committed to the belief that giving an account of the nature of law is not so much a matter of discovery as one of normatively-guided construction, with the best account of the nature of law being the one most likely to serve deeper normative goals".[50]

5. *Doubts About General Jurisprudence*

A different criticism is offered, albeit more implicitly than expressly, in Ronald Dworkin's work. Dworkin offers an interpretive approach to law and legal theory, within which he asserts that the interesting work will be at the level of interpretations of particular legal systems, rather than at the level of general theories of law. Dworkin's position is not so much that theories generally about law are impossible or incoherent, but rather that they are not productive: that there is nothing terribly interesting that one can say about *all* legal systems, but that there are many things of value one can say about *particular* legal systems.[51]

47 Schauer, "Fuller's Internal Point of View", *Law and Philosophy*, num. 13, 1994.

48 Schauer, F., "Critical Notice of Roger Shiner, Norm and Nature: The Movements of Legal Thought", *Canadian Journal of Philosophy*, num. 24, 1994, p. 508, writes:

> [N]ot every class that exists in the world is philosophically interesting as a class. The classes "residents of London", "foods that begin with the letter «Q»", and "professional basketball players" are all "real" even though they are not natural classes, not ontologically primary, and not of great philosophical interest. Similarly, law may exist as an analogously non-ontologically primary aggregation of individuals, institutions, and practices, undeniably part of the world but simply not having the philosophically interesting core that philosophers of law have often supposed.

49 This is not to be confused with categories that have the best *theoretical* consequences (consequences for research), a view associated below with Brian Leiter.

50 Schauer, *op. cit.*, note 48, p. 290 [footnote omitted].

51 It may also be significant that Dworkin sees more general statements about law *being tied to* quite specific claims made *within daily legal practice*. He famously states

One might respond to Dworkin the same way he has responded to challenges to his right-answer theory based on global indeterminacy or global incommensurability (incomparability). His response has been that arguments cannot, or cannot easily, be made on a global level, but must be made piecemeal. Dworkin's argument is that for a particular case, one puts up an argument for there being a (certain) right answer, and it is up to the critic to show that *for this question* there is no right answer, or that the values factored into a possible answer are incommensurable.[52] The same sort of response could be offered to Dworkin's view on the proper scope of legal theory: once a theory purporting to say something interesting about (the concept of) law generally, it will then be proper for critics to show that this theory is faulty in some way.

Dworkin's own work is, at best, doubtful support for this critique. While it is true that he writes of the interpretation of particular legal systems, and doctrinal areas within particular legal systems, he simultaneously makes claims that apply to all legal systems:[53] most importantly, that all legal systems – indeed, all social institutions – are (should be) understood through constructive interpretation.[54] Also, while he offers one theory in discussions of the legal system of the United States,[55] he never indicates that a distinctly different theory would be appropriate for some other, distinctly different legal system (*e. g.*, that of England, France, Iran, or Tibet).

(Dworkin, "Legal Theory and the Problem of Sense," in Gavison, R. (ed.), *Issues in Contemporary Legal Philosophy*, Oxford, Clarendon Press, 1987, p. 14) that "no firm line divides jurisprudence from adjudication or any other aspect of legal practice". See Dworkin, *Law's Empire*, Cambridge, Harvard University Press, 1986, pp. 102 & 103.

52 Dworkin, *Laws Empire*, *cit.*, note 51, 1986, pp. 266-275; *Id.*, "On Gaps in the Law," in Amselek, P. & MacCormick, N. (eds.), *Controversies About Law's Ontology*, Edinburgh, Edinburgh University Press, 1991, pp. 89 & 90.

53 *Cfr.* Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison", *Legal Theory*, num. 4, 1998, p. 282: "the book [*Law's Empire*] belies the modesty of passages like the above [*Law's Empire*, at pp. 102 and 103]. Time and again, from its beginning to its very last section, it declares itself to be offering an account of law, unqualified, in all its imperial domains".

54 See Dworkin, R., *Law's Empire*, Cambridge, Harvard University Press, 1986, pp. 49-53). Dworkin defines "constructive interpretation" as "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong." *Id.* at p. 52.

55 On some occasions, he makes passing references to the law of England (and Wales), but he has not offered a distinct theory *of english law*.

