YOUNG ACADEMICS

European Legal Theory 1

Cameron Moss

In Defence of the Concept of Law

Tectum

YOUNG ACADEMICS

European Legal Theory | 1

Edited by
Prof. Lorenz Schulz,
Prof. Maris Köpcke,
Prof. Migle Laukyte and
Prof. George Pavlakos

Cameron Moss

In Defence of the Concept of Law

With a Foreword by Prof. George Pavlakos

Tectum Verlag

This publication was sponsored by the Frankfurt LLM programme in Legal Theory (Goethe University and European Academy of Legal Theory).

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

Cameron Moss
In Defence of the Concept of Law

Young Academics: European Legal Theory; Vol. 1

ISBN 978-3-68900-214-5
ePDF 978-3-68900-215-2
ISSN 2944-3962

DOI: https://doi.org/10.5771/9783689002152

Onlineversion
Tectum eLibrary

1st Edition 2024

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

Foreword

I am delighted to introduce the first volume of the Series *Young Academics: European Legal Theory*. This new series aims to fill a concrete but upsetting gap: at a time when research integrity, inclusion, and diversity are all the rage it was alarming to experience the lack of a publishing outlet for the work of young and early career scholars in the field of legal theory and philosophy. We are all in the debt of the European Academy of Legal Theory and Tectum Verlag for the pioneering initiative to source and publish the best graduate work of the Academy's Master programme in legal theory, around which an international community of scholars has formed over the past three decades initially in Brussels and later at the Goethe University in Frankfurt on the Main. Knowing how much I have benefited from the study of graduate work, untainted by the inevitable blinders of professionalised writing, I am confident that the Series will inspire future generations of graduate students and mature researchers alike.

Cameron Moss's monograph *In Defence of the Concept of Law* displays all the qualities aspired to by the Series. It is a rigorous and inspiring defence of the philosophical foundations of HLA Hart's theory of law, against some of the most serious criticisms that have been raised over the past 50 years or so. Mr Moss's choice of critical texts and authors is not random or driven by stardom but guided by a well-though research design aiming to offer a fresh reading of important but neglected aspects in the account Hart developed in the *Concept of Law*. His exemplary writing and command of philosophical English makes the book a pleasure to read. Notably the clarity of his writing succeeds to make accessible the complex recent debates in analytical legal philosophy while demonstrating their philosophical significance

and drawing methodological lessons with considerable potential for guiding empirically oriented research in legal systems and institutions.

First comes Dworkin's critique based on his rejection of the possibility of second-order theorising about the law and the need to engage in evaluative interpretation of the law (Interpretivism). Although many others have defended Hart against these points Mr Moss applies a novel approach that places the emphasis on neglected aspects of Hart's theory: Hart's focus on legal systems allows us, pace Moss, to undercut the problems of theoretical disagreement which Dworkin alleges saddle the positivist account of Hart. Inviting us to understand disagreement about the law as uncertainty rather than indeterminacy, Moss shows that the Rule of Recognition – that lies at the centrepiece of Hart's account – can successfully operate as a general structure that governs a method for resolving uncertainties in the law. In addition, the prominent role assigned to legal systems shows that Dworkin's analysis has much weaker application in contexts and traditions outside U.S. law (e.g. civil law systems), a familiar point to some extent which however had not yet been stated as a direct result of the significance Hart places on legal systems. Turning next to Mark Greenberg's powerful critique of Hart, Moss suggests compellingly that Hart's account has resources to meet the demands of metaphysical explanation – posed by Greenberg's enquiry – by referring, again, to the structure of the legal system as organised by the Rule of Recognition. The argument here covers a lot of ground in showing that the Rule of Recognition specifies a mapping that makes it intelligible how the facts of a legal practice make the law. Finally, Hillary Nye's objections to conceptual analysis, as a building block of Hart's method, are decisively questioned by Moss in the last part of the paper, which proceeds to show that the epistemic gap between definitions of *law* and its nature can be bridged when the framework of the enquiry is appropriately adjusted (e.g., by shifting from *analytic* to *real* definition).

Throughout his discussion Cameron Moss proves his philosophical astuteness demonstrating deep familiarity with jurisprudential methods and competence in general philosophical argument and method. While

the essay is capably focussed on well-defined questions within jurisprudence, their treatment and the conclusions drawn benefit from a profound understanding of the wider philosophical issues and questions that underpin the bigger picture within which jurisprudence operates. This is a rare ability enviable even among more advanced scholars and academics in the field.

Finally, an added value of the piece is the close reading of the primary and secondary literature in which the author engages, such that allows him to shed new light on the interpretation of classical texts by Dworkin, Hart and Raz, but also utilise in a new key neglected ideas and arguments from the work of Hart. Not to put too fine a point on it, Cameron Moss has managed to convince me through this research that there are enough new materials for a revival of Hart's significance beyond the standard 'disciplinary quarrels' of analytical jurisprudence.

In a nutshell, the book has set a new standard for graduate work and will repay careful study by early career and advanced researchers alike.

Glasgow, 2 October 2024

George Pavlakos

Professor of Law and Philosophy
School of Law, University of Glasgow

Preface

I am incredibly happy that my master's thesis was selected to be part of this series, not just to represent young academics but also to represent European legal theory. It is a great privilege to be able to say that one has contributed to such a long and varied tradition, with its roots dating as far back as Socrates, and the Sophists before him. While my thesis is concerned with defending HLA Hart's work and addressing contemporary challenges to it, I think many readers will be surprised and interested to find that some of the ways I do this involve ancient arguments with ancient roots. This is the case for much of my challenge to Dworkin's interpretivism. Where I rely on a significant charge of *peritrope* against his account, which Socratic philosophers used to dispute Protagoras' view that 'man is the measure of all things'. The same idea of *peritrope* runs through much of Descartes' work that I later mention when addressing some of the epistemic scepticism at play in Hilary Nye's work. I think sometimes we are prone to forgetting some of the great accomplishments of the old philosophers and legal theorists. I also think that occasionally legal theory loses sight of the bigger picture, and analytic principles, when faced with new challenges.

That is why I decided to address these challenges to Hart's theory. As time has gone past it seems that part of the objective of modern analytic legal theory became to find new ways to elucidate flaws in Hart's work, as a kind of rite of passage. Or to find ways to say that Hart actually supports some radical new line of theory. I do not believe that Hart's theory or analytic theory in general has been so exhausted so as to leave us in such 'all or nothing' positions these kinds of discussions would tend to. I genuinely think that there is a path forward to expand analytic theory, and it comes from the general and descriptive

framework elucidated by Hart. I know many will disagree with my view, and that is the best thing I could hope for. Hart's most ardent critics were his former students Dworkin, Finnis, and Raz. In much the same way Plato criticised Socrates, and Aristotle did Plato. From such disagreement good things have always followed.

I would like to express my thanks to Brian Flanagan at Maynooth University for his support and encouragement when I started my legal theory journey as an inquisitive student in his jurisprudence lectures – though I imagine he has some thoughts about how I have treated Dworkin. I would also like to thank George Pavlakos for supervising this ambitious project and pointing out early infelicities which would have been just a little bit disastrous. I am also very grateful to the European Academy of Legal Theory for making much of this possible.

Contents

Chapter I – Introduction

In the early days of legal theory it was generally thought that law was an immutable part of human nature – notably in legal theory the accounts of Aquinas and Blackstone.[1] The consequence of this sort of thinking however was that it tends to insist that the laws of all peoples should tend towards the same structures and substance. Leaving little room for the wide variation of practices and legal rules that are found historically and by example, since for positive law to be compatible with natural law it must conform to 'right reason'.[2] Important in this connection is whether an immoral or unjust law is in fact a law, right reason holds that it is not. The existence and persistence of this kind of rational and natural thinking prevailed without substantial challenge until Bentham started the fully fledged legal positivist tradition criticising such ontological accounts of rights and laws as 'nonsense upon stilts'. Both Bentham and his student Austin found themselves closer to Hobbes after criticising these ontological notions, wedding themselves to the idea of a 'Sovereign' in order to explain how it is that there could be law without ontology or grandiose metaphysics.

While both Austin and Hobbes insisted that the Sovereign was legally unlimited, Bentham did not – although his account of a legally limited Sovereign has proved deficient like Hobbes' and Austin's accounts.[3]

1 References in this essay to 'naturalistic' or 'naturalism' and the like are references to natural law and natural law theorists works, not philosophical naturalism or anything else unless mentioned expressly.

2 Leslie Green, 'Introduction' in HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) xviii.

3 HLA Hart, 'Bentham on Sovereignty' (1967) 2(2) Irish Jurist (ns) 327, 328–30. See also, HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982) Ch IX.

Unfortunately Bentham's nuances were hidden for many years with his manuscripts on the subject only becoming recently known and so it was Austin's blunt account that became the most influential of the early positivist theories. In the last century positivists made a move to break from these early positivists, especially Austin, and their devotion to the Sovereign. Positivists like Kelsen were unsatisfied, for instance how can the Sovereign be said to be the origin of a contract between two private parties? Thus Kelsen orchestrated the beginning of contemporary thinking of law being composed of 'rules' and of there being a hierarchy of rules – important then is for there to be a rule at the top of the hierarchy, thus the rest of the rules will derive from it and that collection of rules is the legal order.[4] Hart, while inspired by Kelsen's move past the Sovereign, was unsatisfied with certain strands of Kelsen's theory. Hart broke away from Kelsen importantly because Kelsen stipulated that beyond a constitution there was the highest rule that is 'hypothetically postulated' called the *grundnorm* or *basic norm* – whereas Hart's highest rule is the rule of recognition, an empirical question of fact.[5] This has the other crucial benefit of helping distinguish legal rules from moral and social rules as different kinds of norms, which the *Grundnorm* struggles to do.[6]

Hart went much further than attempting to simply move past one or two limitations of his predecessors and considered a broader range of questions. This resulted from his entire approach being different to theirs.

---

4 For instance, Hans Kelsen, *General Theory of Law & State* (Originally published 1949, Routledge 2017) 110–4.

5 HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) 292–293. See also, HLA Hart, 'The New Challenge to Legal Positivism (1979)' Andrzej Grabowski (tr) (2016) 36(3) Oxford J of L Studies 459, 465.

6 For instance Kelsen says, 'a system of norms can only be valid if the validity of all other systems of norms with the same sphere of validity has been excluded', Kelsen, *General Theory of Law & State* (n. 4) 410. Thus according to Kelsen there cannot be a valid system of moral norms and legal norms which conflict, it would be the same as saying A and not A. For Kelsen if the legal norms are valid then no moral considerations may be heard. Hart seeks to distance himself from this view because Hart thinks that one can accept the validity of something as a law but withhold their obedience on moral grounds, this allows for better moral deliberations because one can consider what it means for something to be an 'evil law' which is something the Kelsenian view and natural law do not allow, see, Hart, *The Concept of Law* (n. 5) 207–12, 292–3.

