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PROBLEMA

Anuario de Filosofía y Teoría del Derecho **6**

**NATALIE STOLJAR'S WISHFUL THINKING
AND ONE STEP BEYOND: WHAT SHOULD
CONCEPTUAL LEGAL ANALYSIS BECOME?***

Imer B. FLORES**

Resumen:

Alabar el “pensamiento ilusorio y bien intencionado” es un riesgo que estoy dispuesto a correr no solamente en este artículo para comentar el

* Revised version of the comment presented at Seminario *Problema*, Instituto de Investigaciones Jurídicas, UNAM, May 2, 2012, on Natalie Stoljar's “In Praise of Wishful Thinking: A Critique of Descriptive/Explanatory Methodologies of Law” (in this same volume), which is based upon her “What Do We Want Law to Be? Philosophical Analysis and the Concept of Law”. (I address almost indistinctively both papers as if they were one, but whenever and wherever it is or seems appropriate I will refer to the former as Problema's paper and to the latter as McMaster's paper, since it was presented in May 13, 2011 at McMaster University Philosophy of Law Conference “The Nature of Law: Contemporary Perspectives”).

** Professor-Researcher, Instituto de Investigaciones Jurídicas (Legal Research Institute) and Facultad de Derecho (Law School), UNAM and Visiting Professor of Law, Georgetown University Law Center. E.mail: imer@unam.mx. The subtitle expresses my indebtedness to the work of Roberto Mangabeira Unger, in general, and to his book *What Should Legal Analysis Become?*, London: Verso, 1996, in particular. I am also grateful to Natalie Stoljar for sharing her concerns on legal methodology with me and to Enrique Cáceres, Michael Giudice, Carla Huerta, Dan Priel, Veronica Rodriguez-Blanco and Juan Vega Gómez for their reactions to my comment to Natalie. I would also like to thank the members of my classes over the past years, especially of my Jurisprudence course at Georgetown Law, because it is through discussion with them that most ideas, right or wrong, have become what they are now. Clearly errors are still my responsibility.

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trabajo de Natalie Stoljar sino además en el resto de mi producción académica. Aun cuando voy a analizar su argumento y voy a estar de acuerdo en la mayor parte con ella, también la voy a criticar por detenerse un paso antes al adoptar la tesis de la *deseabilidad* o tesis débil, cuando no es meramente posible sino necesario ir un paso más allá al adoptar la tesis de la *necesidad* o tesis fuerte. Para tal efecto, intento presentar algunas razones adicionales para apoyar el “pluralismo del análisis (jurídico) conceptual” al distinguir las tres investigaciones o proyectos diferentes que están y deben estar integrados y establecer la prioridad normativa de uno de ellos, *i.e.* prescriptivo, interpretivo y moral.

Palabras clave:

Análisis conceptual, jurisprudencia integrada, metodología jurídica, pluralismo jurídico.

Abstract:

Praising wishful thinking is a serious risk that I am willing to run not only in this article commenting of Natalie Stoljar's work but also elsewhere in my own scholarship. Although I will analyze her claims and will agree mostly with them, I will criticize her for stopping one step short adopting the desirability or weaker claim, when in it is not merely possible but necessary to go one step beyond arguing for the necessity or stronger claim. Accordingly, I intend to present further grounds for endorsing "conceptual (legal) analysis pluralism" by distinguishing the three different inquiry or projects that are and must be integrated and stating the normative priority of one of them, i.e. the prescriptive, interpretive, and moral.

Keywords:

Conceptual Analysis, Integrative Jurisprudence, Legal Methodology, Legal Pluralism.

NATALIE STOLJAR'S WISHFUL THINKING

-Why are you looking at me with such concern?
-I'm so very worried. Your vitality's been drained from you. Marriage? Is the end, I tell you.
-I think of it as the beginning.
-Armageddon.
-Rebirth.
-Restriction.
-Structure.
-Answering to a woman.
-Being in a relationship. A life in matrimony. The possibility of a family. Who wants to die alone?
-So, we'll have a good old-fashioned romp tonight, you'll settle down, have a family, and I'll die alone.

Exchange between Sherlock Holmes and Dr. John Watson in *Sherlock Holmes: A Game of Shadows* (2012).

[W]e call many different forms of legal and social arrangements found in different societies marriages... It is a mistake to say, for example, as many now do, that the essence of marriage is a union between a man and a woman so that gay marriage is an oxymoron.

Ronald Dworkin, *Justice in Robes* (2006).

The purpose of marriage is the procreation of children, and polygamy is not directly contrary to that purpose, though it is partly contrary since the procreation of children is not helped, indeed it is somewhat hindered, by polygamy: two women will be better impregnated by two men than by one.
Francisco de Vitoria, *On Law*, §123, Article 5 (1533-4).

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SUMMARY: I. *Introduction: Wishful Thinking*. II. *Jhering's Heaven of Legal Concepts and Same-Sex Marriage*. III. *Conclusion: What Should Conceptual Legal Analysis Become?*

I. INTRODUCTION: WISHFUL THINKING

Praising and even running myself “the serious risk of wishful thinking”,¹ I cannot be more empathetic—and even sympathetic—with Natalie Stoljar’s concerns and her project as developed in “What Do We Want Law to Be? Philosophical Analysis and the Concept of Law”² and “In Praise of Wishful Thinking: A Critique of Descriptive/Explanatory Methodologies of Law”.³ In the recent past, I personally have claimed both that (1) the descriptive and evaluative but still morally-neutral or non-moral approach⁴ does not provide the methodological tools required to operate adequately a purposive social phenomenon, like law, which has an undeniable prescriptive character and will have at some point to face interpretive and normative issues regarding justification and legitimation; and, hence, that (2) the moral

¹ *Vid.* Wilfrid J. Waluchow, *Inclusive Legal Positivism*, Oxford: Oxford University Press, 1994, p. 17.