IV. The Challenge of Naturalism

Brian Leiter[56] has argued that conceptual analysis is inappropriate for analytical jurisprudence, and should be abandoned for a more naturalistic (that is, more empirical and scientific) methodology, as has occurred in other areas of philosophy. Here, he summarizes (though only partly endorses) a general critique of conceptual analysis:"What is a «concept»? A cynic might say that a «concept» is just what philosophers used to call 'meaning' back when their job was the analysis of meaning. But ever since Quine embarrassed philosophers into admitting that they didn't know what «meanings» were, they started analyzing «concepts» instead".[57]

In a way, this challenge to conceptual analysis is related to a nominalist critique. In addition to the responses to the nominalist critique, one might add (as Leiter himself does), "the concept of law" has an advantage over 'the concept of the good', in that there is an identifiable set of practices and institutions to ground our discussions.[58] The concept of law cannot easily be accused of being an entirely mysterious entity, made up by metaphysicians in their spare time.[59]

Further, as Jules Coleman has argued,[60] the search for analytic truths that W. V. O. Quine criticized is quite different from what modern legal theorists were (and are) doing in their conceptual theories. Neither H. L. A. Hart nor Joseph Raz or Jules Coleman, nor any other prominent legal

56 "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," *Texas Law Review*, num. 76, 1997; "Realism, Hard Positivism, and Conceptual Analysis", *Legal Theory*, num. 4, 1998; and "Naturalism in Legal Philosophy," in Zalta, E. N. (ed.), *Stanford Encyclopedia of Philosophy* [http://plato.satanford.edu], 2003.

57 Leiter, B., "Naturalism in Legal Philosophy", in Zalta, E. N. (ed.), *Stanford Encyclopedia of Philosophy*, 1998, p. 535). Leiter continues: "The cynical view has, I believe, a modicum of truth, but it is hardly the whole story." *Id.*, *cfr*. Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis*, Oxford, Clarendon Press, 2000, p. vii) ("Properly understood, conceptual analysis is not a mysterious activity discredited by Quine that seeks after the a priori in some hard-to-understand sense. It is, rather, something familiar to everyone, philosophers and non-philosophers alike"); see also *id.*, pp. 44-46, 52-55 (responding to Quine).

58 Leiter, "Realism, Hard Positivism, and Conceptual Analysis," *Legal Theory*, num. 4, 1998, p. 536.

59 Compare Mackie's (*Ethics: Inventing Right and Wrong*, 1977) famous accusation that moral objectivism depends on the belief in "queer entities".

60 Coleman, "Methodology", in Coleman, Jules L. & Shapiro, Scott (eds.), *Handbook of Jurisprudence and Legal Philosophy*, Oxford, Oxford University Press, 2002, pp. 343-351.

theorist, could reasonably be understood as trying to determine the analytical "essence" of some trans-historical trans-empirical (platonic) idea.[61]

V. Description and Selection

While analytical legal theorists frequently refer to their theories about the nature of law as 'descriptive', the sense in which such theories can be, or should be, descriptive requires further elaboration.

While H. L. A. Hart famously referred to his book, *The Concept of Law*, as an exercise in "descriptive sociology"[62] he knew that his theory was hardly "mere description" (and it warranted the term "sociology" only in the broadest sense of that term, but that is another issue). He did not want to discuss what was common to all rule-guidance and dispute-resolution systems that we might call "law". He emphasized that his focus was on the more sophisticated or more mature legal systems, and on systems 'accepted' by at least some of their members as giving reasons for action (that is, as giving reasons for action beyond the fear of sanctions).[63] This basic methodological point was elaborated and clarified by later theorists:[64] the construction of a theory of law is inevitably a matter of selection and evaluation.

Some basis is required for selection, under Hart's approach: that law should be analyzed in its fullest and richest sense (not what is universal to all instances we might be inclined to call "law"), and that the analysis of a legal system should take into account the perspective of someone who accepts the legal system.[65] Finnis re-characterizes the process (using ideas from Aristotle and Max Weber) as one of seeking the "ideal type" or "central case" of law.[66] Other theorists, emphasize other aspects of the process of selection within theory-production: *e. g*., that one should prefer theories that are simple, comprehensive, and coherent,[67] and that a

61 Coleman, *The Practice of Principle*, Oxford, Oxford University Press, 2001., pp. 210-217; *id*., *Handbook*..., *cit*., note 60, pp. 350 and 351.

62 Hart, *op. cit.*, footnote 11, p. v.

63 Hart, *op. cit.*, footnote 11, pp. 14-17, 116 and 117.

64 Finnis, *op. cit*., footnote 45, pp. 3-18; Raz, *Ethics in the Public Domain*, Oxford, Clarendon Press, 1994, pp. 219-221.

