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**PROBLEMA**

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CONCEPTUAL ANALYSIS AND ITS CRITICS

Michael GIUDICE

**Resumen:**

Existen varias críticas en cuanto al método de análisis conceptual en la teoría jurídica, pero tres de ellas han cobrado especial relevancia en las últimas dos décadas. Primero tenemos la crítica de quienes sostienen que la mera diversidad de tipos de derecho hace que la búsqueda de un único concepto supremo sea absurda; en segundo lugar, tenemos a quienes suponen que el involucrarse en una tarea de análisis conceptual no soluciona disputas en los límites acerca del concepto de derecho, tarea que por cierto es la que tiene que resolver el análisis conceptual; y finalmente, tenemos a quienes argumentan que el análisis conceptual, como método filosófico en general, descansa sobre una epistemología fallida, la cual por cierto tiene tiempo desacreditada. En este artículo voy a hacer una exposición de estas tres categorías de críticas al análisis conceptual, (esto en la sección I), y posteriormente evaluaré el impacto general que las mismas han tenido (en las secciones II y III).

**Palabras clave:**

Concepto de derecho, filosofía del derecho naturalizada, filosofía del derecho general, pluralismo jurídico y análisis conceptual, filosofía del derecho especial, metodología de la filosofía jurídica.

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**Abstract:**

*Several criticisms exist surrounding the philosophical method of conceptual analysis in legal theory, but three have become particularly prominent in the last two decades. First, there are those who argue that the sheer diversity of types of law renders the pursuit of a single, overarching concept of law absurd. Second, there are those who suppose that engagement in conceptual analysis cannot resolve boundary disputes about the concept of law, which was the very purpose of conceptual analysis in the first place. And third, there are those who argue that conceptual analysis, as a general philosophical method, relies on a deeply flawed epistemology which has for a long time now been discredited. In this article I shall present each of these categories of challenges in turn (section I) before providing an assessment of their overall impact (sections II and III).*

**Keywords:**

*Concept of Law, Naturalized Jurisprudence, General Jurisprudence, Legal Pluralism and Conceptual Analysis, Particular Jurisprudence, Methodology in Jurisprudence.*

## CONCEPTUAL ANALYSIS AND ITS CRITICS

SUMMARY: I. *The Challenges*. II. *Some Replies*. III. *So Is It Modest or Immodest Conceptual Analysis?* IV. *Bibliography*.

### I. THE CHALLENGES

#### 1. *The Legal Pluralist Challenge*

The first category of challenges to conceptual analysis is found in the works of those who argue that the sheer diversity of types of law makes pursuit of a single concept of law, which identifies necessary or essential features of law, deeply wrongheaded. This group of critics, which is comprised for the most part of legal pluralists, criticizes analytical legal theorists for being unduly narrow and especially state-centric in the range of phenomena chosen from which to elucidate a concept of law. They argue that once the various manifestations and levels of law are acknowledged, it will be clear why there cannot be any single concept or essence of law.

For example, Brian Tamanaha argues that there is a truly wide range of phenomena legal theorists ought to investigate, which has important implications for general jurisprudence:

Law is whatever we attach the label *law* to, and we have attached it to a variety of multifaceted, multifunctional phenomena: natural law, international law, state law, religious law, and customary law on the general level, and an almost infinite variety on the specific level, from *lex mercatoria* to the state law of Massachusetts and the law of the Barotse, from the law of Nazi Germany to the Nuremberg Trials, to the Universal Declaration of Human Rights and the International Court of Justice. Despite the shared label 'law', these are diverse phenomena, not variations of a single phenomenon, and each one of these does many different things and/or is used to do many things ... No wonder, then, that the multitude of concepts of law circulating in the literature

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have failed to capture the essence of law —it has no essence.<sup>1</sup>

Tamanaha's strategy is to strip away all essential or necessary features of the concept of law (particularly those identified by H. L. A. Hart), which he believes have gone a long way towards creating a kind of 'analytical imperialism' in legal theory whereby all new or different types of law are judged adversely against some standard of central concept (typically a state-centred concept of law).<sup>2</sup>

Similarly, William Twining also argues that a narrow focus on state law overlooks much of what general jurisprudence ought to investigate, and that pursuit of an all-purpose concept of the essence or nature of law is misguided:

First, for the purposes of viewing law from a global perspective as part of a cosmopolitan discipline, a conception of law that is confined to state law (and maybe a few close analogies) leaves out far too much. There are many phenomena, which can be subsumed under the umbrella of non-state law, that are appropriate subject-matters of our discipline that would be excluded or distorted by such a narrow focus, such as various forms and traditions of religious or customary law. Second, to assume that law, or even state law, has a common nature or core involves reductionist and essentialist tendencies about which I am deeply sceptical. Rather, the picture that I wish to construct emphasizes the diversity, the complexity, and the fluidity of the phenomena with which we are or should be concerned.<sup>3</sup>

<sup>1</sup> Tamanaha, Brian, *A General Jurisprudence of Law and Society*, Oxford, Oxford University Press, 2001, p. 193.

<sup>2</sup> For discussion of the dominant role state law has played in analytical jurisprudence, see Culver, Keith, and Giudice, Michael, *Legality's Borders: An Essay in General Jurisprudence*, New York, Oxford University Press, 2010.

<sup>3</sup> Twining, William, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge, Cambridge University Press, 2009, p. 66.

One way in which Twining believes that the different kinds of law can be distinguished is in terms of geographical levels, of which he identifies eight: global, international, regional, transnational, inter-communal, territorial state, sub-state, and non-state.<sup>4</sup> However, as Twining also notes, the differences between these kinds of law are not just geographical differences; they include differences in structure, scope, and purpose as well. The cross-cutting variety of differences makes it pointless to search for a common core or concept of law.

It is possible to distinguish two main features of the pluralist views of Twining and Tamanaha. First, they maintain that a general jurisprudence, by its very nature in being general, must take as its subject-matter law wherever and whenever it exists, and since state law is only one kind of law, it cannot be given any special theoretical priority. In this way, both Twining and Tamanaha are *pluralists about the sources or types of law*. Second, both Twining and Tamanaha maintain that the diversity of sources and types of law makes it impossible or at least unproductive to settle on an essence or nature of law: law's manifestations are simply too diverse. In this way, both Twining and Tamanaha are *pluralists about the concept of law itself*.<sup>5</sup> We can then say that the legal pluralist challenge has two parts to it: first, general jurisprudence must address a much wider range of phenomena than it has so far; and second, theorists ought to give up on developing single, all-purpose concepts of law.

## 2. *Self-Understanding and Irresolvable Boundary Disputes*

The second skeptical challenge to conceptual analysis begins not with the diversity of kinds of law we can find in the

<sup>4</sup> *Ibidem*, p. 69.

<sup>5</sup> There is, however, an important difference between the views of Tamanaha and Twining which I will discuss below.

world, but instead with observation of longstanding disagreements about what the true concept of law is. Through various types of argument it attempts to demonstrate that the disagreements are in fact irresolvable. The conclusion typically reached is that legal theorists are therefore better off abandoning the exercise of attempting to establish the truth or correctness of any particular concept of law. Two theorists who have recently leveled this particular charge against conceptual analysis are Danny Priel and Liam Murphy.