² *Vid.* Natalie Stolar, “What Do We Want Law to Be? Philosophical Analysis and the Concept of Law”, in Wil Waluchow and Stefan Sciaraffa (eds.), *The Philosophical Foundations of the Nature of Law*, Oxford: Oxford University Press, 2013 (forthcoming).

³ Natalie Stoljar, “In Praise of Wishful Thinking: A Critique of Descriptive/Explanatory Methodologies of Law”, *Problema. Anuario de Filosofía y Teoría del Derecho*, No. 6, 2012, pp. 51-79.

⁴ This approach is usually associated with Julie Dickson’s position, which constitutes a critique of Ronald Dworkin’s, John Finnis’, and to some extent Frederick Schauer’s “directly evaluative legal theory”, and a defense of Joseph Raz’s “indirectly evaluative legal theory”, *vid.* Julie Dickson, *Evaluation and Legal Theory*, Oxford and Portland, Oregon: Hart Publishing, 2001. *Vid.* also Frederick Schauer, “The Social Construction of the Concept of Law. A Reply to Julie Dickson”, *Oxford Journal of Legal Studies*, Vol. 25, No. 3, 2005, pp. 493-501.

can neither be eliminated nor insulated from legal philosophizing and theorizing.⁵

In my opinion the papers have the virtue of considering the possibility of connecting different levels or projects within legal methodology and can be read either all the way down as *inter-methodological* by bridging two different legal methodologies or at least as *intra-methodological* by developing three different inquiry projects within a legal methodology, namely conceptual (legal) analysis. Although Stoljar, by following Sally Haslanger,⁶ develops the last option in detail, *i.e.* “conceptual analysis pluralism”, I assume that in doing so and in the process of denying “methodological legal positivism” she also explores the connections between the substantive projects of legal positivism —exclusive and inclusive— and its critics, *i.e.* anti- or non-legal positivism.

My one and only problem with Stoljar’s approach is that in the process of clarifying her position she stops one step short from —or at least one step shorter than— what I ad-

⁵ Let me advance, the connection between these two papers from Stoljar, especially the one presented at the 2011 McMaster University Philosophy of Law Conference “The Nature of Law: Contemporary Perspectives” with one of my own, which was also presented at that same Conference and benefitted from her comments. Akin to her, I claimed that there are different levels (or projects) within law and legal rationality, and so that a pluralistic approach was required not only to integrate them into one but also that morality played a definitive role in it. Hence, that the methodological approach to law and legal rationality neither can remain merely or purely conceptual nor descriptive and evaluative in an arguably morally-neutral or non-moral way, but at some point does —and even must— engage with the prescriptive and interpretive in a non-morally neutral or openly moral way. *Vid.* Imer B. Flores, “The Problem about the Nature of Law *vis-à-vis* Legal Rationality Revisited: Towards an Integrative Jurisprudence”, in Wil Waluchow and Stefan Sciaraffa (eds.), *The Philosophical Foundations of the Nature of Law*, Oxford: Oxford University Press, 2013 (forthcoming).

⁶ *Vid.* Sally Haslanger, “Gender and Race: (What) Are They? (What) Do We Want Them to Be?”, *Noûs*, Vol. 34, No. 1, 2000, pp. 31-55; “What Are We Talking About? The Semantics and Politics of Social Kinds”, *Hypatia*, Vol. 20, No. 4, 2005, pp. 10-26; and “What Good Are Our Intuitions?”, *Aristotelian Society Supplementary Volume*, Vol. 80, No. 1, 2006, pp. 89-118.

vised her to pursue: one step beyond. This view not surprisingly is the one that I personally favor and argue for: moral evaluation does and even must play a necessary role in law. On this regard, in the McMaster's paper, her position appears to be more or less ambiguous. For example, she affirmed that in answering to the question "What is law?":

We must ask questions such as: What are the legitimate purposes that we want this concept to serve in our practice? What do we want the concept to do for us? How do we characterize the concept in order to enable it to better serve our purposes? Answering these questions will sometimes employ moral evaluation. It is obvious therefore that I am in broad agreement with the positions taken by Dworkin, Finnis and Perry each in a rather different way, and perhaps by Murphy in yet a different way again, namely that to offer a fully fleshed-out answer to the question 'What is law?' we need to engage in substantive moral and political argument.

In a few words, on the one hand, by stating "Answering these questions will *sometimes* employ moral evaluation" she appears to conceive it as contingent; but, on the other hand, by suggesting "we *need* to engage in substantive moral and political argument" she seems to consider it as necessary. And so not surprisingly she can conclude "I am in *broad* agreement with the positions taken by [Ronald] Dworkin, [John] Finnis and [Stephen] Perry each in a rather different way, and perhaps by [Liam] Murphy".⁷

However, in the Problema's paper she did state unambiguously: "there are two possible strategies for denying methodological positivism, only one of which I adopt here." And so, first, she characterizes the two positions: (1) the *necessity claim*, *i.e.* "the position that moral evaluation is a conceptually necessary element of legal theory because theorizing either about social practices in general or law in particular (conceptually) *requires* moral and political argument" (or stronger claim); and, (2) the *desirability claim*, *i.e.*

⁷ The emphasis is mine.

“the position that it is desirable for legal theorists to employ moral considerations because it is only through moral argument that we can answer important questions we care about with respect to law” (or weaker claim). Later on she attacks the necessity or stronger claim as “incorrect”, solely because it is in her view incompatible *per definition* with conceptual (legal) analysis pluralism: “*the necessity claim* is false because certain logically possible theoretical strategies do not employ moral considerations” and, thus, defends the desirability or weaker claim. In short “If it is desirable for theorists to employ moral considerations, moral considerations should not be kept out of theorizing, and hence methodological positivism is incorrect.”