Hart was concerned with how it is that the social world can progress to the legal world and to do this he paid special attention to the use of words and their underlying meaning.[7] Many writers, notably Hart's most persistent critic Dworkin, have displayed confusion and suspicion at Hart portraying his book as an essay in 'descriptive sociology',[8] however it is remiss to ignore that the first five chapters of *The Concept of Law* (hereafter "*CL*") are dedicated in essence to this question of legal and pre-legal, i.e. how a society without law develops into one with it. Sociologists are interested in understanding 'society' rather than the individual, that is, the motivations societies have for doing things and acting in the way they do rather than the factors at play in the minds or cognition of individuals. In this regard it would be quite difficult to understand modern societies whilst ignoring the existence of law, therefore there are obvious sociological interests in this question of what makes a society a legal or pre-legal one. Thus, Hart, following in the tradition of the early positivists, set out empirical conditions which have to be met which can be used for such sociological analyses, rather than metaphysical concepts and structures. In this way Hart set out the conditions that have to be met in order to say that there is a legal system and thus where there is a legal system there can be law.[9]

This difference in Hart's sense and use of the word 'law' has led to many confusions and mistakes regarding understanding and critiquing Hart.[10] Since Hart expressly rejected the idea that he was attempting to explain law *simpliciter*, as this would entail having to provide definitions and rules governing the use of words like 'law' or 'legal'.[11] Thus, according to Hart, his book is offered as *CL* rather than *The Definition of Law*.[12] For example, Hart holds that attempts to narrow valid laws only to rules which are morally acceptable is to narrow the concept

7 Hart, *The Concept of Law* (n. 5), Preface, 14.
8 See, Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 22(1) Oxford J of L Studies 1, 21.
9 Hart, *The Concept of Law* (n. 5) 100–101.
10 Others have also argued that not appreciating this distinction is an error in critiquing Hart, see for instance, Michael Payne, 'Hart's Concept of a Legal System' (1976) 18(2) William and Mary L Rev 287, 298–9.
11 Hart, *The Concept of Law* (n. 5) 17, 213.
12 ibid, 213.

too much and inconsistently with its usage, but does not seek himself to venture further and describe other conditions of valid laws.[13] But here rises another difficulty which has been expressed by others, which is that Hart's 'empirical project' is strange in that it does not use empirical methods.[14] Usually styled "why write a book about empirically identifying law but proceed to call it *CL*?" One answer could be to say that to assert that something is empirically testable cannot itself be an empirically testable or contingent thing, since then one could empirically discover that the original article is not empirically testable and the claim that it was testable was therefore false *ab initio*. This argument was advanced by Kant about Hume's empiricism as a reason for concluding that *a priori* statements are necessary and exist.[15] Thus Hart may have said that the conditions for law to exist must be empirically satisfied but the argument or theory itself cannot be (entirely) empirical – though he would probably just say he never described his project as empirical.

At some stage that answer may have been conclusive however contemporary philosophical debates doubt the neat divide between *a priori* and *a posteriori* statements.[16] There is now a multitude of theories attempting to show empiricism is better than rationalism or conceptualism and that they are misconceived or simply false without a shred of truth, then there is arguments attempting to show the reverse, while others attempt to find some middle ground.[17] Thus, it can be difficult to address criticisms of Hart's alleged conceptual or empirical short-

13 ibid, 214.

14 Or that if it is to be some sort of empirical generalisation it is bizarre, for instance, Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 8) 22; Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP 2011) 404.

15 Immanuel Kant, *The Critique of Pure Reason* (first edn published 1781, second edn published 1787, Cambridge edn, Cambridge UP 1998) B5.

16 See generally, Bruce Russell, '*A Priori* Justification and Knowledge' *The Stanford Encyclopedia of Philosophy* (Summer edn 2020) <https://plato.stanford.edu/archives/sum2020/entries/apriori/> accessed 11 May 2023.

17 See generally, Peter Markie and M Folescu, 'Rationalism vs. Empiricism' *The Stanford Encyclopedia of Philosophy* (Spring edn 2023) <https://plato.stanford.edu/archives/spr2023/entries/rationalism-empiricism/> accessed 11 May 2023.

comings since each critic may have different supporting opinions from those philosophical debates, i.e., each objection may mean different things when it speaks of empiricism, rationalism, or conceptualism.[18] To get involved in those debates is not the purpose of this essay and so there will be no direct use of material from them for the same reason. Thus this essay is focused on objections stemming from analytic legal theory and should only be taken to have such intended scope.

Notwithstanding the ongoing philosophical inquiries there has been a collection of sustained objections and misconceptions about Hart's project that must be addressed for the sake of legal theory. The general character of these objections is that they dismiss the core of Hart's methods in order to dismiss his conclusions. Hart sought for his theory to be 'general' and 'descriptive' – to be general so as to account for a variety of *legal systems* and to be descriptive in that it does not justify or morally comment on any particular system, e.g., as good, bad, efficient, or impractical.[19] This was a lesson ushered in by Kelsen and Hart because the early positivist accounts based on the Sovereign cope at a basic level when accounting for legal systems like those historically of the United Kingdom or the Roman Republic, with legally unlimited monarchs and representatives, but cannot adequately cope with federal systems and other governmental configurations. By adopting this methodology Hart avoided being waylaid in these sorts of difficulties. Notice that Hart's argument, that laws come from legal systems, is present in these early accounts which reduce legal systems to the Sovereign.

Attempts to mitigate these significant explanatory deficiencies in legal theory by adopting these methods are often underappreciated by positivism's and Hart's critics. The objective of this essay therefore is to explore aspects from a specific set of unanswered objections from these criticisms that are directed at or relevant for Hart's theory, with a focus on Hart's methodology. The centre of this focus, and indeed this entire project, is to show that by elucidating legal systems rather than

18 Others share this concern in legal theory generally, see especially, Julie Dickson, *Elucidating Law* (Oxford UP 2022) 39–40.

19 Hart, *The Concept of Law* (n. 5) 239–40.

law *simpliciter* Hart's theory is defensible from these objections. This will allow for it to be used in other areas of legal theory.

Chapter II seeks to dispute Ronald Dworkin's criticisms of Hart on two fronts. The first front is the challenge posed by interpretivism and the alleged existence of objective moral facts later incorporated into interpretivism. Here the driving objection is the incompatibility of fixed moral facts with a non-fixed interpretive enterprise (which is supposed to allow for variation in social concepts). Following this, interpretivism, in the absence of any fixed concepts, appears to suffer from *peritrope* – a charge which, if true, disputes the viability of the entire project. Therefore criticisms based upon it against Hart similarly fall off. The second front of Dworkin's challenge is about the proper way to 'do legal theory' and which sense of speaking about law is correct, i.e. whether it is possible to do descriptive and therefore second-order legal theory. Here some of the flaws in the construction of Dworkin's argument are explicated such that a defence of descriptive legal theory is provided. The justification for choosing to discuss Dworkin should be plain enough – if Dworkin is correct in even one of his arguments, then the Hartian project has failed.

Chapter III seeks to consider Mark Greenberg's account that evaluative facts about what is right and wrong are determinates of 'what makes legal content the way it is'. Here Greenberg alleges there is an explanatory gap in current theories, and to show the importance of this Greenberg also aims to show that Hart's account is similarly victim to this gap and therefore inadequate. The core part of Hart's failure comes allegedly from the inability of Hart's 'practice theory' to explain the determinates of legal content. Thus an examination of this theory and its representation of Hart is due, considering also how this practice theory came to be since Hart did not construct this theory himself. Following this the chapter is dedicated to testing the crux of Greenberg's argument the 'rational relational requirement', which is a requirement that explanation of legal phenomena must respect a constraint of intelligibility. Theories of argumentation will be considered to explore whether they might offer a challenge to Greenberg. A vital line

of inquiry is also developed which is that Greenberg fails to provide any analysis of the place of legal systems and the effect this may have on legal content, thus failing to capture the thrust of Hart's project. The objections to Hart therefore miss their mark. Since this has not been clearly defended elsewhere, this account is deserving of attention.

Chapter IV is dedicated as a response to Hilary Nye's criticism of the 'concept-nature nexus'. While this criticism is directed at Raz's methodology it can, *mutatis mutandis*, be applied to Hart. Nye holds, *inter alia*, that there is an epistemic gap between the nature of a thing itself, the concept that corresponds to that nature, and the variety of concepts that each individual or group of individuals may have. Nye also adopts in this connection a criticism against the type of conceptual analysis regularly employed in legal theory. It stands to reason that if Nye is correct about this gap and conceptual analysis that much more of legal theory is in jeopardy than just Raz or Hart. Here a critique of Nye's arguments is mounted, along with a defence of Hart's search for definition in law. An interjection here stands to clear up some misunderstandings and provide a renewed discussion of definition in legal theory, which has been ignored and forgotten for far too long.

Chapter II – Law Has No DNA?

In recent years frustration of the enduring Hart-Dworkin debate has grown.[20] Therefore there will be no deliberate rehashing of the debate here, but there will be a recounting of the relevant sections of Dworkin's arguments which may be reminiscent. As will be outlined in this part Dworkin's arguments as a whole can be summarised as proposing the following two overarching arguments. Firstly, Archimedean second order description of law is impossible because it would end up influencing the law, thereby making it first order participation and not descriptive, i.e. second-order, at all. Secondly, the only way to make sense of law as a distinct thing from other things is to do so interpretively, thus practices are distinguished from each other via the requirements of justification and fit – as such they can only conceivably be construed as political since one must make substantive claims about what it should or should not do.

To that end the subsequent sections of this chapter will address distinct problems in Dworkin's account, which will dispute the overarching argument. Section I is the setting out of Dworkin's position. Section II illustrates that Dworkin's account of interpretation suffers from a charge of *peritrope*, whereby the fact that it also partakes in the practices it aims to describe means that it can be construed as false and therefore the account is unsustainable. Similarly, Dworkin's attempt to incorporate moral realism into interpretivism to surpass this charge is regarded as unsuccessful. In section III the different senses of

20 Andrei Marmor and Alexander Sarch, 'The Nature of Law' *The Stanford Encyclopedia of Philosophy* (Fall edn 2019) Ch 1.2 <https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/> accessed 13 May 2023.

law are explored explicating that Dworkin only referred to law in the sense of practice whereas Hart did so in the sense of legal systems. This difference provides Hart a way to avoid Dworkin's objections.

II.I.I – Law as Interpretation

The interpretivism introduced in *Law's Empire* (hereafter "*LE*") features prominently in the work of later Dworkin making its recollection an occupational necessity. The argument begins in earnest with the example of courtesy, that is, how is it that one can explain what courtesy is.[21] Dworkin gives an imagined example of a society wherein the notion of courtesy changes over time – this changing over time happens due to the adoption of an 'interpretive attitude'.[22] The adoption of this attitude assumes two things; the practice of courtesy has some reason, point or value for existing which can be stated independently from it, and the requirements of courtesy extend only insofar as allowed by its independent reason.[23] Dworkin then considers various competing ways of interpreting how the interpretive attitude operates, settling on the 'constructive account' of interpretation as a general account of interpretation.[24]

Importantly there are three stages of interpretation which refine constructive interpretation as an instrument for understanding law as a social practice (but also any other social practice); firstly the 'preinterpretive stage' where tentative rules of the practice are identified by the consensus of the community – which too requires a degree of interpretation, secondly the interpreter settles on a justification of the worthiness of the practice (which can be called the 'justification stage'), thirdly a 'postinterpretive stage' where the understanding of the requirements of the practice can be adjusted in view of its justi-

21 Ronald Dworkin, *Law's Empire* (Hart Publishing 1986) 47.
22 ibid.
23 ibid, 47–8.
24 ibid, 53–65.

fication.[25] Another vital point about justification is that it must 'fit' the practice rather than invent something new, and the substantive convictions underlying fit and justification must be independent of each other, otherwise convictions about fit would be overridden by justification.[26] Dworkin distinguishes between a concept and conceptions of it, wherein, for example, the concept of courtesy of the imagined community could be considered a matter of respect and conceptions of courtesy are competing conceptions about what respect requires.[27] Thus at the preinterpretive stage emerges the practice of courtesy, which is justified at the justification stage by respect (which already has independent substantive convictions grounding its importance) giving rise to the concept of courtesy, however disagreement in the postinterpretive stage will give rise to various conceptions of what is required by the concept of courtesy.