According to the dominant understanding of analytical jurisprudence its task is to offer a theory of law which identifies and explains the necessary and essential features of law, and helps people to understand how they understand themselves. This view of the task of analytical jurisprudence is of course best associated with Joseph Raz, who puts the two beliefs together as follows: 'legal theory attempts to capture the essential features of law, as encapsulated in the self-understanding of a culture'.<sup>6</sup> Such a view might seem unobjectionable, but upon reflection Priel contends that pursuit of essential or necessary features is in fact incompatible with the attempt to explain a particular culture's self-understanding.

There are several steps in the argument Priel uses to generate the incompatibility. First, he argues that if pursuit of knowledge of necessary features of law is the objective, a certain kind of empirical investigation is ruled out as a possible means to attaining such knowledge. Commenting on the distinction between sociology of law and philosophy of law, Priel writes:

Amassing all instances of laws and trying to find what they have in common is exactly the kind of empirical, *sociological* inquiry that legal philosophy is to be distinguished from. What philosophy of law calls for... is an inquiry into what

<sup>6</sup> Raz, Joseph, *Between Authority and Interpretation*, Oxford, Oxford University Press, 2009, p. 98.

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something *must* be in order to be law, what are the features that if something does not exhibit, it *ipso facto* will no longer count as law. Such an inquiry cannot be based on an empirical investigation of examples of laws, no matter how many we examine; it must be based on a conceptual, a priori inquiry.<sup>7</sup>

However, and this is the second step in Priel's argument, the kind of conceptual, a priori inquiry required is not of the regular kind in which we try to gain knowledge by looking for propositions which are necessarily true in virtue of the very meaning of the terms of the propositions and logical relations they employ. Priel explains:

Suppose we believe conceptual analysis is a philosophically respectable method of inquiry, how should it be conducted when trying to explain the nature of law? Would it mean that a theorist could simply come to see the boundaries of the concept of law, or the necessary features of law, in the abstract? Could the theorist argue from this that whatever does not fit the account provided is simply not law? This does not seem right, and it does not seem right because unlike in the more familiar cases of (purported) a priori knowledge (such as the claim that nothing can be red and green all over at the same time, or that 2 and 2 are 4), we are not trying to learn what the world is like by trying to see what we find inconceivable, in the case of law we use this method to understand what a contingent and highly varied social phenomena is.<sup>8</sup>

So conceptual analysis in the philosophy of law requires at least some familiarity with law in the world, which provides the data upon which to theorize. Such data also provides the means by which to test competing theories of law:

<sup>7</sup> Priel, Dan, "Jurisprudence and Necessity", *Canadian Journal of Law and Jurisprudence*, vol. 20, 2007, pp. 175-6.

<sup>8</sup> *Ibidem*, p. 176.



Hart, Raz, and other legal philosophers routinely examined their own and other philosophers' competing accounts of the nature of law against *factual* counter-examples of instances of law; and they (as Hart famously did with regard to Austin's account) judged other theories as false because they failed to pick out instances of law or because they ended up covering by their accounts things that are not law.<sup>9</sup>

Priel draws the following conclusion: conceptual analysis does not in fact, and cannot, proceed via any kind of a priori, logical exercise aimed at discovering necessary or essential features of law. Instead, 'the "direction" of jurisprudential inquiry is from some samples of law (*i.e.*, pre-theoretically agreed upon examples of things that are law), to a theory that tries to show what the necessary and important features these samples (together with all other laws) have'.<sup>10</sup>

Everything would seem to hang, then, on what counts, pre-theoretically, as law. It is here, however, where the hopes for conceptual analysis, and identification of law's necessary features, come to an end. The third step of Priel's argument is meant to show that conceptual analysis has no means to resolve disputes about what counts as law in the first place, at a pre-theoretical level. He offers the following thought experiment. Suppose we compare the views about legal validity of two different societies. The self-understanding of the first society is that 'something is law only if it is moral, and that public officials' actions can be legitimate only if they act on laws that do not contradict certain moral principles, which they consider to be part of the law.'<sup>11</sup> Suppose also that they believe that certain members of the society are able to identify the true requirements of morality. In the second society, since people hold different beliefs about morality and government, a self-understanding forms

<sup>9</sup> *Ibidem*, p. 177.

<sup>10</sup> *Ibidem*, p. 187.

<sup>11</sup> *Ibidem*, p. 179.

which maintains that conformity with moral principles does not count among the conditions of legal validity. Priel formulates the issue of the comparison as follows:

The question now is whether, given their attitudes about particular laws, if members of the two societies had been asked to consider things in the world and distinguish between laws and non-laws they would have given the same answer. I believe it is clear that the answer is no: if members of one society had been presented with laws of the other society and had been asked whether they are laws, they would have given a different answer from the one given by members of the other society. At the very least they would have said: 'these are laws only if we adopt the others' view on this question'.<sup>12</sup>

As Priel contends, there is no way of resolving the disagreement between the two societies and their views about law, and the reason is simple. If it is part of the task of conceptual analysis to explicate the self-understanding of a particular community's view of law, in other words, to explain its concept of law, then if two societies or cultures have different views or concepts of law, which leads them to treat different things as law, at a pre-theoretical or at least pre-reflective level, the best conceptual analysis can do is report that there are multiple, and conflicting concepts of law. This in turn means that any purported necessary or essential features of law are not really necessary or essential features of law at all, but only necessary or essential features of particular, culturally or socially relative self-understandings.<sup>13</sup>

There are two general conclusions Priel draws from his analysis, one negative and one positive. The negative conclusion: analytical jurisprudence is incapable, given its misguided reliance on pre-theoretical agreement on exam-

<sup>12</sup> *Ibidem*, pp. 179-80.

<sup>13</sup> For a similar analysis, see Perry, Stephen, "The Varieties of Legal Positivism", *Canadian Journal of Law and Jurisprudence*, vol. 9, 1996, pp. 370-1.

ples of law, of reaching necessary or essential truths.<sup>14</sup> Second, and more positively, there is plenty of room for analysis of particular phenomena which pose puzzles in their understanding. Here is how Priel describes the alternative approach for legal theory:

All one needs to be able to do is identify a puzzle, which may be a 'philosophical' question that may be relevant only to understanding a particular legal system, or part of a legal system, which can be much more easily identified and individuated than law in general or even just our concept of law. Moreover, in offering an answer to the puzzle the theorist need not presuppose that the account can explain equally well, say, English law, Soviet law, Roman law, and Islamic law. So long as one succeeds in solving a puzzle about, say, English law, one has given us something of value.<sup>15</sup>

Such an approach, Priel believes, leaves plenty of room for inductive generalization about non-necessary features of law, but more importantly, it will free legal theorists from the impossible and misguided task of discovering necessary or essential features of law. We might even say that on Priel's view legal theorists are indeed better off not asking about the nature of law at all.

Liam Murphy also believes that conceptual debates in analytical jurisprudence are fundamentally unsolvable as debates about what law really is. Murphy writes:

Both Raz and Dworkin propose ways of finding the true content of the concept of law underneath what they must regard as the superficial equivocation in the concept as it is actually employed. This seems to me to be a hopeless project. When it comes to the boundary of law and morality, there is no truth of the matter. There are just different ways of drawing that boundary, preferred by different people.<sup>16</sup>

<sup>14</sup> *Idem*.