65 Hart, *op. cit*., footnote 22, 1994, p. 98; Finnis, *op. cit*., footnote 45, pp. 6 & 7.

66 Finnis, *op. cit*., footnote 45, pp. 9-11.

67 Waluchow, *Inclusive Legal Positivism*, Oxford, Clarendon Press, 1994, pp. 19-29.

legal theory should strive to identify the "central, prominent, important" features of law[68] Legal positivists emphasize that such evaluation should not be confused with moral evaluation.[69]

However, if the construction of a theory comes down to judgments of "importance" and "significance", this hardly seems the most stable or objective basis for a discussion. "Importance" and "significance" seem like relative terms —"important" for whom? "significant" relative to which purpose? These evaluations seem likely to be matters over which reasonable observers could disagree— and disagree sharply. One response would be that the possibility of reasonable disagreement need not rebut the view that a theory about the nature of law need not turn on moral evaluation of the law. However, it is just the argument of theorists like Stephen Perry[70] that choices among different tenable theories about the nature of law can only be made on the basis of moral evaluation.

Raz's references to "the concept of law", and even to the way "concepts emerge within a culture at a particular juncture",[71] seem to assume that there is only one concept of law (or, perhaps more precisely, only one concept of law for us in the present era), but the view is, of course, not self-evident. When Raz and Coleman and others try to defend a conceptual jurisprudence unconnected with classical Platonism, this approach has the advantage of not being burdened with a metaphysics many people find unlikely (at least where applied to social practices and institutions). On the other hand, Platonism has the relative advantage of explaining why it is that there is a single (correct) answer to conceptual inquiries about law. When we move from 'the concept of law' to 'our concept of law,' there is more work to be done in justifying the assumption or conclusion that there is only one such concept. In fact, important work by Stephen Perry has argued forcefully for the claim that there is more than one tenable theory about the nature of law (grounded on different tenable theories about the purpose of law), and the choice among

68 Raz, "The Morality of Obedience," *Michigan Law Review*, num. 83, 1985, p. 735; *cfr.* Raz, *op. cit.*, footnote 64, pp. 219-221; Dickson, *Evaluation and Legal Theory*, Oxford, Hart Publishing, 2001.

69 See Coleman, *op. cit.*, footnote 61, pp. 175-197; Dickson, *op. cit.*, footnote 68, 2001.

70 "Interpretation and Methodology," in A. Marmor (ed.), *Law and Interpretation*, Oxford, Clarendon Press, 1995; *id.*, "The Varieties of Legal Positivism", *Canadian Journal of Law and Jurisprudence*, num. 9, 1996.

71 Raz, *op. cit.*, footnote 64, p. 4.

them must be made on moral or political grounds.[72] In the jurisprudential literature on methodology, there remains substantial controversy regarding whether there are in fact choices that need to be made among tenable theories of law (or among the tenable purposes of law that ground these alternative theories), and about whether such choices are necessarily normative, or can be justified on conceptual or morally neutral meta-theoretical grounds.[73] Perhaps we should at least be open to the possibility that our society contains multiple and conflicting concepts of law; perhaps, as Gallie, W. B.[74] suggested for the concepts of "art" and "democracy", our concept of "law" is essentially contested (grounded in different tenable interpretations of a complex paradigm or set of paradigms).

VI. The Internal Point of View, and the Challenge of Ideology

H. L. A. Hart, under the influence of Max Weber, Peter Winch, and others, led English-language analytical jurisprudence to a "hermeneutic turn".[75] The basic idea is that since social practices and social institutions are purposive activities, a purely external theory or description will be inadequate. Theorists must take into account the purposes and perceptions of participants in the practice.

Austin's work can be seen as having tried to find a 'scientific' approach to the study of law, and this scientific approach included trying to explain law in empirical terms: an empirically observable tendency of some to obey the commands of others, and the ability of those others to impose sanctions for disobedience.[76] Hart criticized Austin's efforts

72 Perry, "Interpretation and Methodology", in Marmor, A. (ed.), *Law and* Interpretation, Oxford, Clarendon Press, 1995; *Id.*, "The Varieties of Legal Positivism", *Canadian Journal of Law and Jurisprudence*, num. 9, 1996. See also Leiter, "Realism, Hard Positivism, and Conceptual Analysis", *Legal Theory*, num. 4, 1998.