Moreover, I do not believe that conceptual (legal) analysis pluralism has to be compatible with either one or the other, but on the contrary that it can be compatible with both: not only with the *desirability* or weaker claim but also with the *necessity* or stronger claim, as I intend to explain right here, right now. In that sense, I think it is possible to adopt both the conceptual (legal) analysis pluralism and the necessity or stronger claim all together.⁸ Keep in mind, Stoljar’s words:

If I am right that there are three strategies of conceptual analysis, and these three strategies can be used to analyze the concept of law, then no single strategy is *necessary* for conceptual analysis. Methodological positivism as exemplified in the morally-neutral conceptual and descriptive strategies is logically possible. Thus, one cannot adopt the necessity claim; one cannot argue against methodological

⁸ By the by, to Stoljar’s credit, she seems to admit this possibility when she concedes that “there is a stronger normative position that one could adopt, namely that the strategy that allows moral considerations to be employed in legal theorizing has *normative priority* over the morally-neutral strategies. Hence in some cases it would be not just desirable but *morally* required for a theorist to employ moral considerations when theorizing about law. Although I believe this stronger position is probably correct, I will not be pursuing it here.”

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positivism by proposing that moral evaluation is a logically necessary element in legal theorizing.

As I read (legal) pluralism, in general, and conceptual (legal) analysis pluralism, in particular, indeed no single level or project is necessary and much less sufficient on its own as Stoljar is correct in pointing out. But if conceptual analysis pluralism is true then a plurality of levels or projects is not merely important or valuable but necessary and as such a normative priority of one of the different levels or projects, to maintain a still workable order or system, is not merely desirable but necessary too.

In other words, all the levels or projects are important or valuable and even necessary parts of a whole. Let me insist, the fact that the moral evaluation is not necessary at certain level or project does not rule out that at some other level or project it is necessary and even that some form of normative priority of the moral evaluation is necessary. In sum, moral evaluation does and even must play a necessary role in law, in general, and in conceptual (legal) analysis, in particular.

As you can see, I am willing to argue for the necessity or stronger claim and in the following the reader will find further grounds for it. Accordingly, in the remainder of this article, I pretend to present two subsets of reasons for conceptual (legal) analysis pluralism and for the necessity or stronger claim, which I can classify as the theoretical ones following Jhering's heaven of legal concepts critique, on the one hand, and the practical ones following the "same-sex marriage" case, on the other hand. Finally, to conclude, I will briefly return to the answer to the question on: What should conceptual legal analysis become?

II. JHERING'S HEAVEN OF LEGAL CONCEPTS AND SAME-SEX MARRIAGE

First of all, I will like to emphasis a couple of points in which I agree with Stoljar's papers, but in which I still will

like to point her into other sources for inspiration. On the one hand, the traditional picture of conceptual analysis, *i.e.* “What is *X*?” or alternately “What is the nature of *X*”, can certainly be traced all the way back to Socrates. However, let me point not to *Theaetetus*, which is a later middle dialogue of Plato about the concept or nature of knowledge, but to *Cratylus*, which is a transitional dialogue of Plato between the early and middle periods about the concept or nature of language. Actually, most of Plato’s *Dialogues* can be said to embody the classical philosophical approach: “What is *X*?”⁹

On the other hand, the traditional picture of conceptual analysis does attempt to resolve a concept into necessary and sufficient conditions and do correspond to a wholly *a priori* project of reflection from a philosopher’s armchair, but sometimes it identifies a cluster of core or important features, including moral ones, and is complemented with *a posteriori* reflection, something like John Rawls’ “reflective equilibrium” or even H. L. A. Hart’s “critical reflective attitude”.¹⁰

⁹ *Vid.* Plato, *Cratylus*, trans. C.D.C. Reeve, Indianapolis: Hackett, 1998. *Vid.* also Plato, *Theaetetus*, trans. M.J. Levett, Indianapolis: Hackett, 1990.

¹⁰ *Vid.* John Rawls, *A Theory of Justice*, Cambridge, Massachusetts: Harvard University Press, 1971, pp. 20-1, 48-51, and so. (In the revised ed.: 1999, pp. 18-9, 42-5 and so.) H.L.A. Hart, *The Concept of Law*, Oxford: Oxford University Press, 1961, p. 56. (In the 2nd ed. “With a Postscript edited by Penelope A. Bulloch and Joseph Raz”, 1994, p. 57.) (Hereinafter the references will be made to the 2nd ed.) John Mikhail, *Elements of Moral Cognition: Rawls’ Linguistic Analogy and the Cognitive Science of Moral and Legal Judgment*, Cambridge: Cambridge University Press, 2011.

Elsewhere I have criticized Hart’s “critical reflective attitude” as underdeveloped by his followers but endorsed the necessity of adopting the internal point of view and the neediness for such “critical reflective attitude” —or at least “something like” it. *Vid.* Imer B. Flores, “In the Dark Side of the Conventionality Thesis?”, in Enrique Villanueva (ed.), *Studies in Social, Political and Legal Philosophy. Philosophy of Law and of Politics*, Amsterdam: Rodopi, 2002, pp. 155-6; and “The Living Tree

In addition, to Martha C. Nussbaum,¹¹ I have in mind Frederick Schauer, who did emphasis the important —and even valuable— features following his birds' example, *i.e.* although flying is something characteristic of almost all the genre of birds, it is not the case of the species of emus, ostriches and penguins, which are also birds, to the extent that the only non-birds flying vertebrates are bats.¹² My hunch is that once we engage in the important and even valuable, we might end not only with the morally important and even valuable as well but also with something morally necessary.