<sup>15</sup> Priel, Dan, *op. cit.*, n. 7, p. 193.

<sup>16</sup> Murphy, Liam, "Concepts of Law", *Australian Journal of Legal Philosophy*, vol. 30, 2005, p. 9.

Like Priel, Murphy believes that the problem lies precisely in the absence of agreement, in participants' understanding, on what counts as law. As he says, '...there is insufficient agreement in the intuitions that are the data for any philosophical conceptual analysis',<sup>17</sup> and '[i]t is hard to see how conceptual analysis can settle a disagreement that is present in the very data that the analysis is supposed to explain'.<sup>18</sup> One might conclude from this claim that Murphy—like Priel—must think that disputes about the boundary between law and morality are best abandoned, since there is no hope of resolution. This is not Murphy's view. In a return to an argument about the practical effects of different attitudes to law Hart made in some of his early work (following Bentham), Murphy proposes that different concepts or theories of law are best judged not according to their truth (since there is no truth), but instead according to their practical political consequences: 'the methodology I favour for thinking about the boundary of law is what would be called a practical political one: the best place to locate the boundary of law is where it will have the best effect on our self-understanding as a society, on our political culture'.<sup>19</sup> When judged against this standard, Murphy argues that it becomes possible to decide between competing theories of law.<sup>20</sup> If quietism—an unwillingness to question or indifference towards the morality or wisdom or justice of the state's norms—is the greatest danger for a citizenry, then it follows, according to Murphy, that we are all better off on practical political grounds if we adopt a positivist concept of law. The belief that nothing follows about what

<sup>17</sup> *Ibidem*, p. 6.

<sup>18</sup> *Ibidem*, p. 7.

<sup>19</sup> *Ibidem*, p. 9.

<sup>20</sup> For a similar view, see Schauer, Fred, "Positivism as Pariah", in George, Robert (ed.), *The Autonomy of Law: Essays on Legal Positivism*, Oxford, Oxford University Press, 1996. For criticism of Schauer's view, see Dickson, Julie, *Evaluation and Legal Theory*, Oxford, Hart Publishing, 2001, pp. 84-93.

should be done, all things considered, from the mere existence of law will foster and encourage the kind of vigilance citizens need.

### 3. *Naturalized Jurisprudence*

The third challenge to conceptual analysis in legal theory is perhaps the best known, as it draws on a more general challenge to conceptual analysis in philosophy. This is the naturalistic challenge best associated with the arguments of WVO Quine, who argued that there are no a priori or analytical truths, since all propositions are in principle revisable when tested against empirical observation and assessed in light of other beliefs.<sup>21</sup> In legal theory, Brian Leiter, in a series of articles culminating in his recent book *Naturalizing Jurisprudence*,<sup>22</sup> has put the lessons of Quine's arguments in epistemology to work. According to Leiter, legal theorists ought to accept as established (i) Quine's view that there are no genuine analytic or necessary truths, and (ii) that appeals to intuitions will at best reveal contingent and local beliefs. In Leiter's view, '[t]he real worry about jurisprudence is not that it is descriptive —of course it is (or tries to be)— but rather that it relies on two central argumentative devices —analyses of concepts and appeals to intuition— that are epistemologically bankrupt'.<sup>23</sup>

In Leiter's view, (i) and (ii) should be enough to convince legal theorists that conceptual claims about law, which appeal as they do to 'our intuitions', are only defensible to the extent to which they are continuous with the methods and results of social scientific accounts of law. Leiter advocates a significant change to the methodology of jurisprudence,

<sup>21</sup> See Quine, Willard Van Orman, "Two Dogmas of Empiricism", in *From a Logical Point of View*, Cambridge, Harvard University Press, 2004.

<sup>22</sup> Leiter, Brian, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, Oxford, Oxford University Press, 2007.

<sup>23</sup> *Ibidem*, p. 175.

arguing that conceptual analysis must be replaced in large part by ‘naturalized jurisprudence’, drawing as it does on contemporary developments in epistemology and the philosophy of science. The replacement, however, will not be complete, since as even Leiter acknowledges, some concept of law will be needed to group together sources of law and legal phenomena to be studied naturalistically.<sup>24</sup> This is an important observation, and one well worth bearing in mind to ward off the thought that Leiter is suggesting that a naturalistic approach is capable of solving all the problems of legal theory.

## II. SOME REPLIES

In what follows I will address each of the challenges in turn, but it is important to note that it is not my aim to show either that the challenges uniformly fail or uniformly succeed. Instead, each of the challenges can be viewed as important considerations for the development of conceptual analysis and its role in analytical jurisprudence and legal theory more generally.

### 1. *Taking the Legal Pluralist Challenge Seriously*

If we admit that conceptual explanation of law is often historically and locally limited, as surely we ought to, why not go all the way to non-essential conceptual pluralism of the kind Tamanaha advocates?<sup>25</sup> We should first notice that it can scarcely be doubted that analytical legal theorists, at least since John Austin, have focused their theories of law on explanation of law in the context of the modern state. In fact, some even make correct explanation of the nature of state law a criterion of adequacy for general theories of law. In explaining some assumptions about successful theories

<sup>24</sup> *Ibidem*, pp. 45-6.

<sup>25</sup> Priel, Dan, *op. cit.*, n. 7.

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of law, Joseph Raz identifies what he calls the ‘assumption of the importance of municipal law’:

It reflects our, or at least my, intuitive perception that municipal legal systems are sufficiently important and sufficiently different from most other normative systems to deserve being studied for their own sake. They are, or are part of, a form of social organization which is both important and different from most others and which therefore should be made an object of separate study. Obviously, in part the investigation of municipal systems is designed to compare and contrast them with other normative systems. Indeed it is to this part that the present essay is dedicated. In pursuing such investigations it may turn out that municipal systems are not unique, that all their essential features are shared by, say, international law or by church law. If this is indeed so, well and good. But it is not a requirement of adequacy of a legal theory that it should be so or indeed that it should not be so. It is, however, a criterion of adequacy that the theory will successfully illuminate the nature of municipal systems.<sup>26</sup>

The proliferation of types of law, and especially the growing interactions and interdependencies of legal orders at various social levels (including local, national, transnational, regional, international and global) render Raz’s commitment open to serious challenge on grounds of relevance and responsiveness to the social reality of law.<sup>27</sup> (However, below I will discuss some of the ways in which Raz’s views about legal theory leave open the means by which to keep legal theory on pace with new phenomena).

Nonetheless, while it is no doubt true that analytical jurisprudence needs to recast the scope of its subject matter, I think there are several questions to be raised about

<sup>26</sup> Raz, Joseph, *The Authority of Law: Essays on Law and Morality*, 2nd. ed., Oxford, Oxford University Press, 2009, p. 105.

<sup>27</sup> See Culver, Keith, and Giudice, Michael, *op. cit.*, n. 2.