73 For a response to Perry, arguing that there are sufficient resources in conceptual analysis to choose, see Coleman, J. L., *The Practice of Principle*, Oxford, Oxford University Press, 2001, pp. 197-210.

74 "Essentially Contested Concepts", *Proceedings of the Aristotelian Society*, num. 56, 1955 and 1956.

75 Hart, *op. cit.*, footnote 22; see also Morawetz, "Law as Experience: Theory and the Internal Aspect of Law", *SMU Law Review*, num. 52 1999; Bix, "H. L. A. Hart and the "Hermeneutic Turn in Legal Theory", *SMU Law Review*, num. 52, 1999.

76 Austin, *The Province of Jurisprudence Determined*, Cambridge, Cambridge University Press, 1995, pp. 21-26.

to reduce law to empirical terms of tendencies and predictions,[77] for to show only that part of law that is externally observable is to miss a basic part of legal practice: the acceptance of those legal norms, by officials and citizens, as giving reasons for action.[78] The *attitude* of those who accept the law cannot be captured easily by a more empirical or scientific approach, and the advantage of including that aspect of legal practice is what pushed Hart towards a more "hermeneutic" approach. Hart's hermeneutic turn involved the grounding of his theory of law on the perceived differences (1) between acting out of habit and acting according to a rule; and (2) between being obliged and having an obligation.[79] According to Hart, a person takes an "internal point of view" towards some norm when that person uses the norm as a justification for action, and the basis for criticism (and self-criticism) on observing deviation from the norm. Hart added that for a legal system to exist, the officials of the system must have an internal point of view to the system's criteria of validity ('the rule of recognition') and the citizens must be in general compliance with the system's rules.[80]

One can, of course, reject or modify Hart's particular use of the internal point of view[81] without rejecting his basic point that taking into account the participant's perspective is crucial for a successful theory of law – or any other social practice or social institution. (For example, one might argue that Hart's theory fails by emphasizing the internal perspective of the system's officials rather than the internal perspective of citizens.) A more basic challenge to a hermeneutic approach is likely to come from two arguments (which sometimes seem to overlap). First, some would argue that a more empirical, scientific approach is better (more objective, less likely to be tainted by bias, and/or more likely to lead to useful insights and successful predictions). Second, some are concerned about the biases inherent in the participants' perspective, biases sometimes characterized in terms of self-deception and sometimes

77 A similar effort, to reduce law to empirical terms, was offered by the Scandinavian legal realists (*e. g.*, Olivecrona, K., *Law as Fact*, 2nd. ed., London, Stevens & Sons, 1971); and Hart (*Essays in Jurisprudence and Philosophy*,1983, pp. 161-169) criticized those theorists for those attempts.

78 Hart, *op. cit.*, footnote 22, pp. 13, 55-58, 82-84, 88-91, 99.

79 *Ibidem*, pp. 9 and 10, 55-58.

80 *Ibidem*, p. 116.

81 For example, Finnis offers a modification of Hart's internal point of view in his work. Finnis, J., *op. cit.*, note 45, pp. 6-18.

in terms of ideology.[82] The first challenge just re-states the basic methodological debate from the social sciences, which cannot be resolved here, though one should note that most writers in the area seem to believe that a hermeneutic approach – or a hermeneutic approach supplemented at the margins with a more behaviorist approach – is superior[83] and one can see how the first challenge (social sciences behaviorism versus hermeneutic approaches) merges into the second (ideology): focusing on the internal perspective of participants in a practice is open to the criticism that the participants are in fact deluded about the significance of the practice or their participation in it, or the argument that the participants' perspective is distorted in some important way. If that is the case, then this distortion is an important part of the story that theory should tell.[84]

One response might be that though the claim of general error, bias, or ideology is a potentially crushing argument against conventional social theories, it would have significantly less critical power against a theory about the nature of law. One could of course argument that a particular theory of the nature of law reflected the political biases of its author, or was merely a reflection of the cultural moment, or worked obliquely to legitimate injustice, but these claims, even if true, would not be conclusive of the validity of the theory (though they might, of course, make us less confident regarding the theory's validity).The theory would rise and fall on other grounds; there are criteria for selecting better theories from worse theories.[85]

[82] Here I am using "ideology" in its sense of unconscious coloring or distortion of perception (both variants traceable to Marx) (Williams, R., *Keywords: A Vocabulary of Culture and Society*, New York, Oxford University Press, 1976, pp. 126-130), rather than in the sense of a more conscious or articulated political program (*e. g.*, Kennedy, D., *A Critique of Adjudication (fin de siècle)*, Cambridge, Harvard University Press, 1997, pp. 41-44).