This allows for interpretation to be localised, that is, different groups of people may be at different interpretive stages in relation to their practices and may hold different substantive convictions about their worth.[28] According to Dworkin all of this means that there can be no 'defining feature' of courtesy since in the imagined society courtesy is originally connotated with respect but over time with other things, and therefore one cannot search for such a feature in virtue of the word 'courtesy'.[29] Similarly, paradigm cases are mutable and can be disproven like the original paradigm cases of respect and courtesy.[30] Dworkin's reason, in essence, for concluding such a position is due to what he calls the 'semantic sting', wherein the predominant view of disagreement is that participants of a discussion can only be said to be genuinely or sensibly disagreeing if they share the same criteria for

25 ibid, 65–6. See also, Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP 2011) 131–2.
26 Dworkin, *Law's Empire* (n. 21) 67–8.
27 ibid, 70–1.
28 This is clearly inferred from the hypothetical question Dworkin poses for the philosopher attempting to outline the concept of courtesy so as to account also for the practices in neighbouring or distant societies, see, ibid, 69.
29 ibid, 71–2.
30 ibid, 72.

when their claims apply – otherwise they are not really talking about the same thing at all.[31] Dworkin opposes this view of disagreement, holding that this paints a shallow picture of the disagreements that lawyers actually have since it can only account for empirical disagreement in the law, but not theoretical disagreement.[32]

Suppose one wanted to know if something, a proposition, was legally true (or valid) then it would only be true in virtue of the grounds of law which have the ability to make such propositions valid – the grounds of law may vary but are typically taken to be things like statute or past judicial decisions.[33] An empirical disagreement, for example, would be if lawyers disagreed about whether there was in fact a statute passed to the effect of making a relevant proposition valid – but all are agreed about what makes propositions valid, in this example statutes.[34] A theoretical disagreement is where all are not agreed, for example, that statutes are the relevant instrument for deciding on the validity of a proposition and suggest that other things like past judicial decisions are also relevant.[35]

Thus, the crux of Dworkin's argument is this: in order to avoid the semantic sting and account for theoretical disagreement in law, law should be understood as being an interpretive concept.[36] Dworkin continues in the rest of *LE* to consider the best interpretive concept of law that he can render, i.e. portraying law in its best light. Eventually concluding that the "courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets".[37] Dworkin's description of what law is, can be summed in the following:

31 ibid, 45.
32 ibid, 46.
33 ibid, 4–5.
34 ibid.
35 ibid.
36 ibid, 87–8.
37 ibid, 407.

> "Law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is. General theories of law, for us, are general interpretations of our own judicial practice."[38]

II.I.II – Dworkin's Later Work and Response to Hart

Following Hart's postscript Dworkin found it necessary to address and clarify his own position in response, especially those of *LE*. Since the postscript has been the receipt of much attention in other works and because the purpose of this paper is not to be a work about what others have said there will be no summary of the postscript given here nor of all of Dworkin's responses to it, only those pertinent to understanding the core objections. Dworkin's most substantive responses to Hart can be found in essays titled 'Hart's Posthumous Reply' which is a section by section response by Dworkin to Hart's postscript,[39] and in 'Hart's Postscript and the Character of Political Philosophy' which presented some new arguments.[40] The former essay was not published by Dworkin while he was alive apparently because he thought it would be unkind to Hart to publish a response to which Hart could not reply, but later began to consider publishing a substantive reply.[41] Ironically this response also ended up being posthumously published. Before addressing the arguments it would be better to acknowledge clarifications and modifications on Dworkin's part.

The theories of law that Dworkin originally called semantic in *LE* he would now call 'Archimedean',[42] by which Dworkin means that they purport to be second-order inquiries that are neutral and *about* law,

38 ibid, 410.
39 Ronald Dworkin, 'Hart's Posthumous Reply' (2017) 130(8) Harvard L Rev 2096.
40 Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 24(1) Oxford J of L Studies 1.
41 Nicos Stavropoulos, 'The Debate That Never Was' (2017) 130(8) Harvard L Rev 2082, 2093–94.
42 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2105.

but not *part* of law.[43] Additionally, he holds that legal theory cannot be Archimedean – 'describing law is doing law' such that 'in the way that ordinary legal reasoning is normative legal theory is normative too'.[44] Dworkin puts legal positivism and especially Hart's theory in this camp as clear examples of Archimedean legal philosophy which he is dedicated to disputing.[45] Thus Dworkin qualifies the disagreement between him and Hart as the connection between legal theory and legal practice – wherein if he is right that legal practice is interpretive and that doing legal theory is to take part in the practice, then Hart's theory must be regarded as interpretive and not descriptive.[46]

Another vital clarification that Dworkin reiterates about his theory, apart from addressing Archimedeanism, is that it is only directed at developing law in the sense of what makes propositions within legal adjudication true or false, not law in the other sense of legal systems as a type of social institution.[47] Dworkin did make this qualification in *LE*, saying that his project 'centres on formal adjudication, on judges in black robes' and acknowledging that a 'more complete study of legal practice would attend to legislators, police and so on'.[48]

What Dworkin is trying to dismantle is Hart's position that his theory can be 'general and descriptive', of which Hart needs both in order for his position to be coherent. Recall that Hart sought for his theory to be able to account for all the varieties of legal systems, thus to avoid the failure of previous positivist accounts which were parochial. Descriptive theory does a great deal if not the most amount of work here in ensuring that this is possible, since if Hart was to justify certain systems or practices in the process this would obscure the generality of the analysis, for instance like how Bentham and Austin

43 ibid, 2097. See also, Ronald Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25(2) Philosophy & Public Affairs 87, 89; Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 40) 2.
44 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2097.
45 For instance, Dworkin, *Law's Empire* (n. 21) 34–5.
46 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2098.
47 ibid, 2105.
48 Dworkin, *Law's Empire* (n. 21) 11–2.

conflate law with the legislature.[49] By doing so they implicitly justified legislative perspectives of law to the expense and detriment of other legal systems which emphasise other aspects, like judicial power or federalism. Dworkin is trying to show that Hart is guilty of the same sort of error. However, Dworkin is not just trying to argue that Hart's account is parochial but rather that it is not possible to construct a theory which does not end up trying to justify certain practices, thus descriptive theory would be impossible. Running alongside this objection is of course the classic objection against positivism that by not including morality in its accounts it is over-inclusive of legal phenomena. Dworkin's ambitious goal is this trifecta; that Hart's theory does justify practices contrary to claiming to be descriptive, legal theory is not possible as a descriptive enterprise, and *a fortiori* positivists have therefore always been wrong about the classic problem of morality and law.

The arguments against Archimedeanism are predominantly employed against Hart's methodology and are therefore the subject of present interest. In dismissing this view Dworkin considered if Hart meant for the content of his theory, i.e. his understanding of law, to be taken analogously to what philosophers call a 'natural kind', but here Dworkin argues nothing shows 'how Hart's claims could be seen as different from ordinary legal claims, so that the former could be descriptive while the latter are interpretive.'[50] In a deeper elaboration of this claim Dworkin explored the difficulties, in his view, of political Archimedeanism, finding three fatal flaws. Firstly, descriptive accounts of values are contested and the means to refute them is solely by reference to evaluative conceptions of those values, which would mean making evaluative arguments – thus making them the same thing, i.e. first order.[51] Secondly, Dworkin considered if non-natural phenomena may still form kinds, e.g. political kinds, that are open to a descriptive

49 HLA Hart, 'The New Challenge to Legal Positivism (1979)' Andrzej Grabowski (tr) (2016) 36(3) Oxford J of L Studies 459, 463.
50 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2102.
51 Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 40) 9.

but non-normative discovery, concluding: "No. That is nonsense. We might pretend to such an idea."[52] Finally, description in the sense of historical generalisation is insufficient to distinguish descriptive political philosophy from social history or political anthropology.[53]

In order to chart a position for himself Dworkin elucidates that the 'deep structure' of natural kinds is physical and the deep structure of political values is normative – thus one can explain the 'concrete manifestations' of political values by 'exposing their normative core'.[54] The process of exposing the normative core is itself normative.[55] This importantly is not mere assertion, it is a position which logically does not fall foul of the three fatal flaws Dworkin just identified. In this connection Dworkin is trying to justify and show that legal theory has to be normative and so too does Hart's theory. Dworkin clarifies that political values are akin to natural kinds in that they are equally real: 'the value of freedom does not depend on anyone else's belief, invention or decision' – to justify this Dworkin says "[this] is, I know, a controversial claim: many philosophers dispute it. But I shall assume that it is true."[56] Law, then, according to Dworkin, is a political concept – this is so because people use it to form claims of law, that is, with regard to the social consequences of law.[57]

With the foregoing in mind Dworkin moved to consider whether Hart's descriptive project could succeed, granting as proponents have argued that description is normative in *some* sense.[58] Nonetheless Dworkin held that the flaws of political Archimedeanism could not be escaped by Hart – "If liberty has no DNA, neither does law".[59] Since political concepts are concepts of value there needs to be a concept which engages with the puzzles of legal philosophy, Dworkin therefore

52 ibid, 11.
53 ibid, 11–2.
54 ibid, 12–3.
55 ibid, 13.
56 ibid, 12.
57 ibid, 19.
58 ibid, 20.
59 ibid, 20–3.

proposes the interpretive concept of legality and that Hart's theory should be considered a conception of legality.[60] In order to create a coherent set of values that do not conflict with each other Dworkin argues that political values should be interpreted holistically in order to create a web of convictions.[61]

II.II – *Peritrope*, Natural Law & Interpretivism

Let it be assumed for the sake of argument that Dworkin's account of interpretation is correct.[62] All social practices are subject to interpretation, in view of the fact that the account applies generally. But that means that Dworkin's account of interpretation would itself be open to the same interpretative exercise, Dworkin poked fun at this feature of interpretation saying, 'you are interpreting me as you read this text'.[63] It is this feature of interpretation that leads Dworkin to say that everything involved in interpretation must be first-order. Dworkin concedes this clearly by saying that only a comparative legal project could disprove his account and that describing norms is to take part in them.[64] As Dworkin later put it: 'interpretation is therefore interpretive… all the way down.'[65]

Supposing then the account is open to interpretation, it *could* be interpreted such that it is incorrect, as Dworkin admits. Thus, interpretation as an enterprise would not be possible. It might not be that obvious why this is problematic but this construction of interpretation suffers from *peritrope*. Anything guilty of this charge is said to be self-refuting or self-defeating. This type of logical criticism was famously

60 ibid, 23–5.
61 ibid, 17–8, 26; Dworkin, *Justice for Hedgehogs* (n. 25) 162–3.
62 Note others deeply dispute the account, for instance, Jon Mahoney, 'Objectivity, Interpretation, and Rights: A Critique of Dworkin' (2004) 23(2) L and Philosophy 187; David Plunkett and Timothy Sundell, 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' (2013) 13 L Theory 242.
63 Dworkin, *Justice for Hedgehogs* (n. 25) 123.
64 Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 40) 36.
65 Dworkin, *Justice for Hedgehogs* (n. 25) 131, 162.

employed by Plato, Aristotle, and other Socratic philosophers against Protagoras' view that 'man is the measure of all things'.[66] The counter-argument goes that if man is the measure of all things then man *could* measure that man is not the measure of all things – since it admits the possibility of being false according to its own terms the whole idea is false *ipso facto*. Another famous use of this principle was already mentioned in chapter I in Kant's critique of Hume's empiricism. This objection can be applied *mutatis mutandis* to Dworkin's interpretivism because nothing precludes one engaged in an interpretive enterprise from dismissing interpretivism as an endeavour – the mere existence of this possibility, in whichever stage of interpretation one considers, is enough to invoke this objection. Now one could try to argue that this form of logical criticism is not sound in view of the debates entertaining that very possibility.[67] But this need not be done because Dworkin relies heavily on this principle in order to tackle scepticism.[68] Thus it is obvious that if the principle's use was disapproved of the account would fail anyway for it would not address the sceptical challenge.