Secondly, I agree that the traditional picture of conceptual analysis is still useful for understanding aspects of the concept of law, but the role of the conceptual should neither be overstated nor understated. In that sense, I could not agree more that it is necessary to adopt a form of “conceptual (legal) analysis pluralism” that connects and even interconnects three different projects within conceptual analysis, which neither exclude nor include each other and that can be integrated into one broader project: an integrative jurisprudence.

For that purpose, in what follows, I will revise the core of Stoljar's claim, which I will divide in the two main components that she identifies: (1) the three inquiries or projects within conceptual (legal) analysis pluralism; and (2) the four different positions towards it. Let me advance, that in order to facilitate the analysis and critique I will collapse

Constitutionalism: Fixity and Flexibility”, *Problema. Anuario de Filosofía y Teoría del Derecho*, No. 3, 2009, p. 62.

¹¹ *Vid.* Martha C. Nussbaum, “Objectification”, *Philosophy and Public Affairs*, Vol. 24, No. 4, 1995, pp. 249-91.

¹² *Vid.* Frederick Schauer, “Necessity, Importance, and the Nature of Law”, available for download at the Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1594930>. *Vid.* also Frederick Schauer, “The Nature of the Nature of Law”, available for download at the Nature of Law: Contemporary Perspectives conference site: <http://tnl.mcmaster.ca/conference/papers/Schauer%20-%20On%20the%20Nature%20of%20the%20Nature%20of%20Law.pdf>.

the four different positions into two and will apply them at the end of this section to the “same-sex marriage” case.

On one side, Stoljar —following Haslanger— suggests that the traditional picture of a *conceptual* inquiry or project aims to uncover our *manifest* concept of X in question, but identifies two further interconnected inquiries or projects of conceptual analysis: a *descriptive* inquiry or project that aims to discover an *operative* concept; and an *ameliorative* inquiry or project that aims to yield a *target* concept for legitimate purposes in using that concept.¹³ Furthermore, Stoljar point outs in the McMaster’s paper the way in which the three inquiries or projects are integrated. In her own voice:¹⁴

For concepts that refer to social kinds or objective social types, all three projects can be employed to provide a fuller or more resolved account of the concept. If there is no convergence on the *manifest* concept, the theorist might turn to an *operative* or a *target* concept. If there is an incompatibility between the *manifest* and the *operative* concepts, a *target* concept might be employed to decide between them, and so forth.

Since the *manifest* concept —corresponding to the merely or purely conceptual— will not be enough in some cases it is clear that in doing conceptual analysis we will have to move from-time-to-time toward an *operative* concept —corresponding to the descriptive, evaluative and non-moral— and if (and only if) it turned out not to be enough to the case at hand we will have to move toward a *target* concept —corresponding to the prescriptive, interpretive and moral.

On the other, the different positions that she identifies are: (1) the claim that the concept of law is an *interpretive* or hermeneutic concept and hence conceptual analysis of

¹³ By the by, let me suggest that Schauer’s *prescriptive* conceptual analysis parallels Haslanger’s *ameliorative* project and can also be labeled as *purposive* inquiry. Cfr. Haslanger, “What Are We Talking About?...”, *cit.*, pp. 11, 12, 23-4 fn 1; and, Schauer, “The Social Construction of the Concept of Law...”, *cit.*, p. 500.

¹⁴ The emphasis is mine.

law must employ *moral* considerations (Dworkin and Perry);¹⁵ (2) the claim that concedes that it is an interpretive or hermeneutic concept, but that denies that it has to employ moral considerations and so conceptual analysis can remain still *descriptive* and *non-moral* but not merely or purely conceptual (Hart and Leiter);¹⁶ (3) the claim that conceptual analysis is *pointless* since there is no convergence on common usage (Murphy);¹⁷ and (4) the claim that conceptual analysis is *evaluative* at a metatheoretical level but still *descriptive* and *non-moral* (Raz and Dickson).¹⁸

¹⁵ *Vid.* Ronald Dworkin, *Taking Rights Seriously*, 2nd ed. with a Reply to Critics, Cambridge, Massachusetts: Harvard University Press, 1978; and *Law's Empire*, Cambridge, Massachusetts: Harvard University Press, 1986. *Vid.* also Stephen R. Perry, S. "Hart's Methodological Positivism", in Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to The Concept of Law*, Oxford: Oxford University Press, 2000, pp. 311-54.

¹⁶ *Vid.* Hart, *The Concept of Law*, *cit.*, especially "Preface", p. vi: "Notwithstanding 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" and "Postscript", pp. 239-40: "My aim in this book was to provide a theory of what law is which is both general and descriptive. It is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative') aspect... My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law." (The emphasis is in the original.) *Vid.* also Brian Leiter, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis", in Coleman (ed.), *Hart's Postscript...*, *cit.*, pp. 355-70; and "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence", *American Journal of Jurisprudence*, Vol. 48, 2003, pp. 17-51.

¹⁷ *Vid.* Liam Murphy, "The Political Question of the Concept of Law", in Coleman (ed.), *Hart's Postscript...*, *cit.*, pp. 371-409.