[83] Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*, Oxford, Clarendon Press, 1997, pp. 58-90.

[84] Lucy, *Understanding and Explaining Adjudication*, Oxford, Oxford University Press 1999, p. 69 and 70.

[85] Of course, one can argue that most of these criteria, or their applications in the past, have themselves been tainted by ideological distortion. However, if the notion of ideology itself assumes that one can distinguish truth from distortion, and thereby assumes that in some way it must be possible to distinguish true theories from false ones, or at least less distorted theories from more distorted ones.

VII. LEGAL POSITIVISM *VS.* NATURAL LAW

One reason why natural law theorists and legal positivists frequently seem to be talking past one another is that they have quite different starting points about what law is, and what legal theory should be trying to do. Legal positivists (with the possible, though important exception of Hans Kelsen, discussed briefly in the next section) tend to focus on law as a kind of social system. This is well-phrased by H. L. A. Hart:[86] "[T]here is a standing need for a form of legal theory or jurisprudence that is descriptive and general in scope, the perspective of which is… that of an external observer of a form of social institution with a normative aspect, which in its recurrence in different societies and periods exhibits many common features of form, structure, and content".

By contrast, natural law theorists focus on law as a kind of reason-giving practice.[87] Law gives reasons for action, at least (many would say) when it is consistent with higher moral standards. (Natural law theorists are here focusing on the *moral* reasons for action that law may (sometimes) offer, not on the prudential reasons that legal sanctions (like all threats of force or public shame) may entail.) This aspect of law points the attention of theorists to the congruence of particular laws, and particular legal systems, with moral criteria, to determine when law adds to the list of our moral reasons for action. For this broader category of theorizing about reason-giving practices, there would be obvious tensions in any effort to create a 'descriptive' or 'neutral' theory of an intrinsically evaluative practice. At the least, there are evident arguments for preferring a perspective on reason-giving practices that would reflect on their merits according to their ultimate purposes.[88]

It seems inevitable that a focus on law as a reason-giving activity, a focus on when or how legal systems create new moral reasons for action, will take us in a different direction from a study of law as a particular kind of social institution, and vice versa.

86 "Comment" in Gavison, Ruth (ed.), *Issues in Contemporary Legal* Philosophy, Oxford, Clarendon Press, 1987, p. 36.

87 Finnis, "On the Incoherence of Legal Positivism", *Notre Dame Law Review*, num. 75, 2000, pp. 1602-1604.

88 *Cfr.* Finnis, "Natural Law: The Classical Tradition," in Coleman, Jules L. & Shapiro, Scott (eds.), *Handbook of Jurisprudence and Legal* Philosophy, Oxford, Oxford University Press, 2002; *Id*., *op. cit.*, footnote 87.

It may well be that law's double nature – as a social institution and as a reason-giving practice – makes it impossible to capture the nature of law fully through any one approach, with a more 'neutral' approach (like legal positivism) required to understand its institutional side, and a more evaluative approach (like natural law theory) required to understand its reason-giving side.

VIII. Kelsen and Normative Logic

In English-speaking countries, the best-known legal positivist theory (and, along with Ronald Dworkin's interpretive approach, one of the two best-known legal theories of any kind) is that of H. L. A. Hart, already discussed at length. However, in other countries, the legal positivism of Hans Kelsen[89] is far better known than that of Hart, and Kelsen's "pure theory of law" is highly influential. Kelsen's work does not fit comfortably within the structure of the analysis given so far, but its methodological assumptions are of obvious importance.

Kelsen's work has certain external similarities to Hart's theory, but it is built from a distinctly different theoretical foundation: a neo-Kantian derivation, rather than (in Hart's case) the combination of social facts, hermeneutic analysis, and ordinary language philosophy.[90] Kelsen applied something like Kant's Transcendental Argument to law: his work can be best understood as trying to determine what follows from the fact that people sometimes treat the actions and words of other people (legal officials) as valid norms[91] Kelsen's work can be seen as drawing on the logic of normative thought. Every normative conclusion (*e. g.*, "one

[89] *Pure Theory of Law*, Berkeley, University of California Press, 1967; *id*., *Introduction to the Problems of Legal Theory*, Oxford, Clarendon Press, 1992.