Tamanaha's approach in particular.<sup>28</sup> First, it may well be that Tamanaha's conclusion is premature, since so few have attempted the kind of project for general jurisprudence he describes. Analytical legal theorists can scarcely be faulted for incorrectly explaining non-state forms of law when they have explicitly limited their theories to law in its state form. The problem is one of oversight or ignorance, not mistake. We can also notice that conceptual pluralism, *i.e.* plurality about the concept of law, does not follow from sources pluralism, *i.e.* plurality about the sources or types of law. Perhaps more successful theories which can explain a concept of law that covers all sources of law are yet to be constructed. Second, and more importantly, Tamanaha's approach assumes that law exists and is to be identified when relevant actors, as a matter of convention, use the label 'law' to describe what they have. But what explanation does it provide to those who are unsure about whether what they have or what they see amounts to law? For example, some theorists of transnational law are uncertain about whether there is such a thing as transnational law, or that the phenomena they are observing amount to a distinct kind or form of law at all.<sup>29</sup> In this way, questions about transnational law ask about the emergence of *prima facie* legal phenomena for which no settled convention exists. In fact I think many of the new forms of normative order which now exist (at local, national, and global levels) are interesting precisely because their emergence tends to precede any settled linguistic convention about their nature.<sup>30</sup> Here, however, we should note an important difference between Tamanaha's and Twining's view. While

<sup>28</sup> *Ibidem*, pp. 143–8.

<sup>29</sup> See Scott, Craig, "Transnational Law' as Proto-Concept: Three Conceptions", *German Law Journal*, vol. 10, 2009, p. 859.

<sup>30</sup> See also Twining, William, *op. cit.*, n. 3, pp. 88–103, Himma, Ken, "Do Philosophy and Sociology Mix? A Non-essentialist Socio-legal Positivist Analysis of the Concept of Law", *Oxford Journal of Legal Studies*, vol. 24, 2004, p. 717, and Cotterrell, Roger, "Transnational Communities and



Tamanaha does not believe that any general concept or definition of law can be constructed, Twining sees no problem in general definitions for particular purposes. For example, for viewing law from a global perspective, Twining settled on this formulation as a general definition of law: 'From a *global perspective* it is illuminating to conceive of law as a species of *institutionalised social practice* that is *oriented to ordering relations* between *subjects* at one or more *levels* of relations and of ordering'.<sup>31</sup> It is important to note that Twining insists that this definition is not to be considered the only possible definition:

Although it takes the form of definition *per genus et differentiam*, this is not 'Twining's conception (or definition) of law'. I use different conceptions of law for different purposes in other contexts. Here the purpose is to provide some conceptual tools for viewing law from a global perspective, first in respect of constructing a broad overview or mental map of legal phenomena and, second, for describing, interpreting, analysing, explaining, and comparing legal phenomena.<sup>32</sup>

Twining likely has the better of the internal dispute with Tamanaha. Twining makes no presumption to have identified law's necessary or essential features, but at the same time he purports to offer an account of law which identifies general, structural features of legal phenomena for use in explanation and analysis. Most importantly, we can notice that while Twining's view challenges the belief that conceptual analysis might indeed deliver necessary or essential features of law, his view is in an important sense friendly to a more phenomena-aware and purpose-driven kind of conceptual analysis. While the state-centric conceptual analyses of most analytical legal theorists can be faulted for be-

the Concept of Law", *Ratio Juris*, vol. 21, 2008, p. 8 for criticism of Tamanaha's view.

<sup>31</sup> Twining, William, *op. cit.*, n. 3, p. 117.

<sup>32</sup> *Idem*.

ing narrow or parochial, there is nothing in the nature of conceptual analysis that prevents it from being wider and more general in its scope.

So perhaps the greatest lesson of the legal pluralist challenge is that, while giving up on pursuit of necessary or essential features of law, it nonetheless does not countenance a focus or return to analyzing what is local and familiar. General theories of law still need to be general, but this means looking at law as it figures at diverse levels and in diverse places around the world, instead of presuming what law must everywhere be like by comparison to a standard example (most often state law). If anything, legal pluralism ought to upset not the role and value of conceptual analysis, but instead how it has been typically carried out.

## *2. Necessary Features of Concepts of Law and the Essential Properties of Law*

Yet focusing on what is local and familiar seems to be exactly what Priel advises we do. This makes it important, I think, to investigate the extent to which we can resist Priel's conclusion. To do so I will adopt as my strategy discussion of some of Raz's reflections on the methodology of legal theory, particularly since Raz's views are Priel's primary target.

Raz's work on the theory of law's authority and the nature of legal systems is systematic and profound. His remarks on the methodology of legal theory are less systematic, but no less insightful. His view about the goals and success conditions of analytical legal theory is perhaps best stated in the following passage:

There is no uniquely correct explanation of a concept, nothing which could qualify as *the* explanation of the concept of law. There can be a large number of correct alternative explanations of a concept. Not all of them will be equally appropriate for all occasions. Appropriateness is a matter of

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relevance to the interests of the expected or intended public, appropriateness to the questions which trouble it, to the puzzles which confuse it... The relativity of good explanations to the interests and the capacities of their public makes them ephemeral and explains why philosophy has a never-ending task.<sup>33</sup>

A central aim of philosophy of law, then, is to offer explanations of the general concepts of law (and the concept of law itself) which are responsive to both citizens' and theorists' interests in a way which illuminates their self-understanding. As Raz writes elsewhere, the theorist's goal is to 'advance our understanding of society by helping us understand how people understand themselves'.<sup>34</sup> This is a nuanced view, and one far removed from any belief that philosophers of law are in the business of elucidating the meaning or definition of particular words. Raz's view is nonetheless vague in one respect: what counts as or what are, exactly, the philosophical interests of citizens and theorists? I will return to this point below, but here we can note that the indeterminacy is deliberate, and likely a strength. As Raz observes in identifying the unsolved problems of identity and continuity of legal systems, the interests of citizens and theorists shift, such that some problems might fall in or out of fashion.<sup>35</sup> It might be, for example, that in some era and social situation explanation of the nature of *authority* best responded to questions about the nature of law, as citizens and theorists alike were concerned to understand the nature of their relation to the state. In another era and social situation explanation of the nature of *governance* might be more responsive to concerns about the nature of law, as citizens and theorists seek to understand new forms of private regulation and their rela-

<sup>33</sup> Raz, Joseph, *op. cit.*, n. 6, p. 57.

<sup>34</sup> Raz, Joseph, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed., Oxford, Clarendon Press, 1995, p. 237.

<sup>35</sup> Raz, Joseph, *op. cit.*, n. 6, p. 58.

tion to public forms of law in a globalizing world. Similarly, in one era attention to the nature of state legal systems might have been prominent, but this may also be changing as new forms of non-state legal orders seem to be emerging. By highlighting the philosophy of law's responsiveness to contingent practices and shifting interests, Raz's views might serve very well to characterize its never-ending tasks.