If one objects to this and says, 'of course interpretivism does not allow that it could be wrong, that would be absurd'. Then interpretivism is similarly doomed for if it does not apply to itself then it would not be true that 'all socially constructed things are subject to interpretation' – it would not be entirely first order, nor would it be 'interpretive all the way down'. There would also be worries that this is mere assertion and not argument. More importantly however Dworkin conceded that interpretivism does function in this way. Remember, all of this results from Dworkin's insistence that it is not possible to do second order

66 Mauro Bonazzi, 'Protagoras' *The Stanford Encyclopedia of Philosophy* (Fall edn 2020) Ch 2.2 <https://plato.stanford.edu/archives/fall2020/entries/protagoras/> accessed 30 July 2023.

67 See for instance the discussion here, ibid.

68 Dworkin deploys a vast array of considerations against scepticism which cannot be recounted here but eventually the crux of his argumentative strategy is to turn scepticism against itself, specifically this is how Dworkin manages to turn external scepticism into internal scepticism which he can then deal with as a moral argument, see, Dworkin, *Law's Empire* (n. 21) 76–86; Dworkin, *Justice for Hedgehogs* (n. 25) Chs 3, 5.

inquiry in legal theory without it becoming first order participation. Thus arriving at the conclusion that interpretation is interpretive and normative, and therefore first order.

It can be observed that Dworkin's interpretation is contingent on individuals' beliefs in the three stages of interpretation. This is clear particularly in the preinterpretive stage where tentative rules of any practice are reached through consensus – interpretivism would be correct only insofar as there is consensus and justification for it. This however presents another problem, regarding the origin of values and interpretivism. Recall that in the preinterpretive stage the practice requires consensus on its worth (since there is some degree of interpretation at this stage too), then in the justification stage for a practice to be justified it must be justified by other values which are already independently justified – in the example courtesy was justified by respect which already had pre-existing convictions grounding it. But if social practices are only justified by pre-existing values, which in turn are justified by other pre-existing values, how can there be a first value? Humanity has not existed infinitely into the past, at some point in time there was the first society, or societies, which established the first social practices and from which all other practices must have originated from. They, however, could not have had other pre-existing values or norms before then since they are the origin. Dworkin thus set out to defend his account from these sorts of objections by relying on moral realism. Can this move save the account from the charge of *peritrope*? This is the consideration motivating and in the background of further discussion on Dworkin's construction of value.

> "We defend a conception of justice by placing the practices and paradigms of that concept in a larger network of *other* values that sustains our conception. We can in principle continue this expansion of our argument exploring other values, until, as I said, the argument meets itself. The circularity, if any, is global across the whole domain of value."[69]

69 Dworkin, *Justice for Hedgehogs* (n. 25) 162–3.

This structure creates a risky all or nothing gambit for Dworkin. Either values are justified as a holistic whole, or they are not justifiable at all. Remember however that in order to show the deep structure of a practice's underlying values, or worth, one can expose its normative core. This too is done normatively. Thus excluding private prescriptions or personal idiosyncrasies – values are social, not individual. Therefore, if one personally thought that keeping a person locked up was an example of liberty they would be corrected by the general consensus of others responding, 'look, we might not all agree exactly or at all times what liberty is, can be justified by, or requires, but locking someone up clearly is not it'. Suppose such an individual persisted in their belief, arguing that if there was not a 'correct answer' showing theirs to be wrong then surely everyone else's must equally be wrong, the response to them would be to distinguish indeterminacy from uncertainty.[70]

This presents a challenge to values, relativism. What if a society is mistaken in thinking that the concept of a value is shared with another society when really they are talking about different values? Here there cannot be recourse to norms as there was in the case of the individual. Dworkin answers the challenge: either they share the concept but they profoundly misunderstand it – 'no justification of justice approves gender discrimination', or they do not have the concept but nonetheless violate it – 'one acts unjustly even if they do not have the concept of justice'.[71] These two answers can be effectively treated as being the same thing in substance since the basic point is that if one does not act in accordance with the concept they violate it. Thus Dworkin holds there is no relativism.

The irony of this position now must be appreciated. In trying to dismiss second-order inquiry in favour of first-order interpretivism Dworkin, in his response to the challenge, has given the same response that Aquinas gave. The objection faced by Aquinas was that the natural law is not the same in all people because not all people follow the Gospel, and the related objection that if natural law is all that people

70 See, ibid, 148–9.
71 ibid, 171.

are inclined to by their nature that different individuals have different natures and thus the natural law cannot be the same for all.[72] Aquinas answered that the general principles of knowledge and reason were the same for all, but that truth or the conclusions of knowledge may not be known to all or they may be subverted by passions or an "evil" disposition or habit – the example given is that even though it is contrary to natural law stealing was not considered wrong among the Germans (as documented by Caesar).[73] Thus Aquinas' answer is the same as Dworkin's, by not acting in accordance with the concept they violate it.

Dworkin even mirrors Aquinas in that first principles of natural law cannot be changed – gender discrimination is incompatible with justice as stealing is incompatible with the natural law.[74] Indeed this answer presupposes that value has a DNA or 'realness' beyond its normative core, because a whole society and their norms can supposedly violate values like justice even if they do not share it. But Dworkin absolutely refused to grant Hart the idea that people could be acting according to the rule of recognition even if they did not know about it, or as Dworkin put it 'this is preposterous, Hart's theory was original not old hat, few actually thought of law that way before Hart'.[75] In other words if values can exist beyond the normative core then why not also theories about law qua inquiry, i.e. as second-order claims? The response against relativism must be rejected because it is simply the natural law, not interpretivism at all. Conversely if it were granted then it would have to be granted for Hart too, defeating the project on two fronts.

The conflict here is between interpretation as a normative exercise and the non-normative values presupposed by the notion that a society can violate a value. Dworkin in this response is arguing that a whole society can violate a value like justice, therefore *ex hypothesi* all societies

72 Thomas Aquinas, *Summa Theologiae* (written c.1265–1274) I-II, 94.4.
73 ibid.
74 See, ibid, I-II, 94.5.
75 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2100.

that have ever existed and still exist may not have ever acted in accordance with justice. But this directly conflicts with interpretivisms *modus operandi* of 'best justifying' a practice in light of its justification. One could succeed in an interpretive exercise of best justifying a practice in light of justice but still fail to have acted in accordance with the 'objective' concept of justice.[76] This has the effect that the interpretive exercise is unsuccessful. Thus the defence is just natural law to the detriment of interpretivism – nothing about it is interpretive. Trying to strike off this natural law component would have no benefit either for if things were restated in terms of 'best justification' then it would fall foul of Hart's past criticism of that theory, illustrated by the example that 'killing an innocent man without torturing him is morally justified to some extent because killing him with torture would be worse'.[77]

Nothing in the account provides that the interpretivism itself is supported by any of the realism advanced by Dworkin, it remains the case that interpretivism could be decided to be false by a community acting in the way outlined by interpretivism. It is therefore quite sufficient to regard that the charge of *peritrope* holds. It is important to stress that nothing in this argument is against moral realism *per se* but rather of Dworkin's attempt to integrate it into interpretivism. Not only is it an unsuccessful and harmful integration but it also does nothing to save the account from itself. All of these problems could be avoided by Dworkin by presenting the account as a second-order one but likewise that would permit Hart to continue with his general and descriptive project.

---

76 When this argument is read alongside the alternative introduction to the section on discretion in Hart's postscript which is set out in the notes it seems that Hart was about to make this very point against Dworkin's notion that there is a 'right answer' to legal disputes which objective values would amount to but the sentence ends in the middle of making it, this is obviously very unfortunate for legal theory but nevertheless suggests that this argument is what Hart would likely have done and that he would support it, HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) 306–7.

77 HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982) 151. See also, Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 475.

II.III – Which Sense of Law?

We can therefore take as a hypothetical what Dworkin's account would argue about law if one were to take it as a second-order account. To pre-empt objection and to demarcate the scope of his project Dworkin qualifies the sense of law which he is addressing, which is law in legal practice or in adjudication. As opposed to law as the whole legal practice or as describing what a legal system is. As noted in section I of this chapter Dworkin first iterated this in *LE* and later again in 'Hart's Posthumous Reply'. On the other hand, Hart's theory is dedicated to law in the sense of legal systems. As such this section is dedicated to explicating the effects of this difference of sense.

As was mentioned in chapter I Hart explicitly stated that his theory did not seek to outline or define the precise boundaries of the word 'law'.[78] According to Hart, moral iniquity in laws belonging to a system with the union of primary and secondary rules ought not be deprived the title of valid law, to do so would confuse theoretical inquiry and not accord with usage.[79] Hart then examined the issue of international law, i.e. whether international law is 'law'. After some discussion of the state of international law Hart found that it is not comprised of the union of primary and secondary rules but is merely an arrangement of primary rules between states – thus meaning there is no legal system and therefore cannot be regarded as law.[80] Hart's argument in both cases is, in effect, that law in the sense of legal systems is prior to law in the sense of practice – 'legal' practice comes from legal systems. Reading Hart's theory as meaning law in the sense of legal systems is therefore necessary, attempting to read it in the other sense of legal practice is contrary to the argument.

This is vital because when Dworkin finds his own account in danger he distinguishes himself as using law in the sense of legal practice, not legal systems, but when criticising Hart Dworkin refuses to read Hart

78 Hart, *The Concept of Law* (n.76) 17, 213.
79 ibid, 213–4.
80 ibid, 232–7.

as describing law in the sense of legal systems and not practice. In *LE* Dworkin identifies Hart and all of legal positivism as using law in this sense.[81] In another place he discusses a hypothetical case claiming that Hart's theory takes sides in it which, again, is a forced reading of Hart as making claims about practice.[82] In perhaps the clearest instance of this, Dworkin acknowledges that Hart's theory is about the structure of legal systems but then holds that it is better to understand Hart as 'agreeing with any lawyer who asserts, as a matter of law, that all valid rules are valid in virtue of a fundamental master rule'.[83] Reframing Hart's view from the point of view of the lawyer making a claim 'as a matter of law' is yet again a forced reading of Hart as making claims about practice.

But why does Dworkin maintain his sense of law over Hart's in spite of their numerous engagements? Effectively it comes to disagreement over the rule of recognition. In his postscript Hart tried to clarify that there is a misconception that the rule of recognition is meant to provide criteria for settling the correct legal answer in cases or disputes, saying rather 'its function is to determine only the general conditions which correct legal decisions must satisfy'.[84] In response to this Dworkin supposed that in America the general conditions could be the 'tests imposed by the Constitution, interpreted in the right way to interpret it'.[85] Following this Dworkin asked how then could there be general conditions if there was disagreement over the right way to interpret the Constitution?[86] Now Dworkin here has done absolutely nothing wrong in reaching this conclusion based on what Hart said, in fact it seems quite reasonable. The real question is why Hart framed the rule of recognition in this way. In light of the nature of the publication of the postscript it seems fair that an adjustment of the rule based on what

81 Dworkin, *Law's Empire* (n. 21) 33–44.
82 Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (n. 40) 3–5, 19–20, 23–4.
83 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2100–1.
84 Hart, *The Concept of Law* (n.76) 258.
85 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2118–9.
86 ibid, 2119.