[90] Kelsen's ideas developed and changed over the course of six decades of writing; the claims made about his work here apply to most of what he wrote, but will generally not apply to his last works (Kelsen, *General Teory of Norms*, Oxford, Clarendon Press, 1991), when he mysteriously rejected much of the theory he had constructed during the prior decades (Hartney, "Introduction", in Kelsen, *op. cit*., *supra*, pp. xxxvii - liii; Paulson & Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, Oxford, Clarendon Press, 1998, p. vii; and Paulson, "Kelsen's Legal Theory; The Final Round" *Oxford Journal of Legal Studies*, num. 12, 1992). This section discusses the main body of Kelsen's writings, but does not purport to cover all its permutations, especially excluding the views in his last works.

[91] Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law", *Oxford Journal of Legal Studies*, num. 12, 1992.

should not drive more than 55 miles per hour" or "one should not commit adultery") derives from a more general or more basic normative premise. This more basic premise may be in terms of a general proposition (*e. g.*, "do not harm other human beings needlessly" or "do not use other human beings merely as means to an end") or it may be in terms of authority ("do whatever God commands" or "act according to the rules set down by a majority in Parliament"). Thus, the mere fact that someone asserts or assumes the validity of an individual legal norm ("one cannot drive faster than 65 miles per hour") is implicitly to affirm the validity of the foundational link of this particular normative chain ("one ought to do whatever is authorized by the historically first constitution of this society").

Like John Austin, but unlike Hart, Kelsen is a "reductionist": trying to understand all legal norms as variations of one kind of statement. In Austin's case, all legal norms were to be understood in terms of commands (of the sovereign); in Kelsen's case, all legal norms are to be understood in terms of an authorization to an official to impose sanctions (if the prescribed standard is not met).

Kelsen's work diverges from the usual approach of Anglo-American (in particular, Hartian) legal positivism, in that it is not grounded on the view of law as a social institution, while also diverging from the natural law view of law as a factor in practical reasoning. Kelsen's analysis is of law as a particular kind of normative thought (differing from Hartian legal positivism in not emphasizing, while also not denying, the social-fact basis of law; and differing from natural law in separating legal normativity from moral normativity, rather than analyzing how the first affects the second).

IX. Truth and the Nature of Law

While this is a paper about methodology and not about legal truth, it may be worth noting briefly how some of the same matters that raise particular methodological issues for analytical jurisprudence also raise questions for discussions of truth in legal and jurisprudential propositions. This is particularly true for law's double-nature,[92] discussed earlier: that

[92] See Finnis, "Natural Law: The Classical Tradition," in Coleman, Jules L. & Shapiro, Scott (eds.), *Handbook of Jurisprudence and Legal Philosophy*, Oxford, Oxford University Press, 2002, pp. 11 & 12.

it is both a set of past and present actions by officials, and a mode of thinking meant to affect our practical reasoning. In different terms, it is both "will" and "reason".[93] In fact, one thing that makes law distinctive from morality is that it is, as a practical matter if not by conceptual necessity, a mixture of both "will" and "reason" And it is this intertwining of reason and will, of normative system and practical reasoning, which makes assertions about the nature of legal truth, and theories about the nature of law, so difficult.

There are a number of other aspects of legal practice that will also raise problems regarding truth in law. Any theory about the nature of 'truth' within law (or about the nature of law generally) must be able to deal with two aspects of legal practice true of most modern legal systems: (1) that the decisions of certain legal officials have authority, at least until expressly reversed, even when those officials have acted in a mistaken interpretation of the relevant legal texts or even when they have acted beyond the scope of their authority; and (2) officials applying legal texts are often ordered or authorized to make the all-things-considered morally best decision, *taking into account the legal sources*, but not necessarily confined to those sources.

X. Conclusion

Most of the prominent contemporary theories about the nature of law tend to assume that it is possible and valuable to do general jurisprudence, and that conceptual analysis is the appropriate approach. However, these basic methodological positions have been subject to challenge, and they require justification. Conceptual analysis in jurisprudence needs to be defended against the naturalist critique; and those who would justify general jurisprudence on grounds other than (an unlikely) Platonism about law need to clarify whether the choice among competing theories can be made on purely conceptual and meta-theoretical grounds, or whether moral evaluation is inevitably part of the process.

[93] Bix, "Will versus Reason: Truth in Natural Law, Positive Law, and Legal Theory", *Truth*, Washington, D. C., The Catholic University of America Press, 2004.

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