Yet, responsiveness to contingent practices and shifting interests might suggest that Raz's view is incapable of offering what a theory of law should: an explanation of law's *universal* and *essential* properties. But here appearances of having abandoned legal theory's goal are deceiving, and show a further way in which Raz's view of the methodology of legal theory is nuanced. The fact that explanations of the concept of law are explanations in service of particular inquirers' interests does not preclude holding at the same time that law has universal or essential properties.<sup>36</sup> As Raz argues, beginning with an explanation of *our* concept of law, a concept developed largely in the Western world of sovereign states, need not inevitably result in a rigidly parochial concept of law. While our concept of law is a stable part of a common and shared understanding, it is still a 'philosophical creation', designed to aid understanding of particular social phenomena by mediating between words or phrases and aspects of the world.<sup>37</sup> As a 'philosophical creation', which is more than a reflection of linguistic usage, that creation is influenced by new experience, and as Raz notes, our concept of law has in fact been changing to make it 'more inclusive and less parochial'.<sup>38</sup> In this way, concepts of law are not in competition with but instead re-

<sup>36</sup> 'The appropriateness, aptness, or success of explanations presupposes their truth... It is important to emphasize that there is nothing in the relativity of good explanations to their public to threaten the nonrelativity of their truth'. *Ibidem*, pp. 57-8.

<sup>37</sup> *Ibidem*, p. 18.

<sup>38</sup> *Ibidem*, p. 33. Unfortunately, Raz offers no explanation or illustration of how this is so.

sponsive to shifting interests as, *e.g.*, our interest in understanding law may be expanding from its familiar context of a singular sovereign state to comparison between dissimilar types of states to transnational, international, and global contexts.

Understanding this complex view nonetheless requires observing a distinction Raz draws between the nature of law and the concept of law (a distinction Raz argues that earlier theorists, including Hart, overlooked).<sup>39</sup> The *nature of law* is to be a metaphysical object having universal and essential properties, while the *concept of law* is a parochial, typically prevailing understanding of law's nature. It is important to note that by this distinction Raz does not aim to argue that law really does have universal and essential properties —only that those committed to supposing that there is such a thing as the nature of law are committed to viewing law as having universal and essential properties. Whether there is or is not a 'nature' of law cannot be assessed from evaluation of 'our' or 'your' concept of law, since explanations of concepts of law are explanations of a particular perspective of law's nature, not explanations of the universal and essential properties themselves. In other words, no conclusion either way —whether law does or does not have universal or essential properties— can be drawn from observation that concepts of law differ, are a matter of disagreement, and are subject to change. There is also, then, on Raz's view, nothing objectionable in applying our concept of law to other cultures which do not share our concept of law, or do not themselves have a concept of law at all. What matters is whether other cultures have social institutions which have the nature of law as picked out by our concept of law. An explanation of a concept of law is thus a kind of descriptive-explanatory tool used by inquirers with interests and perspectives to explain the world to themselves and others as they see it.

<sup>39</sup> *Ibidem*, p. 19.

We should also note that Raz sees no problem in supposing that particular concepts of law have necessary features, which may or may not track law's essential properties. This is a distinction which Priel seems to miss, despite the fact that several others have adopted it. Jules Coleman writes, for example, that:

The descriptive project of jurisprudence is to identify the essential or necessary features of our concept of law. No serious analytic legal philosopher-positivist or interpretivist 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 some day 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.<sup>40</sup>

Coleman never explains how technology might require us to revise our concept of law, but this ought not to be taken as a fault, but instead as an invitation to future theorists to explore the possibilities.<sup>41</sup> Commenting specifically on Raz's appeal to necessity, Brian Bix similarly remarks that:

...a defense of conceptual analysis in jurisprudence must likely follow Raz's lead, offering a notion of 'necessity' that is distinctly not Platonist, but is rather deeply grounded in a community's way of life or its self-understanding. In this sense, one can have the paradoxically sounding "necessary truths that change over time".<sup>42</sup>

So there is an important distinction between necessary features of particular, contingent concepts and necessary con-

<sup>40</sup> Coleman, Jules, "Incorporationism, Conventionality, and the Practical Difference Thesis", *Legal Theory*, vol. 4, 1998, p. 393, fn. 24.

<sup>41</sup> See Culver, Keith, "How the New ICTs Matter to the Theory of Law" *Canadian Journal of Law and Jurisprudence*, vol. 17, 2004, p. 255.

<sup>42</sup> Bix, Brian, "Raz on Necessity", *Law and Philosophy*, vol. 22, 2003, p. 538.

cepts or necessary features of law simpliciter. Priel may very well have criticized analytical legal theorists for failing to deliver necessary concepts or necessary features of law, but it appears that this was never the promise.<sup>43</sup> But more on this below.

There is one final observation which is important to note and rounds out Raz's view of the methodology of legal theory. The closer a concept of law comes to covering or designating successfully all instances of law, and so transcending its particular origin, the closer *explanation of that concept of law* comes to *explanation of the nature of law*. As Raz writes:

Is it not our aim to study the nature of law, rather than our culture and its concept of law? Yes and no. We aim to improve our understanding of the nature of law. The law is a type of social institution, the type which is picked up –designated– by the concept of law. Hence in improving our understanding of the nature of law we assume an understanding of the concept of law, and improve it.<sup>44</sup>

So while the life of a concept of law might have a parochial beginning, through its responsiveness to shifting practices and broadening interests and perspectives, it may, eventually, come to resemble the kind of philosophical concept of law a general jurisprudence or truly general legal theory seeks to accompany in explanation of the nature of law.

So much, then, for Raz's account of the methodology of legal theory. How well does it fare in meeting the challenge raised by Priel? Recall that on Priel's account the central problem for analytical jurisprudence is that it has no way of resolving boundary disputes about what counts as law at a pre-theoretical stage of the inquiry. We might imagine that Raz's reply would go something like this. It might indeed be

<sup>43</sup> See also Coleman, Jules, "Methodology", in Coleman, Jules, and Shapiro, Scott (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford, Oxford University Press, 2002.

<sup>44</sup> Raz, Joseph, *op. cit.*, n. 6, p. 31.

impossible for such disagreements to be resolved by appeal to a particular concept of law itself, but this should not come as surprise, since such a concept of law may not be the same as or compatible with another concept of law. Difference and disagreement at the conceptual level may be irresolvable. But, our understanding of such difference and disagreement ought to change if we acknowledge that concepts of law can change, and in particular if such change can bring them more in line with a true theory of the nature or essential properties of law. To put the point in a different way, we cannot infer that law has no nature or essential properties from the fact of conceptual disagreement about what law is.

I raise this particular response that Raz might give not to endorse it, but instead to show where its limits lie as a response to Priel. It seems to me that for the very same reason that we cannot infer that law does not have any necessary or essential properties from the fact of conceptual difference or disagreement about law, we cannot infer that law has any necessary or essential features from similarity or agreement about the concept of law. Law's necessary or essential features are, in other words, epistemically inaccessible to us, as we are, on Raz's view, incapable of thinking about law outside of any concept of law.<sup>45</sup> We might even put the point this way: without access or knowledge of law's necessary or essential properties, we have no way of knowing whether a change in our concept of law amounts to a change which brings our concept of law (*i.e.*, its explanation) closer to an account of the nature of law. This is true even if, as Raz says, our concept of law changes and becomes more inclusive and more in line with other concepts of law.