Hart had said originally is appropriate. More so still since Hart said that he was restating what the rule was, not making a change to it, but basically Hart did change it and Dworkin noticed this too.[87]

When Hart constructed his account of secondary rules he stated that the rule of recognition was a remedy to the defect of uncertainty,[88] a defect which arises,

> "if doubts arise as to what the [primary] rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative."[89]

This construction of the rule of recognition as that which is taken to 'settle doubts as to what the primary rules are' is a much better and truer description of the rule than the 'general conditions' that Hart spoke of in the postscript.[90] Now the resources to quantify Dworkin's position in Hart's terms becomes much more apparent. When Dworkin suggests that there are doubts or disagreement over the 'right way' to interpret the Constitution this implies that there is no way to settle doubts as to what the legal rules, what the legal obligations, actually are. But this implication is mistaken. There clearly is a rule of recognition in operation in America, i.e. an authoritative way by which doubts are settled, and that is ultimately the US Supreme Court. Though many may disagree with decisions of that court or a decision may be controversial among the citizenry it still stands as a decision by which the doubt is settled. Even if it is a decision that is decided by one vote or hated universally by everyone else it matters not as long as it is followed, obeyed, and still regarded as the proper way to settle doubt about what the rules are. Certainly nothing in the rule of recognition requires a 'right answer' or 'right way' for the dispute to be settled, only that there is an agreed way of settling disputes.

87 ibid, 2119–20. Dickson shares this view as well, Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) Oxford J of L Studies 373.
88 Hart, *The Concept of Law* (n.76) 94.
89 ibid, 92.
90 See, ibid, 94–5

Now of course the only way the Supreme Court comes to be authoritative, as Dworkin would probably say, is because the Constitution says that it is. How can it be authoritative when the Constitution itself is in doubt? This can be formulated more precisely, the reason that the Constitution can be regarded as expressing *inter alia* a rule of recognition is because it contains a 'system of subordination' that puts the Supreme Court (roughly) at the top of the system of settling doubts as to what the rules are.[91] But when Dworkin formulates his issue as doubts about the construction of the Constitution Dworkin fails to abide by his own arguments. As mentioned briefly earlier, when addressing sceptics of communication Dworkin said that one must be careful to distinguish uncertainty from indeterminacy.[92] Clearly when formulating his concern against the 'right way' to interpret the Constitution Dworkin is conflating uncertainty with indeterminacy, for it does not follow that uncertainty about part of the Constitution unrelated to the system of settling doubts means *ipso facto* that the whole Constitution including the system of settling doubts is indeterminate or that there is disagreement about settling doubts over the rules.

Dworkin refuses to grant opponents as reading law in the sense of legal systems but this needs to happen since in order to understand 'judges in black robes' as being part of 'legal practice' one needs to understand whether they are in a 'system for settling doubts' that makes them 'judges' with authority to 'formally adjudicate' and not merely individuals declaring their personal beliefs in fancy gowns. Really Dworkin's work is about how legal disputes are settled, which obviously *requires* an agreed method of settling those disputes, i.e. the judge in the courtroom. In other words Dworkin requires that there be a rule of recognition, which he has always implied in his work via formal adjudication. Even still Dworkin's work on formal adjudication

91 Just to be clear the rule of recognition is a social rule but nothing stops it from *also* being expressed in legal sources which are socially accepted as such, the reason Hart emphasises that the rule of recognition is social is because Hart wants to avoid resemblance to Kelsen's *grundnorm* and Hart wants to be able to account for unwritten constitutions, see, ibid, 101, 292–3.

92 Dworkin, *Justice for Hedgehogs* (n. 25) 148–9.

is insufficient as a general account for it ignores many other crucial parts of other legal systems. Even Dworkin acknowledges that 'judges are not the only or most important actors in the legal drama' when he narrows his project to law in the sense of practice.[93] Nonetheless the account is inadequate in this way due to its insistence on understanding law through practice alone.

In some legal systems formal adjudication has a prominent position, as it does in the United States due to the implementation of the doctrine of the separation of powers. There the federal courts have the power to declare acts of the executive as unlawful or pieces of congressional legislation as unconstitutional. In the United Kingdom the courts have much less power than those of the United States. There the courts cannot declare the invalidity of legislation unless empowered to do so by another piece of legislation or where the maxims of equity require. It is only in recent times that the courts of the United Kingdom have successfully intervened against the actions of the government and royal prerogatives through judicial review without legislative backing.[94]

Dworkin argues interpretivism explains law because in theoretical disagreement there is nothing swaying the decision either way. This error was not lost on Hart who contended that other parts of legal practice mitigate this, giving the example that in the Swiss system there is a statute that requires where there is an absence of a provision judges must decide in accordance with customary law and where this too is lacking they must decide as the legislator would.[95] The legislator can therefore prevent theoretical disagreements of some kinds and this denies wholesale interpretivism in formal adjudication. Other clear instances exist, for instance when it comes to statutory interpretation in common law countries it is routine for there to be an act of the legislature setting out how statutes should be interpreted and this is

93 Dworkin, *Law's Empire* (n. 21) 12.
94 *R (Miller) v Prime Minister* [2019] UKSC 41.
95 Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 472.

the case in Ireland,[96] the United Kingdom,[97] Canada,[98] Australia,[99] and New Zealand,[100] among others. This legislative practice of restricting interpretation goes back at least as far the United Kingdom Interpretation Act 1889.

If one were to take Dworkin's interpretivism in theoretical disagreements as applying to all such cases or as the way judges decide all cases then it is clearly false. For if the judiciary took to developing their own methods of statutory interpretation in the jurisdictions listed contrary to the mentioned statutes then it would be a blatant disruption and challenge to the legal system. To be fair to Dworkin he did not argue this exactly, he sought to show that in some cases doubts arose seemingly in this way. But the point stands nonetheless that the legislature can pre-emptively settle those kinds of doubts in which case the decision-making process of judges cannot be acting in this interpretivist way – it would apply to an empty domain. Of course, in some of those jurisdictions constitutional challenge is possible, however the broad sweeping changes that can happen in such instances are significantly less in general than in America. None of this, in fact, *even considers or acknowledges* the civil law tradition which is quite repugnant to the idea generally of such sweeping changes, and powers, being in judicial hands – it goes against the spirit of codification espoused by that tradition. One must stand back and appreciate the irony of the state of legal theory for a moment. Under the early positivist theories of Bentham and Austin law was viewed as the explicit or tacit legislation of the legislator.[101] This was bluntly criticised by American jurists as being entirely parochial, applying only to the United Kingdom.

96 Interpretation Act 2005.
97 Interpretation Act 1978.
98 Interpretation Act 1985.
99 Acts Interpretation Act 1901.
100 Legislation Act 2019.
101 Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 463.

> "The general acceptance by English jurists of Blackstone's definition of the law, and of the irrational theory founded upon it by Bentham and Austin, and the long continued dominion established by the theory over the English mind, is one of the most curious and instructive phenomena presented in the history of mankind. Nor is it possible to estimate fully the deleterious consequences that have thus resulted. Briefly, it may be said that it has eradicated from English jurisprudence… the very notions of justice and reason, and has thus effectually isolated the English jurists from those of other ages and countries."[102]

On reverse footing, Hart points out that American legal theory attributes exaggerated importance to the point of view of the judge, including American legal positivists.[103] Take for instance Holmes' well known locution – "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[104] As such these sorts of simplistic reductions of law were something Hart sought to avoid, thus insisting on his theory being general. Besides, it has always been a caveat of the American legal system that it is quite allergic to referenda.[105] As a result of that handicap the Supreme Court there holds a massive power to set out the definitive terms of the meaning of the constitution. Thus Hart is right to say that European jurists and philosophers may find the American preoccupation with adjudication surprising, it is.[106]

All of which, though especially the points about international law, reaffirm the general point that 'every law necessarily belongs to a legal system'.[107] Therefore, it is clear that the use of law in the sense of practice is *necessarily* subordinate to law in the sense of legal system,

102 George H Smith, 'The Theory of the State' (1895) 34(148) Proceedings of the American Philosophical Society 182, 207.
103 Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 462–3.
104 OW Holmes, 'The Path of Law' (1897) 10(8) Harvard L Rev 457, 461.
105 For instance, Richard Albert, 'The World's Most Difficult Constitution to Amend?' (2022) 110 California L Rev 2005.
106 Hart, 'The New Challenge to Legal Positivism (1979)' (n.49) 462.
107 Joseph Raz, *The Concept of a Legal System* (2nd edn, Oxford UP 1980) 1.

because this shows how to identify the practice as 'legal'. Dworkin tried to use law in the sense of judicial practice to show law as a branch of politics and morality but with this sense of law being embedded within the legal system it is difficult to see this attempt as anything other than a parochial description of the American legal system. For as was discussed other legal systems cannot use interpretivism in this way and thus the subsequent argument of politics and morality can only be construed, if it is to be applied at all, as applying only to the legal systems interpretivism can apply to.

When Dworkin restricts the sense of his arguments to being about practice and not about what makes or counts as a legal system it seals the fate of the argument. Hart and Dworkin are talking about law in different senses. Furthermore, Dworkin actually is supporting the existence of the rule of recognition by documenting in such detail how individuals, both citizens and officials alike, are committed to using the courts in order to resolve disputes and settling doubts as to what the legal rules are, even in the somewhat drastic circumstances he has demonstrated over the course of his works. Now Dworkin could have tried to apply his interpretivism to the rest of legal practice, but then a definition of 'legal' practice would be required rather than working from the assumption that 'formal adjudication' is legal in the first place – an assumption which seems, somewhat ironically, to stem from shared semantic or conceptual criteria of what makes it formal or adjudication.

Obviously if one took the rule of recognition to be a rule that settles what the 'right answer' is in legal disputes then it would be an evaluative argument as Dworkin alleged all along. However Hart did not argue for such a rule and thus the arguments given in this section in particular are precisely why Hart finds it difficult to understand the exact reasons Dworkin has for rejecting his project,[108] and likewise dismisses being labelled a semantic theorist in *LE*.[109] For the sake of argument Hart takes Dworkin to be describing certain or perhaps all

108 Hart, *The Concept of Law* (n.76) 242.
109 ibid, 246–51.

judges and lawyers as settling legal propositions in this interpretive or evaluative way, holding even if true 'this would be something for the general descriptive theorist to record'.[110] This makes perfect sense, Hart is simply saying that if Dworkin is right that this is how practice functions then when describing legal systems (which is the focus of a general and descriptive theory), one would need to account for it. Thus, Hart cautions that describing interpretation or evaluation as part of legal systems does not mean one is interpreting or evaluating and no longer talking about law is the sense of legal systems – 'description may be description, even when what is described is an evaluation'.[111]

II. IV – Conclusion

Concluding this section it must be held, as Dworkin held of Hart, that Dworkin was 'wrong clearly when he was clearly wrong'.[112] In order to object to Archimedeanism, Dworkin tried to insist on interpretivism being entirely first-order and that anything other than an explanation of law in this way was not possible. But this is not possible, an argument or account cannot permit its own falsity, thus the charge of *peritrope* was made against interpretivism. Dworkin's attempt to incorporate moral realism into his account was shown to be both unsuccessful and harmful to interpretivism since it is simply natural law and thus the charge of *peritrope* is not escaped.