¹⁸ *Vid.* Joseph Raz, "Authority, Law and Morality", in *Ethics in the Public Domain*, Oxford: Clarendon Press, 1994, pp. 194-221. *Vid.* also Dickson, *Evaluation and Legal Theory*, *cit.*, especially pp. 129-30: "In this type

Regarding (3) I take that the claim that conceptual analysis is pointless is over exaggerated on two grounds: first, if the lack of common usage is a definitive parameter, almost everything regarding social kinds, such as law, is pointless, and the few things in which there might be a convergence of common usage will be most probably unimportant or at least uninteresting;¹⁹ and, second, it is precisely this divergence—or disagreement—on common usage that triggers the need for further conceptual analysis. In my opinion, (2) and (4) regardless of conceding or not that it is interpretive can be reduced to a similar methodological position that claims that conceptual analysis is *descriptive* and *evaluative* but *non-moral*, whereas (1) claims that it is *interpretive* and certainly *moral*, and hence we need to engage in substantive moral and political argument.²⁰

In that sense, since the possibility of a merely or purely conceptual analysis has been ruled out it seems clear that the debate on what should conceptual legal analysis become is between *descriptive*, *evaluative* and *non-moral* (2 and 4), and *prescriptive*, *interpretive* and *moral* (1 and 3). In other words, the debate is whether conceptual analysis can remain a *descriptive* inquiry or project aiming to provide *operative* concepts or it has to be also a *prescriptive*,

of legal theory, [*i.e.* indirectly evaluative legal theory,] it is necessary to make evaluative judgements which pick out the most important or significant features of the law to be explained, but in doing so, the legal theorist is not rendering moral judgement on those features, nor attempting to show them in their best moral and political light simply in order to identify what they are.”

¹⁹ *Vid.* Ronald Dworkin, “Hart’s Postscript and the Point of Political Philosophy”, in *Justice in Robes*, Cambridge, Massachusetts: Harvard University Press, 2006, p. 185.

²⁰ By the way, let me suggest that actually (3) claims that conceptual analysis is pointless if it remains merely or purely conceptual and even descriptive, evaluative and non-moral, and so taking sides with (1) and not necessarily with a strong skepticism about the value of conceptual theorizing. *Cfr.* Richard Posner, *Law and Legal Theory in England and America*, Oxford: Oxford University Press, 1997, pp. 1-5.

ameliorative and *purposive* inquiry or project aiming to provide *target* concepts.

For the purpose of analyzing and criticizing these two options, let me proceed first by recalling the example of “tardy” that Stoljar borrows from Haslanger. If “tardy” is used in local school districts by “defining as tardy any child who arrives at school after the bell rings at 7.50 am” and “School officials who are charged with implementing the policy report that the meaning of ‘tardy’ corresponds to the definition; hence their manifest concept ‘tardy’ corresponds to the definition.” But suppose that in a “particular school there is a 5 minute morning lineup after the bell rings but before students have to go to their classrooms, and suppose in this school teachers only mark children tardy if they arrive in class late. In this school, the operative concept of tardy diverges from the manifest concept under which children are tardy if they arrive after the bell at 7.50. Now suppose a school inspector arrives and asks why children who arrive after the bell are not marked tardy. The reply might be: ‘coming a few minutes late for lineup but getting to class on time is not really tardy’.” Since the implication is far from obvious let me quote Haslanger via Stoljar:²¹

As Haslanger points out, a reply such as this implies that there is ‘a further way of thinking about what tardiness “really is” that should take us into normative questions: Should we have the category of ‘tardy’ in our school district? If so, how should it be defined?... [T]he situation... is ripe for an ameliorative inquiry that would have us consider what the point is of a practice of marking students tardy, and what definition (and corresponding policy) would best achieve the legitimate purposes’.

Since I will be attributing to H. L. A. Hart the *descriptive*, *evaluative* and *non-moral* inquiry or project aiming to *operative* concepts, I will like to advance an objection to the pos-

²¹ Stoljar quoting Haslanger, “What Are We Talking About?...”, *cit.*, p. 15.

sibility of someone suggesting that Hart embodies the conceptual (legal) analysis pluralism and that he did embrace the three strategies by including the *prescriptive*, *interpretive* and *moral* inquiry or project aiming to *target* concepts. The fact that Hart at some point did openly endorse and even engage in moral criticism, most notably in his debate with Lord Patrick Devlin,²² on the legal enforcement of morals against homosexual practices such as sodomy, can be better understood neither as a conceptual nor legal question but as a moral one calling not for an explanation but for a justification. In Hart's own voice:²³

In asking [the question whether a society has the "right" to enforce its morality by law] we are committed at least to the general critical principle that the use of legal coercion by any society calls for justification as something *prima facie* objectionable to be tolerated only for the sake of some counter-

²² The debate was triggered by the appearance in the United Kingdom, September 4, 1957, of the *Report of the Committee on Homosexual Offences and Prostitution*, better known as the *Wolfenden Report*, recommending that homosexual practices between consenting adults in private should no longer be a criminal offence. On the one hand, Lord Patrick Devlin delivered the Maccabean Lecture in Jurisprudence, in the British Academy, March 18, 1959, where he argued that a society's shared morality was as necessary to its existence as a recognized government and the justification for its enforcement by law was simply that the law might be used to preserve anything essential to society's existence. For that purpose he drew the analogy between immorality, *i.e.* an infringement of a society's shared moral code, and treason, claiming that the suppression of such immorality was as much the law's business and justifiable on the same grounds, as the suppression of subversive activities. On the other hand, Hart reacted critically first by publishing a couple of articles "Immorality and Treason", *The Listener*, July 30, 1959, and "The Use and Abuse of the Criminal Law", *Oxford Lawyer*, No. 4, 1961, and later by delivering the Harry Camp Lectures at Stanford University, 1962. *Vid.* Patrick Devlin, *The Enforcement of Morals*, Oxford: Oxford University Press, 1965. *Vid.* also H. L. A. Hart, *Law, Liberty, and Morality*, Stanford: Stanford University Press, 1963; and "Social Solidarity and the Enforcement of Morality", *University of Chicago Law Review*, Vol. 35, 1967, pp. 1-13.

²³ Hart, *Law, Liberty, and Morality*, *cit.*, pp. 20-1.

vailing good. For where there is no *prima facie* objection, wrong or evil, men do not ask for or give *justifications* of social practices, though they may ask for and give *explanations* of these or may attempt to demonstrate their value.