<sup>45</sup> As a general philosophical point, this should not come as much of a surprise, at least since Immanuel Kant demolished the view of pure or unmediated knowledge of the world as it is. See Kant, Immanuel, *Critique of Pure Reason*, London, Everyman, 1993.



Another observation follows from the first. As we noted Priel's main contention was that we have no way of settling pre-theoretical disagreements about what counts as law in the first place. If law does have necessary or essential features, then these features would, presumably, settle the issue. But such necessary or essential features do no good for us if we do not have access to them. We must conclude, then, that Raz, while showing that we cannot reject the possibility that law does have necessary or essential features, has not offered a solution to the boundary issue that Priel has raised.

Notice, however, that Raz has nonetheless provided an account of how concepts of law might be improved. By being responsive to citizens' and inquirers' interests, it is possible for concepts to become less parochial, and less out of touch with the shifting dimensions of *prima facie* legal phenomena. While essential or necessary features might be out of reach, a concept of law, as a philosophical creation, might deliver in another respect as it approaches universality. Recall that on Priel's account conceptual theories are tested against factual backgrounds, such that if a particular conceptual theory failed to cover or adequately explain some example of law (which was agreed or believed to be a true example of law) then that theory needs to be modified or rejected. If this is a proper way to test conceptual theories, then one way in which conceptual theories could improve would be to be tested against (increasingly) broader factual backgrounds. As before, conceptual analysis is not bankrupt, but has options.

This is a possibility which Priel explicitly identifies, but rules as out of bounds for Raz:

It might be suggested that there could be some kind of "reflective equilibrium" approach, according to which the theorist does not hold fast to either theory or object, but rather moves between the two until reaching some stable position. But if we take seriously Raz's view that the theorist cannot choose a concept on the basis of its fruitfulness and that le-

gal philosophy only aims to explain, and not change, an existing practice, then any form of reflection which can rule out certain pre-theoretical judgments as mistaken, cannot be part of the approach to jurisprudential inquiry that I examine here [*i.e.*, Raz's approach]<sup>46</sup>

There are two possible ways to reply to Priel's concerns here. The first is to question whether it really is impossible to judge as mistaken some pre-theoretical judgments when explaining participants' understanding or concept of law.<sup>47</sup> While it seems implausible that all pre-theoretical judgments could be mistaken, could it not be the case that some pre-theoretical judgments could be wrong, if it is shown that they do not fit or cohere with the bulk of other, perhaps more central pre-theoretical judgments? What if, as well, participants reflected on their own self-understanding and came to see that some pre-theoretical judgments did not fit, or did not make as much sense as they initially thought prior to reflection? Surely this is a possibility which is real, and ought to provide motivation to investigate and assess the rationality of participants' self-understanding in the first place. On Priel's view, however, it would seem that such self-reflection would be pointless right from the start, and so un-motivated. This seems mistaken, but more importantly it flies in the face of much of the tradition

<sup>46</sup> Priel, Dan, *op. cit.*, n. 7, pp. 177-8.

<sup>47</sup> It is also doubtful whether all participant beliefs or understandings are of the same status, and therefore ought to play the same role in theorizing about concepts of law. For example, (i) participants might believe legislatures are law-making institutions. But they might also believe (ii) that no law could exist if not backed up by coercion. (i) is surely more of a factual belief, and likely an unassailable one at that, while (ii) is more of a theoretical belief, and a contentious one at that. On the fallibility of participants' self-understanding more generally, see Leiter, Brian, *op. cit.*, n. 22, p. 190; Dickson, Julie, "Methodology in Legal Theory: A Critical Survey", *Legal Theory*, vol. 10, 2004, pp. 138-9; Murphy, Mark, "Natural Law Jurisprudence", *Legal Theory*, vol. 9, 2003, p. 250; and Mackie, John, "The Third Theory of Law", *Philosophy and Public Affairs*, vol. 7, 1977, p. 3.

of analytical jurisprudence. Beginning at least with Jeremy Bentham's view, it was the very purpose of analytical jurisprudence to free our thinking about law from the 'pestilential breath of Fiction' which surrounds its popular understanding.<sup>48</sup> It would also seem that if participants could come to see that some of their pre-theoretical judgments are mistaken, they might also come to see that some of their pre-theoretical judgments about law are parochial as well, and in this way they might alter such pre-theoretical judgments to make them less parochial. Most importantly, all of this might be done while working with a core or bulk of other pre-theoretical judgments, not just about law, but about society and social reality itself. If particular cultures' concepts of law really are dynamic in the way that Raz supposes, and so they are capable of shifting and changing as they become responsive to new interests and new experiences, pre-theoretical judgments would seem to deserve a less stable, foundational, and decisive role than Priel accords them.<sup>49</sup>

The second reply would be to suggest that we reject, or at least loosen the commitment to Raz's view that concepts of law (or their explanations) cannot be judged in terms of their sociological fruitfulness, since they serve an important role, which legal theory must explain, in the self-understanding of participants. In fact, there seems ample reason within Raz's explanation of the task of conceptual analysis to see why this might not be such a damaging option. If there are no single correct explanations of concepts of law, as each explanation ought to serve inquirers' interests, then a particular explanation which emphasizes the role a

<sup>48</sup> Bentham, Jeremy, *A Fragment on Government*, Burns, James Henderson, and Hart, Herbert Lionel Adolphus (eds.), Cambridge, Cambridge University Press, 1988, p. 21, fn. r.

<sup>49</sup> We should also say the same about intuitions. See Dickson, Julie, "On Naturalizing Jurisprudence: Some Comments on Brian Leiter's View of What Jurisprudence Should Become", *Law and Philosophy*, vol. 30, p. 495.

concept of law could play in facilitating a sociological investigation of law could be quite compatible with an explanation which addresses some aspect of citizens' or participants' self-understanding. Not only is the absence of conflict possible, there might even be considerable overlap as citizens or participants might want to know about the causal role law can play in assisting (or perhaps thwarting) some social objective. For example, citizens and sociological theorists alike might be particularly interested in the relation (which might be either necessary or contingent, constitutive or causal) between law and economic development. It seems to me that Raz's rejection of the sociological fruitfulness of conceptual explanations of law is over-stated, as it misses the possibility of diverse interests and purposes which might lie behind different conceptual explanations of law. So long as different explanations are not contradictory or inconsistent, or distorting, let there be as many as possible to serve the interests of inquirers.

### *3. Leiter's Account of Continuity in Legal Theory*

I think the answer developed in the last section can go some distance towards addressing the final challenge raised in section I. As I noted, Leiter urges legal theorists to accept (i) Quine's argument that there are no analytic or necessary truths, since all propositions are in principle revisable, and (ii) that appeal to intuitions will only reveal local or contingent beliefs. The response has been, however, not to refute Leiter's argument, but to show how Raz's view, to a limited extent, already accepts its force. In response to (i), a concept of law –constituted by the beliefs and practices of subjects and theorists– is dynamic, shifting and changing as it meets new experiences and responds to different inquiries. Philosophers of law attempt to explain the dynamic nature of concepts of law by showing how they can and do adapt and evolve in light of new challenges. This is not unlike saying that concepts of law, and especially the propositions

used in their explanation and expansion, are revisable.<sup>50</sup> Second, if it is true that appeal to intuitions will only reveal local or contingent beliefs, then concepts of law and their explanations can be improved once appeal to different and perhaps broader intuitions is made. Such an exercise will not, it can be admitted, yield any conceptually-independent necessary or essential truths, but it will yield conceptual explanations of law which approach universality.<sup>51</sup>

What of Leiter's proposal that concepts of law be developed which will be continuous with empirical investigations? I think this proposal can be accommodated. As we noted, Raz does not offer an account of which kinds of new experiences ought to trigger changes to a concept of law or which kinds of inquirer interests ought to motivate new conceptual explanations of law. But this lack of specificity is best characterized not as a deficiency, but instead as a capacity. Among inquirers' interests could certainly be continuity of conceptual explanations of law with empirical investigation. There is nothing objectionable, for example, with offering a conceptual explanation of law which will serve a legal realist research agenda of studying the causes and effects of judicial decision-making.