Even if one took interpretivism hypothetically as a second-order account advocating for understanding law in the sense of practice over law in the sense of legal systems, it cannot succeed. Here crucially the notion of the rule of recognition as supplying all the correct legal answers to disputes was dismissed in order to elucidate the proper character of the rule as agreement over the way to resolve disputes. It was thus shown that Dworkin actually has supported and endorsed the rule of recognition in all his work by showing how legal practices

110 ibid, 244.
111 ibid.
112 Dworkin, 'Hart's Posthumous Reply' (n. 39) 2096.

are capable of resolving disputes. It was also highlighted however that Dworkin's focus and insistence on discussing adjudication is perhaps misplaced and certainly as a general account of how judges handle disputes it is too narrow because it ignores how other parts of the legal system may interact with judicial functions. Notably the account does not function much if at all in civil law jurisdictions and it fails to consider other common law jurisdictions where other branches of government may have stronger legal powers relative to the judiciary.

Where does this leave Hart? Now that the ability to engage in second-order inquiry has been reclaimed and the character of the rule of recognition has been clarified this leaves Hart's account in a much better position than before. Similarly, Dworkin's challenges to elucidating law as an independent domain have dissipated. Hart's enterprise of general and descriptive legal theory seems secure. But issues still lurk and remain to be explored. For instance the exact relationship between the rule of recognition and the way in which legal practice operates, particularly in judicial decision making, remains to be fully elucidated and this was conceded by Hart himself.[113] In his work Greenberg examines this aspect of legal theory alleging that Hart's theory cannot remain descriptive. Thus the next chapter seeks to explore this link between secondary rules comprising legal systems and the features of practice elucidated by Greenberg.

113 Hart, *The Concept of Law* (n.76) 272.

Chapter III – The Province of Legal Systems Determined

This chapter adopts the same structure as the previous chapter. Section I is an outline of Greenberg's argument and its relevance for Hart's theory. Section II critiques the application of the practice theory to Hart and Greenberg's use of it, which is crucial in rendering the critique of Hart. Section III develops criticisms regarding key parts of the argument, notably in Greenberg's exclusion of legal systems from analysis and the 'rational-relational requirement'.

III.I – Greenberg's View

Originally in an essay titled 'How Facts Make Law' (hereafter "*HFML*") Greenberg began his project with the inquiry of what makes legal content the way it is.[114] This was followed by a criticism from Neta,[115] which Greenberg responded to in another essay clarifying some of his views from *HFML* and adopting some changes in terminology.[116] Then there was a significant follow up of the argument in 'How Facts Make Law II' (hereafter "*HMFL II*") with more terminological changes.[117]

114 Mark Greenberg, 'How Facts Make Law' (2004) 10 L Theory 157.

115 Ram Neta, 'On the Normative Significance of Normative Brute Facts' (2004) 10 L Theory 199.

116 Mark Greenberg, 'On Practices and the Law' (2006) 12 L Theory 113.

117 Mark Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford UP 2008).

After this Himma made a critique of the argument in *HFML*,[118] to which Greenberg also responded making some minor clarifications.[119] It would be longwinded and redundant to outline the relevant parts of the argument from one work to the next and so this section will outline only the most recent state of the argument with the most recent terminology. Trickier still however is that these arguments were written before much of the literature developed on the metaphysical notions of 'grounding' and 'supervenience' so in places it is somewhat unclear what the actual extent of the argument is.[120]

Greenberg begins by setting out a couple of premises which are referred back to in order to direct his argument.

1. In a legal system under consideration there is a substantial body of determinate legal content, where 'determinate' is taken in a metaphysical sense that there is a fact of the matter as to what the law requires – there need not be consensus about this and there may be no way of explaining why it is this way.[121] In this respect 'metaphysical determination can be brute'.[122]
2. 'Law practices' partly determine the content of the law, this is not exhaustive but generally includes votes of the legislature, judicial decisions, etc – law practices generally consist of ordinary empirical facts.[123]
3. Law practices do not include facts about normative or legal content in them, thus consisting of 'descriptive facts'.[124] In contrast 'norm-

118 Kenneth Einar Himma, 'How Much Can a Theory of Law Tell Us about the Nature of Morality: A Response to Mark Greenberg's *How Facts Make Law*' (2012) 40 Direito, Estado e Sociedade 132.

119 Mark Greenberg, '*How Facts Make Law* and the Nature of Moral Facts' (2012) 40 Direito, Estado e Sociedade 165.

120 These terms are outlined in this paper along with the point about Greenberg, Samuele Chivlovi and George Pavlakos, 'Law Determination as Grounding: A Common Grounding Framework for Jurisprudence' (2019) 25 L Theory 53, 56–61.

121 Greenberg, 'How Facts Make Law' (n. 114) 162.

122 ibid, 164.

123 ibid, 162–3; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 267.

124 Greenberg, 'How Facts Make Law' (n. 114) 167.

ative facts' are facts about what is good, bad, right, wrong, etc.[125] (Important to bear in mind is that this usage is different than how the word normative is usually used since it includes *inter alia* evaluative facts which provide reasons for action.[126])

Greenberg *expressly rejects* the view expressed in the first premise that there could simply be a bare or brute metaphysical determination that makes legal content the way it is, rather Greenberg argues against this holding a '*rational determination*' is involved in what makes the legal content the way it is.[127] Here the argument can be refined; if the way the practices determined the content of the law was explained simply as a modal relation then it seems to only show a supervening relationship but if 'rational determination' is also added to the explanation of what grounds legal content then the relation comes much closer to a grounded one, therefore there is a 'rational-relation requirement' present in understanding what makes the legal content the way it is. This requirement holds that the determining relation between the 'determinants of legal content' and the legal content, i.e. that which grounds the legal content, is reason based – where a reason is a consideration that makes an explanandum intelligible.[128] Importantly Greenberg stresses that it is not the legal content itself that must be rational but the determinants of the legal content making it that way, i.e. it must be intelligible why or how a determinant has the effect it does on the legal content.[129]

125 ibid, 157; Greenberg, 'On Practices and the Law' (n. 116) 114. References to normative in this chapter should be construed in Greenberg's sense when the discussion relates to Greenberg.

126 Greenberg, 'On Practices and the Law' (n. 116) 114–5, 120.

127 ibid, 116; Greenberg, 'How Facts Make Law' (n. 114) 163–4, 171–3.

128 Greenberg, 'How Facts Make Law' (n. 114) 164; Greenberg, 'On Practices and the Law' (n. 116) 116; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 270.

129 Greenberg, 'How Facts Make Law' (n. 114) 165; Greenberg, 'On Practices and the Law' (n. 116) 117, 132; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 270; Greenberg, '*How Facts Make Law* and the Nature of Moral Facts' (n. 119) 167.

Quite crucially it is outlined that 'rational determination' need not be normative.[130] Still however it is not enough for the practices to determine the content of the law intelligibly, there would still be various possible mappings as to what the content of the law could be – some other variable, *X*, must be added in order to fully understand what grounds legal content.[131] Another important point Greenberg makes is that the way that nonlegal content bears on the legal content is not a plain or simple mechanical conversion.[132] Greenberg proceeds to make a vital clarification about the scope of his argument here, which is that it does not address the necessary conditions for something to be a legal system nor is it concerned with related arguments between it and practice.

> "If there is a legal system in which there are no determinate legal requirements, my argument would not apply to it. Similarly, if there is a legal system in which law practices… do not play a role in determining the content of the law, my argument would not apply to it. For example, perhaps there could be a legal system in which the content of the law is determined exclusively by the content of morality or exclusively by divine will. In this paper, I do not address questions of the necessary conditions for something's counting as a legal system. It might be argued that a substantial body of legal requirements that are determined by practices of various officials or institutions is a necessary condition for the existence of a legal system, but I do not intend to pursue such an argument."[133]

What Greenberg is looking for is 'a model' for how law practices can determine the content of the law – importantly 'a model's being correct in a given legal system is what makes the corresponding theory of interpretation true'.[134] Though each legal system has its own 'correct model' for that system, which determines,

130 ibid.
131 Greenberg, 'How Facts Make Law' (n. 114) 166.
132 ibid, 177–8.
133 ibid, 173.
134 ibid, 178.

> "what counts as a law practice; which aspects of law practices are relevant to the content of the law; and how different relevant aspects combine to determine the content of the law, including how conflicts between relevant aspects are resolved."[135]

Greenberg, rightly, rejects the idea that the law practices could determine the correct model,[136] this is clearly so since 'surely law cannot just mean what officials do or courts will do since it takes a law to make an official or court'.[137] With that aside, Greenberg argues that the reason for needing a model is because one can be mistaken about what is legally required, i.e. they mistake the correct model for a 'bent model'.[138] Speaking before *Roe v Wade*[139] was overturned, Greenberg gives a hypothetical example of a judge in a US state court denying a woman a right to abortion, clearly, Greenberg argues, this hypothetical judge is using a bent model but how is it that one can know or differentiate the bent model from the correct one?[140] The deciding factor must be *X* and Greenberg proposes that *X* is normative facts to the extent that they are compatible with the operation of the legal system.[141] Thus, normative facts independent of descriptive facts are held to be a necessary part of what grounds legal content contrary to legal positivism.

In *HFML II* Greenberg sought directly to critique Hart's theory in light of his arguments. This will be important to understand for it will be deeply contested in the sections to come. Thus Greenberg constructs Hart in the following way. For Hart's theory a model of how the law practices determine the content of the law is correct in virtue of the rule of recognition specifying that model, and what makes it the case that the rule of recognition exists is an application of Hart's 'practice theory

135 ibid, 179.
136 ibid, 179–81.
137 The phrase is Hart's, HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) 2.
138 Mark Greenberg, 'How Facts Make Law' (n. 114) 182.
139 *Roe v Wade* 410 U.S. 113 (1973).
140 Mark Greenberg, 'How Facts Make Law' (n. 114) 182–4.
141 ibid, 193–198; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 288–90; Greenberg, '*How Facts Make Law* and the Nature of Moral Facts' (n. 119) 166.

of rules'.[142] A 'Hartian disposition' is where a social rule is accepted, at least by the officials, and since it is accepted individuals will criticise or apply other social pressure towards others who fail to follow it and likewise will regard such actions as justified.[143] An example of a social rule Greenberg cites from Hart is that one must take their cap off in church.[144] However, Greenberg cites the example that Hart gave of the rule of recognition as 'what the Queen enacts in Parliament is law', holding that if one were to take 'such formulations of the rule of recognition seriously it would not fit into Hart's practice theory since that theory has nothing to say about rules that do not specify a course of action'.[145]

Thus according to Greenberg 'Hart simply proceeds on the assumption that the Hartian dispositions for a rule of recognition are what they would be if the rule were specified in terms of what standards an official is to apply in dealing with matters that come before them in an official capacity.[146] This warrants reformulating the rule of recognition to 'what the Queen in Parliament enacts is to be applied in deciding matters that come before an official'.[147] Following this it is held that Hartian dispositions cannot satisfy the rational-relation requirement because they are not binding on individuals nor do they specify reasons for actions, nor do they do so intelligibly.[148] Basically Greenberg is arguing that Hartian dispositions are insufficient because they do not, or cannot, successfully aid in determining the correct model.[149] How Greenberg argues this in detail will not be relevant for the forthcoming discussion so it can simply be accepted for the sake of argument.