To reinforce the view that Hart considers the projects of conceptual analysis and moral criticism as two distinct enterprises following the so-called separability thesis, *i.e.* separation between law and morals or more precisely between law as it is and law as (morally) it ought to be, let me point both to his “Positivism and the Separation of Law and Morals”²⁴ and to “Problems of the Philosophy of Law”.²⁵

On the one hand, in his 1957 Oliver Wendell Holmes Lecture at Harvard Law School, Hart advances his skepticism towards the third inquiry or project as part of law or as a legal one, because he not only does conceive it as a form of moral criticism but also does not consider it as part of the conceptual inquiry or project that he usually associates with law. Let me quote Hart at length:²⁶

For if we adopt Radbruch’s view, and with him and the German courts make our protest against evil law in the form of an assertion that certain rules cannot be law because of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism. If with the Utilitarians we speak plainly, we say that laws may be law but too evil to be obeyed. This is a moral condemnation which everyone can understand and it makes an immediate and obvious claim to moral attention. If, on the other hand, we formulate our objection as an assertion that these evil things are not law, here is an assertion which many people

²⁴ *Vid.* H. L. A. Hart, “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, Vol. 71, No. 4, February, 1958, pp. 593-629. (Also published in: *Essays in Jurisprudence and Philosophy*, Oxford: Clarendon Press, 1983, pp. 49-87.)

²⁵ *Vid.* H. L. A. Hart, “Problems of the Philosophy of Law”, in *Essays in Jurisprudence and Philosophy*, *loc. cit.*, pp. 88-119.

²⁶ Hart, “Positivism and the Separation of Law and Morals”, *cit.*, pp. 620-1 (pp. 77-8).

do not believe, and if they are disposed to consider it at all, it would seem to raise a whole host of philosophical issues before it can be accepted. So perhaps the most important single lesson to be learned from this form of the denial of the Utilitarian distinction is the one that the Utilitarians were most concerned to teach: when we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy.

On the other hand, in the essay for the *Encyclopedia of Philosophy* he originally addressed two different sets of problems, namely the “Problems of Definition and Analysis” and the “Problems of the Criticism of Law”, and later added the “Problems of Legal Reasoning”. Actually, in that essay, Hart revisits the necessary distinction between “Analysis and evaluation” as corresponding to two different kinds of inquiries:²⁷

A division between inquiries concerned with the analysis of law and legal concepts and those concerned with the criticism or evaluation of law *prima facie* seems not only possible but necessary, yet the conception of an evaluatively neutral or autonomous analytical study of the law has not only been contested but also has been taken by some modern critics to be the hallmark of a shallow and useless legal positivism allegedly unconcerned with the values or ends which men pursue through law.

In that sense, it is not surprisingly that it is Dworkin, one of the most conspicuous modern critics of legal positivism, in general, and of Hart’s version, in particular, who can be consider as the best example of the *prescriptive, interpretive* and *moral* inquiry or project aiming to *target* concepts within conceptual (legal) analysis pluralism with his “constructive interpretation” and his “stages of interpretation”: “preinterpretive”, “interpretive” and “post-interpretive”.²⁸

²⁷ Hart, “Problems of the Philosophy of Law”, *cit.*, pp. 109-10.

²⁸ *Vid.* Dworkin, *Law’s Empire*, *cit.*, pp. 52-3, and 65-8.

Moreover, I will like to point out to an additional possibility that can be traced all the way back to Rudolf von Jhering's and his essay "Im Juristischen Begriffshimmel", *i.e.* "In the Heaven of Legal Concepts".²⁹ Jhering was the first to criticize satirically and systematically within the German tradition the *Begriff Jurisprudenz*, *i.e.* *Conceptual Jurisprudence*, for its tendency to pretend that legal analysis can remain merely or purely conceptual, when as he himself acknowledged: "It actually became second nature to me to question the *purpose* of all legal theories."³⁰ Actually, Jhering's satirical critique not only has striking parallels with Oliver Wendell Holmes' "cynical acid"³¹ but also has been the source of inspiration for two well known reactions in the Anglo-speaking world in both sides of the Atlantic: one, more radical coming from the American legal thought by Felix S. Cohen;³² and, other, more moderate coming from the British analytical jurisprudence by H. L. A. Hart himself.³³

²⁹ *Vid.* Rudolf von Jhering, "In the Heaven for Legal Concepts: A Fantasy", trans. Charlotte L. Levy, *Temple Law Quarterly*, Vol. 58, 1985, pp. 799-842. (Originally published as "Im Juristischen Begriffshimmel: ein Phantasienbild" (1884), in *Scherz und Ernst in der Jurisprudenz*, Leipzig: Breitkopf & Hartel, 1885.) (Some selections appeared for the first time translated into English in Morris R. Cohen and Felix S. Cohen (eds.), *Readings in Jurisprudence and Philosophy of Law*, Boston: Little, Brown and Company, 1951; and, New York: Prentice-Hall, 1951, pp. 678-89.)

³⁰ Jhering, "In the Heaven for Legal Concepts...", *cit.*, p. 823 (the emphasis is mine). *Vid.* also Rudolf von Jhering, *Law as a Means to an End*, trans. Isaac Husik, Boston: The Boston Book Company, 1913.

³¹ *Vid.* Oliver Wendell Holmes, "The Path of the Law", *Harvard Law Review*, Vol. 10, no. 8, 1897, pp. 461-2: "You see how the vague circumference of the notion of duty shrinks and at the same time grows more precise when we was hit with *cynical acid*, and expel everything except the object of our study, the operations of the law." (The emphasis is mine.)

³² *Vid.* Felix S. Cohen, "Transcendental Nonsense and the Functional Approach", *Columbia Law Review*, Vol. 35, No. 6, 1935, pp. 809-49.

³³ *Vid.* H. L. A. Hart, "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence", in *Essays in Jurisprudence and Philosophy*, *loc. cit.*, pp. 265-77.