Where we might fault Leiter, however, is in his rather narrow view about what needs to be naturalized in jurisprudence. In effect, Leiter proposes that adjudication be naturalized, such that instead of studying what might, rationally, be determined in particular cases through the application of legal norms, theorists study the ways in which judges respond to fact patterns and situation types, as well as legal norms, in deciding cases. We can, however, natu-

<sup>50</sup> For an illustration, in *Legality's Borders* Keith Culver and I set out to show how the conceptual belief that law's foundational unit of analysis is the legal system not only can but should be revised to better explain a range of legal phenomena within, outside, and across state contexts. See Culver, Keith, and Giudice, Michael, *op. cit.*, n. 2.

<sup>51</sup> Notice also that none of this is to say that intuitions have any dispositive role at all to play in deciding conceptual claims. See again Dickson, Julie, *op. cit.*, n. 49, p. 495.

realize much more than the relation between the influences on judges and the outcomes of cases. We might also, for example, move away from thought experiments about how legal systems come into existence (think here of Hart's talk of 'pre-legal' societies) and look instead at historical, sociological, and anthropological accounts of the emergence of societies and law. While Hart might have been right in 1961 in thinking that the social sciences were too underdeveloped to be of much use to analytical jurisprudence,<sup>52</sup> this is most likely no longer true (and we can certainly doubt whether it was even true in 1961). At the very least, the question of the emergence of law is ripe for naturalistic analysis. Of course, whether anything changes or needs revision in our conceptual view of the emergence of law remains to be seen. But whether change or revision is necessary ought to depend on the outcome of naturalistic analysis, and should not therefore be ruled out *a priori*.

Expanding on Leiter's account of continuity in legal theory, and adopting what he calls 'moderate naturalism',<sup>53</sup> William Twining proposes a much larger agenda for legal theory. While Twining does not develop the idea of continuity in any depth,<sup>54</sup> I believe he puts his finger on the precise relevance of the naturalist turn in philosophy for legal theory:

The message for analytical jurisprudence is reasonably clear: a priori, intuitive analysis of concepts divorced from empirical knowledge of actual legal institutions, processes, rules, etc. will not add much to our understanding of law. However, in this view, conceptual elucidation is still a necessary

<sup>52</sup> See Lacey, Nicola, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford, Oxford University Press, 2004, p. 261.

<sup>53</sup> Twining, William, *op. cit.*, n. 3, p. 54.

<sup>54</sup> For my own attempt at an account of continuity, see Giudice, Michael, "Ways of Understanding Diversity Among Theories of Law", *Law and Philosophy*, vol. 24, 2005, p. 509, and Giudice, Michael, "Contingency and Analytical Jurisprudence", in Del Mar, Maks (ed.), *New Waves in Philosophy of Law*, London, Palgrave Macmillan, 2011, p. 58.

part of empirical and normative enquiries about law, but such analysis needs to be sensitive to advances in our empirical knowledge of the real world. Naturalism may have deflated the immodest role of conceptual analysis in philosophy without requiring that it should be abandoned. It still leaves a modest, but important, role for conceptual analysis in jurisprudence, and supports the idea of continuity between analytical, normative, and socio-legal studies.<sup>55</sup>

According to Twining, Hart and others are partially to blame for encouraging an immodest role for conceptual analysis:

Hart treated philosophical questions as quite distinct from historical and sociological ones and rejected any idea of continuity between them. He was relatively unmoved by historical and sociological criticisms of *The Concept of Law* because he thought that these raised different questions from those that he had set out to answer. As a result, 'the social fact' dimensions of *The Concept of Law* were imperfectly realised. Joseph Raz and others followed Hart in trying to maintain a sharp distinction between philosophical and empirical questions. As a result they failed to resolve the tension between emphasising that law is a social phenomenon and refusing to consider it empirically.<sup>56</sup>

I think there are good reasons for agreeing with Twining that analytical jurisprudence has become very isolated from complementary approaches in legal theory. Unfortunately it is beyond the scope of this article to explore the full potential of continuity.<sup>57</sup> But sufficient steps, I think, have been taken to show how such continuity can be established between conceptual analysis and complementary approaches.

<sup>55</sup> Twining, William, *op. cit.*, n. 3, pp. 55-6.

<sup>56</sup> *Ibidem*, pp. 57-8.

<sup>57</sup> But see again Giudice, Michael, *op. cit.*, n. 54.



### III. SO IS IT MODEST OR IMMODEST CONCEPTUAL ANALYSIS?

It is necessary to address one final debate over the nature of conceptual analysis. This is the debate about the proper ambition of the role of conceptual analysis in understanding some phenomenon, law, for example. Placed on one side of the debate are those who suppose that conceptual analysis is to have a rather ambitious or immodest role in explanation of law. They maintain that investigation of the nature of the concept of law will deliver knowledge about what law really is. In other words, by investigating our concept of law —our talk of law— we will come to learn not just about our concept of law but about the reality of law as well.<sup>58</sup> On the other side of the debate are those who interpret the role of conceptual analysis to be modest or nonambitious, which supposes that in investigating and explaining our concept of law we only come to learn about how we use the concept and talk about law.

How should we navigate this dispute? We should first notice a presumption which underlies the terms of the debate: either conceptual analysis will only tell us about our concept of law —its features, commitments, etc.— or it will tell us about the true nature or essence of law. As I argued above, the true nature or essence of law is inaccessible to us, so it would appear that modest or unambitious conceptual analysis is the only way to go. However, what if we reject the terms? I think there are good reasons to do so, and Hart's conceptual analysis is particularly helpful in showing why. Consider the following example. It might be part of a culture's or society's concept of law that all law within that society has as its foundation some constitutional or founding document, such that all acts of authority, regula-

<sup>58</sup> According to Leiter, it's possible to read Hart's conceptual analysis as ambitious or immodest: 'Hart, after all, endorsed the Austinian view that (quoting Austin) we "are looking not merely at words... but also at the realities we use words to talk about". Leiter, Brian, *op. cit.*, n. 22, p. 196. [internal note omitted].



tions, and rules must ultimately rest with the constitution alone. Hart's account of the concept of law, however, disrupts this conceptual understanding of law in a significant way. On Hart's account a system-constituting, socially practised rule of recognition rests at the foundation of all law of some legal system, including whatever constitution that system might have. Commenting on this implication of Hart's theory, Murphy writes:

Some find this picture disturbing. The entire legal order rests on the brute social fact of what is accepted by those who occupy the positions of power within the system. And what if some of them change their minds? Hart's view is that if enough of them do change their minds, the rule of recognition has changed. As he says, here, all that succeeds is success.<sup>59</sup>

That Hart's picture might be disturbing of course does not compromise its illumination or adequacy. More importantly, the reason that it might be disturbing is precisely because it tells us something about the social reality of law, or social life more simply, which we might not have otherwise noticed and might not form any part of our popular understanding or concept of law.