142 Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 271.
143 ibid, 271–2.
144 ibid, 272.
145 ibid.
146 ibid.
147 ibid.
148 ibid, 273.
149 ibid, 274–89.

III.II – Refuting the Practice Theory's View of Hart

For the sake of Hart's theory and legal theory in general an argument must be made against the practice theory. The practice theory is currently so widely regarded as canon in legal theory, even other Hartian defenders tend to concede the problem and try to work around it, thus passing over it here would make the rest of the enterprises of this essay excessively difficult even if they are regarded as alternative arguments.[150] Moreover it follows that if the practice theory can be disputed in its application to Hart that Hart's theory would be defensible from Greenberg's argument since the alleged inadequacy of Hart's position is that it fails on account of the practice theory. The general argument of this section is that the practice theory fails to capture the difference between primary and secondary rules and is therefore an improper representation of Hart.

Raz is generally attributed with terming and constructing 'Hart's practice theory of rules' even though Hart never mentioned it in the main corpus of *CL*.[151] In *Practical Reasons and Norms* Raz was trying to understand the connection between rules and reasons for action.[152] In the process of this inquiry Raz regarded Hart as providing the most successful analysis of rules as practices, it is this analysis that

150 See for instance the following and additionally the relevant authors cited therein, Greenberg, 'On Practices and the Law' (n. 116) 126; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117); Jules Coleman, *The Practice of Principle* (Oxford UP 2001); Scott Shapiro, 'Law, Plans, and Practical Reason' (2002) 8 L Theory 387; Veronica Rodriguez-Blanco, 'From Shared Agency to the Normativity of Law: Shapiro's and Coleman's Defence to Hart's Practice Theory of Rules Reconsidered' (2009) 28(1) L and Philosophy 59; Jeffrey Kaplan, 'In Defense of Hart's Supposedly Refuted Theory of Rules' (2021) 34(4) Ratio Juris 331.

151 For instance, Greenberg, 'On Practices and the Law' (n. 116) 126; Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) Oxford J of L Studies 373, 382; Rodriguez-Blanco, 'From Shared Agency to the Normativity of Law: Shapiro's and Coleman's Defence to Hart's Practice Theory of Rules Reconsidered' (n. 150) 1–2; Kaplan, 'In Defense of Hart's Supposedly Refuted Theory of Rules' (n. 150) 331, 337.

152 Joseph Raz, *Practical Reason and Norms* (2nd edn, first published 1975, Oxford UP 1999) 1.

Raz termed the 'practice theory'.[153] This analysis is formulated in the following way. A rule that x should φ when conditions C obtain exists in society S if, and only if, the following conditions obtain:

> '(1) Most x's who are members of S regularly φ when C. In other words, the rule is regularly complied with by members of the society to whom it applies. (2) In most cases when an x does not φ when C, they encounter some critical reaction from other members of S. In other words deviation from the rule are the occasion for a critical reaction. (3) Such critical reactions do not themselves attract further criticism from members of S. Those who manifest critical reactions to deviations from the rule are not in turn subjected to criticism for doing so by members of S. (4) Members of S use expressions such as 'an x ought to φ when C' and 'it is a rule that an x ought to φ when C' to justify their own actions and to justify demands made of others or criticism of their behaviour.'[154]

The first defect Raz holds that the practice theory suffers from is that it does not explain rules that are not practices.[155] Here Raz argues that 'a legal rule is not legal if it is not part of a legal system likewise a social rule is not social if it is not practised by a society, but it may still be a rule'. Putting the point briefly, if it is possible to consider that there are rules even if they are not practised, then the explanation of what a rule is cannot be explained by the practice theory. Here Raz mentions moral rules as examples of rules which individuals, perhaps even as personal rules, may consider to exist even if they do not believe them to be valid or practised.

The second defect is said to be the failure to distinguish between practised rules and accepted reasons.[156] Here Raz cites Warnock's cricket example where one is a spectator at a cricket match. One would notice that after six balls have been bowled from one end the players

153 ibid, 51.
154 ibid, 52–3.
155 ibid, 53–5.
156 ibid, 55–6.

will move around, after which another six balls are bowled and so on, deviations from this are observed to be met with criticism. One would probably also notice that when a slow bowler is replaced with a fast one that some of the players stationed close will be moved further away, one would also notice as before that a failure to do this will be met with adverse criticism. A person would be right, according to the argument, to conclude there is a rule in the first case but not in the second. The practice theory however treats these as being the same.

The third and final defect of the practice theory is that it deprives rules of their normative character.[157] By condition (4) Raz holds that stating 'x ought to φ' or 'it is a rule x ought to φ' can be both to describe a practice but also more generally that one should do something. Saying 'it is a rule' presupposes a practice. Stating that there is a rule is therefore irrelevant to the normative import of the statement. Thus, these sorts of statements are statements that there is a reason, not reasons in themselves. This is therefore irrelevant for practical reasoning according to Raz and that means the practice theory must be rejected.

On the first defect. When Austin determined the province of jurisprudence he outlined that an inquiry about law is not concerned with anything and everything called 'law' such as scientific laws or 'the laws of fashion' but rather to distinguish 'positive law' from similar phenomena.[158] Kelsen qualified this holding that legal theory is an investigation of law as a specific social technique which has to be distinguished from other social phenomena.[159] Similarly, Hart held that his inquiry could be considered a work in descriptive sociology and clearly discussed law in a social context.[160] The sort of rule Raz is concerned with in this first defect is said to be one which may not even be social, in which case not finding a discussion of it by Hart should be unsurprising given

157 ibid, 56–8.

158 John Austin, *The Province of Jurisprudence Determined* (John Murray (London) 1832) 1–5.

159 Hans Kelsen, *General Theory of Law & State* (Originally published 1949, Routledge 2017) 15; Hans Kelsen, 'Law, State and Justice in the Pure Theory of Law' (1948) 57(3) Yale L J 377, 377–8.

160 Hart, *The Concept of Law* (n. 137) Preface, 1, 9–10, Ch VI.

it was not within the scope of his inquiry or even of legal theory in general. Similarly it signals that Hart was not trying to qualify precisely why an individual accepts a social or personal rule, of course Hart gives various examples here and there but generally the issue is left open since it is beyond his inquiry. Dickson shares the view that Hart was not attempting to provide reasons why individuals accept certain social or legal rules but largely worked from the position that *if* accepted as such those rules entail normative effects, which Hart sought to use to explain legal systems which were the subject of his inquiry.[161]

On the second defect. This defect is widely regarded as being decisive in dismissing Hart's account and is therefore deserving of a detailed treatment and criticism. Hart outlined this precise issue when discussing the persistent questions of legal theory saying, 'the account of the mandatory rule has soon to be abandoned, this account says that a rule exists only when a group of people or most of them behave 'as a rule' in a specified similar way in certain kinds of circumstances'.[162] Hart continues, saying that there may be 'mere convergence of behaviour of a social group yet no rule requiring it'.[163] Even here at this early stage in *CL* Hart qualifies 'mere convergences or habits' as that which the deviation from will not be met with punishment or even reproof, social rules however are likely to result in some sort of reproof if deviated from, and when legal rules are deviated from the consequence is 'definite and officially organised' which the non-legal rule specifically lacks.[164]

It is held in the cricket example that there is a rule requiring players to move after six balls are bowled but there is not any rule requiring the players to move further away when a fast bowler swaps with a slow one. This conclusion is imprecise and can be formulated better using

161 Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (n. 151) 379–82, 396, 398–9.
162 Hart, *The Concept of Law* (n. 137) 9.
163 ibid.
164 ibid, 10.

Hart's distinctions which can be applied *mutatis mutandis*.[165] There is no 'official rule of the game' requiring the players to move to certain positions depending on how fast the ball will be bowled, but it is a 'social rule of the game' that the players do so. Conversely, it is an 'official rule of the game' that the players move after six balls are bowled. How can the cricket spectator differentiate between the various behaviours in order to determine what the official rules are? Here Hart provides an answer. If the spectator observes that no criticism is made against players for bowling the ball with their left or right hand then they can conclude such rules are mere convergencies. If there is criticism made against the players for a particular act, *who* is making the criticism? Is it just amongst their teammates? In this case the rule is very likely to be a social one that has been deviated from, meaning it only applies to that subset of the overall group, i.e. that team. If there is criticism directed against a player by the umpire serving the function of an 'official of the game', and possibly the players of either team, then this is very likely to be an 'official rule of the game' that has been deviated from.

How, however, could the spectator figure out from observation whether the person serving as the 'official of the game' is actually one? Here Hart again provides an answer. If any of the players have a dispute about what to do or what should happen in a particular scenario and they appeal to that person to settle the doubt then that person is very likely to be an 'official of the game'. More importantly, if a player attempts to deviate from the instruction of that same person and suffers a significant consequence – they could be sent off and denied permission to play, or if the refusal is widespread amongst the players they may even cancel the game – in this case again it shows that the person is an official. What the spectator can observe from such occurrences is the existence of a 'rule of recognition of the game' where an authoritative figure is regarded as settling conclusively doubts as to what the 'official rules of the game' are. If they are not regarded

165 In what follows Hart's points about converging behaviour, social rules, official rules, and primary and secondary rules are adapted in order to show how the example has underappreciated Hart's contribution.

as settling the doubts then *ex hypothesi* they are not an 'official of the game'. Perhaps in certain instances the officials or simply the players themselves may refer to what is agreed to be an 'official manuscript' stating what the 'official rules of the game' are, here again there is an occurrence which shows the existence of a 'rule of recognition of the game'. If there are no instances which suggest the existence of a 'rule of recognition of the game' then *ex hypothesi* it appears there are no 'official rules of the game', though there may be 'social rules of the game'.

Raz's formulation of Hart's view completely fails to distinguish between converging behaviour, social rules, and official (or legal) rules which Hart expressly drew attention towards. In premises (1)–(4) Raz has only formulated what Hart would call a social rule, which can only be primary rules. It is the case in fact that Hart is eager to solve the very problems that Raz accuses him of suffering from. As was discussed in chapter II.III the rule of recognition, properly construed, is a rule on which it is agreed that it settles the doubt about what primary rules are. Raz's formulation is one of primary rules and social rules only, completely ignoring Hart's seminal contribution of secondary rules. As Dickson points out, Hart did not go into detail specifying the exact reasons there are for agreeing to or for following the rule of recognition, only holding, or giving basic examples that morality need not be a reason for agreeing to follow the rule.[166] Note that in the example it would be beside the point to ask why the players or officials play or agree to play cricket in the first place.