On the one hand, Cohen—in his eminent and famous article that begins with a reference to Jhering's curious dream about the heaven of legal concepts—insisted that it was necessary both to abandon the “transcendental nonsense”, which he equated with the merely or purely conceptual, and to adopt a “functional approach” instead. According to Cohen every social institution or biological organ has a “purpose” in life, and is to be judged good or bad as it achieves or fails to achieve this “purpose”.³⁴ In a short sentence “A thing is what it does”.³⁵

To reinforce the significance of the functional approach, Cohen not only traces some of its basic contributions: (1) the eradication of meaningless concepts; (2) the abatement of meaningless questions; (3) the redefinition of concepts; and (4) the redirection of research, but also considers its bearings upon four traditional legal problems: (1) the definition of law; (2) the nature of legal rules and concepts; (3) the theory of legal decisions; and (4) the role of legal criticism. For the purposes of this article suffices to say that Cohen recognized:³⁶

Holmes and, one should add, Hohfeld have offered a logical basis for the redefinition of every legal concept in empirical terms, *i.e.* in terms of judicial decisions. The ghost-world of super-natural legal entities to whom courts delegate the moral responsibility of deciding cases vanishes; in its place we see legal concepts as patterns of judicial behavior, behav-

Elsewhere I have pointed out that Hart's methodology—and even his strategy—has a strong tendency towards moderate approaches, which resembles Aristotle's “doctrine of the mean”. *Vid.* Imer B. Flores, “H. L. A. Hart's Moderate Indeterminacy Thesis Reconsidered: In Between Scylla and Charybdis?”, *Problema. Anuario de Filosofía y Teoría del Derecho*, No. 5, 2011, pp. 151-2.

³⁴ *Vid.* Cohen, “Transcendental Nonsense and the Functional Approach”, *cit.*, pp. 821-2.

³⁵ *Ibidem*, p. 826.

³⁶ *Ibidem*, pp. 828-9.

ior which affects human lives for better or worse and is therefore subject to moral criticism.

On the other hand, Hart—in his prominent and notorious essay that addresses Jhering's satire of the heaven of legal concepts—immunizes modern analytical jurisprudence from that critique with the “open texture” of language.³⁷

In that sense, Hart, first, distinguishes five different though related aberrations of legal thought which are the intellectual failings against which Jhering's satire is directed: (1) the excessive preoccupation with concepts considered in abstraction from the conditions under which they have to be applied in real life; (2) the blindness to the social and individual interests which must be considered, together with other practical problems, in the use and development of legal concepts; (3) the belief that it is possible to distinguish between the essence and the legal consequences of a legal rule or concept; (4) the ignorance of the ends and purposes of law; and (5) the false assimilation of the concepts and methods of legal science to mathematics to the extent that all legal reasoning is a matter of pure calculation in which the contents of the legal concepts are unfolded by logical deduction.

Later on, he recalls that Holmes directed the same critique “not against theoretical jurists [as Jhering did] but against judges and practical lawyers”, *i.e.* “an excessive reliance on ‘logic’ in deciding cases”.³⁸ And pointed out to the root of this intellectual error:³⁹

The fundamental error consists in the belief that legal concepts are *fixed* and *closed* in the sense that it is possible to define them exhaustively in terms of a set of necessary and

³⁷ *Vid.* Hart, *The Concept of Law*, *cit.*, pp. 124-36. *Vid.* also Flores, “H. L. A. Hart's Moderate Indeterminacy Thesis Reconsidered...”, *cit.*, pp. 155-9.

³⁸ Hart, “Jhering's Heaven of Concepts...”, *cit.*, p. 268.

³⁹ *Ibidem*, p. 269.

sufficient conditions; so that for any real or imaginary case it is possible to say with certainty whether it falls under the concept or does not; the concept either applies or it does not: it is logically closed (*begrenzt*). This would mean that the application of a concept to a given case is a simple logical operation conceived as a kind of unfolding of what is already there, and, in simpler Anglo-American formulation, it leads to the belief that the meaning of all legal rules is fixed and predetermined before any concrete questions of their application arises.

On the contrary, Hart claimed: "all legal rules and concepts are 'open'; and when an unenvisaged case arises we must make a fresh choice, and in doing so elaborate our legal concepts, adapting them to socially desirable ends."⁴⁰ In that sense, Hart recognized, following Friedrich Waismann the *Porosität der Begriffe*:⁴¹

This is a phrase used by a close adherent of Wittgenstein's, for a most important feature of most empirical concepts and not merely legal concepts, namely, that we have no way of framing rules of language which are ready for all imaginable possibilities. However complex our definitions may be, we cannot render them so precise so that they are delimited in all possible directions and so that for any given case we can say definitely that the concept either does or does not apply to it. 'Suppose I come across a being that looks like a man, speaks like a man, behaves like a man, and is only one foot tall, shall I say it is a man?' Hence there can be no final and exhaustive definitions of concepts, even in science. 'The notion of gold seems to be defined with absolute precision, say, by the spectrum of gold with its characteristic lines. But what should we say if a substance was discovered which looked like gold, satisfied all the chemical tests for gold, but emitted a new sort of radiation?' As we can never eliminate such possibilities of unforeseen situations emerging, we can never be sure of covering all possibilities. We can only rede-

⁴⁰ *Ibidem*, p. 270.

⁴¹ *Ibidem*, pp. 274-5. (References are omitted.)

fine and refine our concepts to meet the new situations when they arise. This recognition of the *Porosität* or, as the English call it, 'open texture' of concepts, is, as I say, a powerful feature of the philosophy inspired by the modern form of analytical jurisprudence.