One might object at this point and maintain that we still have no way of knowing whether rules of recognition, legal systems, constitutions, etc., have anything to do with the nature or essence of law. This might be true, but the cost of such thoroughgoing scepticism seems to be coming into clearer view. Two responses are appropriate. First, scepticism is never free. Absent some reason for thinking that rules of recognition, legal systems, and constitutions have nothing to do with the nature or essence of law, persistent denial appears less and less motivated and helpful. Second, and more importantly, so long as conceptual analysis can assist us in making sense of the realities of our social

<sup>59</sup> Murphy, Liam, *op. cit.*, n. 16, p. 5.

world, we need not believe that its only payoff is greater understanding of how we use our own words or what is going on within the confines of our own minds or ideas.

Again, Twining's recent view on the role of conceptual analysis in Hart's work is instructive. Hart wrote in the Preface to *The Concept of Law* that, '[n]otwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely throw light on words is false'.<sup>60</sup> As Twining notes, the expression 'essay in descriptive sociology' has given rise to no shortage of comment and controversy, but its meaning is clear enough to dispel one kind of misunderstanding about Hart's work (at least as to how Hart intended his work):

Some claim that [Hart] was describing the form and structure of legal systems, but this distracts attention from the significance of Hart's contribution: he was not claiming to *do* empirical description, but rather to provide tools for this purpose. Description, interpretation, and explanation all presuppose adequate concepts.<sup>61</sup>

The construction of concepts for use as tools in empirical description shows a rather close affinity between the views of Twining and Leiter, even though Twining sees—or at least acknowledges—a rather larger role for empirical investigation.<sup>62</sup> The upshot, however, is that both Twining and Leiter provide accounts of how conceptual analysis can be connected to, and aid, investigation of what the world is like (particularly, in the context of law, its social reality) without presupposing any necessary or essential properties of law.

<sup>60</sup> Hart, Herbert Lionel Adolphus, *The Concept of Law*, 2nd. ed., Oxford, Clarendon Press, 1994, p. vi.

<sup>61</sup> Twining, William, *op. cit.*, n. 3, p. 56.

<sup>62</sup> For Leiter, theories of adjudication ought to be naturalized, whereas for Twining there seems to be no claims in legal theory which are immune from moderate naturalization.

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We are now in a position to take stock. It has not been the aim of this article to settle all issues regarding the nature, role, and value of conceptual analysis in legal theory. This would take us well beyond the promise of the article, and would involve a wider investigation into general issues in epistemology. Instead, I have only attempted to address some sceptical objections to conceptual analysis, not so much to refute these, but rather to show the many ways in which they can assist the development of conceptual analysis as a viable and important part of the methodology of legal theory.

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#### IV. BIBLIOGRAPHY

- BENTHAM, Jeremy, *A Fragment on Government*, Burns, James Henderson, and Hart, Herbert Lionel Adolphus (eds.), Cambridge, Cambridge University Press, 1988.
- BIX, Brian, “Raz on Necessity”, *Law and Philosophy*, vol. 22, 2003.
- COLEMAN, Jules, “Incorporationism, Conventionality, and the Practical Difference Thesis”, *Legal Theory*, vol. 4, 1998.
- , “Methodology” in Coleman, Jules, and Shapiro, Scott (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford, Oxford University Press, 2002.
- COTTERRELL, Roger, “Transnational Communities and the Concept of Law”, *Ratio Juris*, vol. 21, 2008.

- CULVER, Keith, "How the New ICTs Matter to the Theory of Law", *Canadian Journal of Law and Jurisprudence*, vol. 17, 2004.
- , and GIUDICE, Michael, *Legality's Borders: An Essay in General Jurisprudence*, New York, Oxford University Press, 2010.
- DICKSON, Julie, *Evaluation and Legal Theory*, Oxford, Hart Publishing, 2001.
- , "Methodology in Legal Theory: A Critical Survey", *Legal Theory*, vol. 10, 2004.
- , "On Naturalizing Jurisprudence: Some Comments on Brian Leiter's View of What Jurisprudence Should Become", *Law and Philosophy*, vol. 30.
- GIUDICE, Michael, "Contingency and Analytical Jurisprudence", in DEL MAR, Maks (ed.), *New Waves in Philosophy of Law*, London, Palgrave Macmillan, 2011.
- , "Ways of Understanding Diversity Among Theories of Law", *Law and Philosophy*, vol. 24, 2005.
- HART, Herbert Lionel Adolphus, *The Concept of Law*, 2nd. ed., Oxford, Clarendon Press, 1994.
- HIMMA, Ken, "Do Philosophy and Sociology Mix? A Non-essentialist Socio-legal Positivist Analysis of the Concept of Law", *Oxford Journal of Legal Studies*, vol. 24, 2004.
- KANT, Immanuel, *Critique of Pure Reason*, London, Everyman, 1993.
- LACEY, Nicola, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*, Oxford, Oxford University Press, 2004.
- LEITER, Brian, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*, Oxford, Oxford University Press, 2007.
- MACKIE, John, "The Third Theory of Law", *Philosophy and Public Affairs*, vol. 7, 1977.
- MURPHY, Liam, "Concepts of Law", *Australian Journal of Legal Philosophy*, vol. 30, 2005.

- MURPHY, Mark, "Natural Law Jurisprudence", *Legal Theory*, vol. 9, 2003.
- PERRY, Stephen, "The Varieties of Legal Positivism", *Canadian Journal of Law and Jurisprudence*, vol. 9, 1996.
- PRIEL, Dan, "Jurisprudence and Necessity", *Canadian Journal of Law and Jurisprudence*, vol. 20, 2007.
- QUINE, Willard Van Orman, "Two Dogmas of Empiricism", in *From a Logical Point of View*, Cambridge, Harvard University Press, 2004.
- RAZ, Joseph, *Between Authority and Interpretation*, Oxford, Oxford University Press, 2009.
- RAZ, Joseph, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. ed., Oxford, Clarendon Press, 1995.
- , *The Authority of Law: Essays on Law and Morality*, 2<sup>nd</sup> ed., Oxford, Oxford University Press, 2009.
- SCHAUER, Fred, "Positivism as Pariah", in GEORGE, Robert (ed.), *The Autonomy of Law: Essays on Legal Positivism*, Oxford, Oxford University Press, 1996.
- SCOTT, Craig, "Transnational Law' as Proto-Concept: Three Conceptions", *German Law Journal*, vol. 10, 2009.
- TAMANAH, Brian, *A General Jurisprudence of Law and Society*, Oxford, Oxford University Press, 2001.
- TWINING, William, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge, Cambridge University Press, 2009.