In my opinion, both Cohen and Hart did transcend the first conceptual inquiry or project moving toward the other inquiries or projects. Moreover it is clear that only one did go all the way to the third prescriptive, ameliorative and purposive inquiry or project. On one side, Hart did in fact complemented the first conceptual inquiry or project of *manifest* concept with the descriptive inquiry or project of *operative* concept, by redefining our legal concepts and by adapting them to socially desirable ends, but claims that it is possible to remain value-free following the separability thesis. On the other, Cohen can embrace even the prescriptive, ameliorative and purposive inquiry or project because precisely through a theory of values and legal criticism he can connect the different inquiries or projects:⁴²

The positive task of descriptive legal science cannot, therefore, be entirely separated from the task of legal criticism. The collection of social facts without a selective criterion of human values produces horrid wilderness of useless statistics. The relation between positive legal science and legal criticism is not a relation of temporary priority, but of mutual dependence. Legal criticism is empty without objective description of the causes and consequences of legal decisions. Legal description is blind without guiding light of a theory of values. It is through the union of objective legal science and a critical theory of social values that our understanding of the human significance of law will be enriched. It is loyalty to this union of distinct disciplines that will mark

⁴² Cohen, "Transcendental Nonsense and the Functional Approach", *cit.*, p. 849. *Vid.* also Felix S. Cohen, *Ethical Systems and Legal Ideals?: An Essay on the Foundations of Legal Criticism?*, New York, Falcon Press, 1933.

whatever is of lasting importance in contemporary legal science and legal philosophy.

Before concluding this section let me try to apply the conceptual (legal) analysis pluralism to the controversial concept of “marriage” as applied to “same-sex marriage”.⁴³ First, assume that most people consider the *manifest* concept of “marriage” —regardless of religious connotations or not— as the “lawful or legal union between a man and a woman, *i.e.* husband and wife” to the extent that “same-sex marriage” seems indeed an oxymoron. Second, imagine that most people have come to terms with the *operative* concept of “marriage” as the “state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law” and as such as “the legal institution that recognizes mutual rights and duties or reciprocal benefits and burdens that derive of such close or intimate union and the co-responsibility that that relationship entails upon the possibility of founding a family and bearing children”. Third, suppose that at least some people become sensitive to the problem of “same-sex marriage” and its eventual recognition beyond other alternatives such as “civil unions” to the extent that it is necessary to engage in the quest for a *target* concept of “marriage” that covers—or is extended to cover— it.

Indeed, the merely and purely conceptual approach, which is closely linked to the *manifest* concept will not help at all to solve the problem, since it tends—or most probably will tend—to treat the “union of husband and wife” as

⁴³ For the point of views against and for “same-sex marriage”, *vid.* e.g. Sherif Girgis *et al.*, “What is Marriage?”, *Harvard Journal of Law & Public Policy*, Vol. 34, No. 1, 2010, pp. 245-87; and Robin West, *Normative Jurisprudence. An Introduction*, Cambridge: Cambridge University Press, 2011, pp. 48-53. For the comparative perspective, *vid.* e.g. Macarena Saez, “General Report. Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why “Same” Is so Different”, *American University Journal of Gender, Social Policy & the Law*, Vol. 19, No. 1, 2011, pp. 1-51.

necessary and sufficient conditions, and hence do not move from there. It is worth mentioning that in classical Roman Law: “matrimony” and “patrimony” referred to the respective burdens of the *mater*, *i.e.* the mother, to bear the children, and the *pater*, *i.e.* father, to provide the means to the subsistence of the family, to the extent than in a original—and even remote— understanding “marriage” might certainly presupposed a man and a woman, *i.e.* a husband and a wife. However, in our contemporary societies both the mother and the father share—or can share—the benefits and the burdens of both bearing the children and providing the means for the subsistence of the family. In addition, either one or the other does carry—or can carry— such burdens and benefits alone. To the extent that in both cases the traditional conception of the union of a man and a woman as husband and wife is no longer necessary and much less sufficient. Keep in mind not only the single-parent families, but also the assisted reproduction mechanisms and surrogate motherhood, which have increased the possibilities of founding a family and bearing children beyond the traditional picture of a man and a woman with their respective and specific roles as husband and wife pro-creating children.

In a similar fashion, the *descriptive*, *evaluative* and *non-moral* approach is not likely to be helpful to solve the problem either, since it pretends—or will pretend—to remain value-free it will be stuck with the *operative* concept of “marriage”, and so will not provide—or be able to provide—the *target* concept required for the actual recognition of “same-sex marriage”. It is worth noting that by not even considering the possibility of discussing whether “same-sex marriage” is justified or not, this approach arguably remains explanatory in a neutral and non-moral way, when on the contrary it somehow reinforces the view that same-sex marriage is—or still—not legitimate.

In that sense, it is necessary to adopt the *prescriptive*, *interpretive* and *moral* approach in the quest for a *target*

concept of “marriage”. In the search, instead of asking for the elements embedded in the *manifest* concept, such as the union of a man and a woman, or for the rights and duties that are recognized in the *operative* concept, we must question: what is (or even are) the purpose(s) of “marriage”? Is the purpose of marriage the procreation of children or is it the possibility of founding a family and bearing children? Analogously, is it justified to exclude or legitimate to include “same-sex” relationships on the concept of “marriage”? Is even some sort of amelioration or prescription needed: Are the benefits and burdens of a “marriage” gender dependent or not? And if not can or must we treat “same-sex” partnerships as “marriages” to the extent that “same-sex marriage” is clearly not an oxymoron.

III. CONCLUSION: WHAT SHOULD CONCEPTUAL LEGAL ANALYSIS BECOME?

To conclude let me insist that conceptual legal analysis can neither remain merely or purely *conceptual* nor *descriptive*, *evaluative* and *non-moral* and that the third *prescriptive*, *interpretive* and *moral* inquiry or project is much better than the alternatives, and thus it is not only necessary but also has a normative priority over them.