On the third defect. Here the main thing Raz takes issue with is that according to condition (4) a person could say 'it is a rule x ought to φ', presupposing in the process that the rule is practised. This premise is far too literal an interpretation of Hart because Raz is applying this to all cases, Hart likely would not say this about his own theory. This is so since Hart argued extensively that language is 'open-textured' and used this specifically to respond to 'rule sceptics', thus it would not be

166 Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (n. 151) 379–82, 396, 398–9.

hard to imagine that one person saying 'it is a rule x ought to φ' or 'x ought to φ' *could* be regarded as instances of the open texture of language.[167] Raz ignores this feature of Hart's theory and offers nothing to dissuade from using such arguments, rather Raz seems to rely on the open texture of language in order to facilitate his objection. Even still, suppose that one did use the expression 'it is a rule x ought to φ' in the way that Raz argues, it would not be much of a stretch to consider that an interlocutor might respond 'do you mean it is a rule enforced by the police or that people generally follow?' Ordinary citizens in general are capable of asking for basic clarifications like this, thus it seems far-fetched to regard Hart as considering that people are so simplistic that they do not ever differentiate one kind of rule from another, which is implied by condition (4).[168]

Furthermore, in *Essays on Bentham* Hart considered, among other things, the arguments offered by Raz on the 'practice theory'. Here Hart said that he did not share the cognitive interpretation of duty advanced by Raz and others, 'far better adapted to the legal case is a non-cognitivist theory'.[169] According to this theory of duty, statements asserting others have a duty do not refer to actions which they have a categorical reason to do but to actions which are due or owed from those 'having the duty or which may be properly demanded or extracted from them'.[170] Hart gives the following example, where a judge decides a case declaring that an individual has an obligation under a statute enacted by the legislature the judge will be making a 'committed statement' since they are holding in common with other judges of the system a rule of recognition according to which legislative enactments are identified as law.[171] The judge who accepts this rule of recognition,

167 Hart, *The Concept of Law* (n. 137) Ch VII.

168 Though it is the sort of simplistic scenario Hart has in mind when constructing primary rules from a hypothetical 'primitive society', but again this only reinforces the point that Raz was imprecise in constructing Hart.

169 HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982) 159.

170 ibid, 160.

171 ibid.

and the deriving subordinate laws in common with other judges of the system, constitutes a reason for them personally to conform to the laws, and to treat this as standards as to what is rightly or wrongly legally required from them and thus determine what demands are properly made from the laws generally.[172] Hart concludes this brief argument by saying that he does not think fleshing it out in an acceptable manner would involve abandoning these essentials.[173]

Here Hart is arguing in the same manner as has been argued in the foregoing of this section, that the secondary rules, especially the rule of recognition, form an important component of explaining the interactions among the officials, and between them and the citizens. Here, as in the original formulation of the rule of recognition, Hart does not elaborate on the reasons why the judges or officials have accepted the particular rule of recognition, what matters is that they do in fact accept it, whatever the reason. Many understand the rule of recognition as giving a reason for action, however this was never Hart's original formulation of the rule and it is argued that no other formulations of the rule should be entertained. This was pointed out in chapter II.III in relation to Hart's postscript and Dickson has issued a similar caution against the discrepancy Hart introduced into the rule of recognition in the postscript.[174]

Greenberg's formulation of 'Hart's practice theory' is quite interesting in relation to this discussion. Recall that Greenberg cited Hart's example of the rule of recognition as 'what the Queen in Parliament enacts is law' and said such formulations should not be taken seriously in order to yield Hart's practice theory. What Greenberg is noticing here is what has been argued; that Hart did not actually consider the rule of recognition to be a reason for acting in itself. To elaborate, even if the rule of recognition is accepted, that would still not mean that a specific course of action is entailed by it alone – those are what primary rules are. Primary rules are *ex hypothesi* rules of obligation, i.e. rules

172 ibid.
173 ibid.
174 Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (n. 151).

specifying a course of action.[175] The rule of recognition is what settles the doubt if there is disagreement about the primary rules which do specify a course of action.[176] For example, if the rule of recognition is 'what Rex I says is law' but Rex I in fact has yet to say anything, i.e. to specify any obligations, then for the time being there is no law. Thus Hart holds that a legal system exists where there is the union of primary and secondary rules.[177] As Greenberg, rightly, is showing, taking only secondary rules would not specify any course of action, hence it logically follows that law is the union of primary and secondary rules but not just secondary rules.

It should therefore be regarded that interpreting the rule of recognition as directly entailing reasons for acting is unsuccessful, since it does not logically follow based on the construction of the primary and secondary rules *ex hypothesi* that they should be interpreted in the way that the practice theory attempts to do. Additionally Hart reiterated this position in rejecting the 'cognitivist' approach to understanding rule acceptance. Now the question that arises is if Hart is not to be understood in accordance with the practice theory, and therefore that Greenberg's argument is not a direct counter-argument, then what is the relationship between Hart and Greenberg? Does Greenberg succeed in making an indirect argument? This question occupies the final section of this chapter.

III.III – Between Models and Legal Systems

To begin this section it will provisionally be assumed that it is correct to talk about models and rational determination in the way Greenberg uses these terms, ultimately with the goal of showing that it is misleading to speak in such ways about law or about what makes legal content the way it is. The argument is that when the rational-relation requirement is applied to legal practices they still cannot account for the

175 Hart, *The Concept of Law* (n. 137) 92.
176 ibid, 94–5, 100.
177 ibid, 97–99

grounding of legal content, thus Greenberg offers normative facts as a viable addition to the explanation of what grounds legal content. Thus if it can be shown that practices plus the rational-relation requirement can account for the grounding of legal content in this way, or that even adding normative facts into the equation does not aid in explaining the grounding of legal content, then a counter-example will have been adduced. Rather than try to discuss these elements in the abstract a proper examination of real legal instruments would be more fruitful for explicating what is at issue.

After the Irish war for independence Ireland separated from the United Kingdom and became a dominion of the British Empire in 1922 as the Irish Free State. In 1937 Ireland adopted a new Constitution which is still in force, and which signified the creation of an independent Irish legal system. In 1948 Ireland declared itself a Republic and became independent from the Empire. Article 50 of the Constitution provides that laws which were in force in the Irish Free State prior to the Constitution coming into force shall continue to have the same force and effect, unless they are incompatible with the Constitution or are repealed or amended by legislative enactments. The practice of the legislature in both the Free State and in the Republic means that most of the legal rules established at common law by the courts in England and Wales prior to 1937 remain in force in Ireland, there being no statutes enacted in relation to them. Thus having such similar legal regimes decisions in the English and Welsh courts are highly persuasive and often followed in Irish courts. In tort law for instance there is hardly any divergence between the two regimes. But there is one very explicit point of divergence in the law surrounding nervous shock that poses a significant explanatory challenge for Greenberg.

Following the Hillsborough disaster in 1989 in England a number of families of the victims sued for nervous shock – a type of negligence claim where the negligence causes a psychiatric illness (or 'illness of the mind' according to older precedents). In *Alcock v Chief Constable of*

South Yorkshire Police[178] the House of Lords held that none of the victims, as secondary victims not involved in the incident, had sufficiently proximate relationships – meaning that they had to have sufficiently close relationships to the victims (e.g., parent-child), and have close proximity in space and time to witness the incident or its immediate aftermath. Further it was held viewing the incident through mediums such as television or radio did not count as witnessing, and hours after the fact did not count as being immediate.[179] Influential in that determination was the dicta of Lord Wilberforce in the earlier case of *McLoughlin v O'Brian*[180] where the spatial and temporal restriction were introduced, but no specific limits were set out. In the Irish High Court shortly after the *Alcock* decision Denham J considered *McLoughlin* but not *Alcock* in *Mullaly v Bus Éireann*,[181] holding that even though a number of hours had passed the plaintiff had witnessed the immediate aftermath of her husband and sons having been gruesomely injured in a traffic accident, she could still be successful under a claim of nervous shock. Later in *Kelly v Hennessy*[182] the Irish Supreme Court set down five criteria necessary for a successful claim of nervous shock in Ireland but did not include a distinction between primary and secondary victims among them, Denham J (then a Justice of the Supreme Court) explicitly held that the fact that plaintiff found out about the accident from a phone call and then witnessed the aftermath did not prevent her from satisfying the proximity criteria. Finally, the Irish Court of Appeal recently in *Sheehan v Bus Éireann*[183] after considering these developments in Irish and English law held that "the primary/secondary classification developed by the English courts… have not, at least to date, been adopted into the law of this jurisdiction."[184]

178 [1991] UKHL 5, [1992] 1 AC 310.
179 ibid.
180 [1983] 1 AC 410.
181 [1992] ILRM 722 (HC).
182 [1995] IESC 8, [1995] 3 IR 253.
183 [2022] IECA 28.
184 ibid, judgment of Noonan J, para 68.

To return to Greenberg. Despite having ostensibly the same legal content and legal determinates prior to the Hillsborough disaster, i.e., the same set of precedents and related principles in relation to the law of torts, the legal content of nervous shock law in Ireland and England has diverged. Such that a secondary victim in England who is informed via phone or some other non-physical media of an accident and takes some hours to arrive at the aftermath cannot succeed in a claim of nervous shock and has no legal remedies, but in Ireland such a person does.

An apparent objection here might be to say that since these are two different legal systems the law practices are in fact different, thus leading to a divergence in legal content. But this objection would be misplaced since the point of departure has been identified and the question posited as to why it has happened, to simply assert 'the legal practices are different' entirely ignores *why* they are different, it ignores Greenberg's inquiry: what makes the legal content the way it is. Especially since in this special case they were not always different but became so.[185] To be faithful to the spirit of Greenberg's argument the proper path is to try to argue that 'normative facts' provide the answer for this divergence, thus explaining what makes the legal content the way it is. In this example then where or what are the normative facts? To simply state that 'normative facts' are the best candidates to explain the divergence is insufficient because *there must be an intelligible reason as to why these particular facts obtain* in order to uphold the rational-relation requirement. No obvious normative facts present themselves here as candidates for this explanatory position.

There is a far better explanatory alternative which could supply the tools for more fruitful analysis, which is theories of argumentation.

185 If the argument were to be followed that the practices are different and not the same up until post *McLoughlin* as is argued here, then could it not be supposed that in every case where there is different legal content that legal practices *must* be different so as to ground it? If this were true Greenberg's argument has failed since there is no place for normative facts in the explanation of differing legal content. For the sake of argument, if nothing else, this line of thought should not be followed.

Since the legal practices in the example are argumentative as are some of the examples Greenberg gives, it is plausible that argumentative practices with a whole or partial basis in formal logic, which is not normative *per se*, could explain how legal content obtains from legal practices. This exemplifies Greenberg's rational relational requirement by reinforcing the notion that legal practices and content are reason based to the detriment of normative facts. As Greenberg said, 'even with a rational-relation requirement there would be various possible mappings as to what the legal content could be', would it not be equally plausible then for divergence in legal content to be explained by this rather than normative facts?

MacCormick for instance holds that arguments support a given way to interpret something and that there are certain kinds of arguments 'that legal systems characteristically deploy in the justification of interpretations where these are themselves reasons for decisions.'[186] MacCormick offers the following typology of the main sorts of arguments that possess this quality; 'linguistic arguments' in which interpretations are favoured based on linguistic context (e.g. ordinary and technical usage), 'systematic arguments' of which there are a few kinds but which in general are made with the overall coherence of the legal system in mind, and finally 'teleological and deontological arguments' which are two basic forms of practical argument but which "are restricted by the institutional setting".[187] MacCormick also points out that positive law may resolve conflicts between these types of arguments, through argument, citing a maxim of English law, 'the Golden Rule', where the ordinary reading of a statute should be taken as its meaning unless it would entail absurd results.[188] A more prominent theory in this domain

186 Neil MacCormick, 'Argumentation and Interpretation in Law' (1993) 6(1) Ratio Juris 16, 20.

187 ibid, 21–6.

188 ibid, 26–9. This is substantially the same point made in the last chapter against Dworkin that the legal system may affect what the law is, here it is stated in an argumentative context, which would only be applicable to legal systems which possess this quality.

is Alexy's theory of legal argumentation though it is beyond the scope of present purposes to summarise it here.[189]

Another interesting author in this connection is Sartor who has made serious strides in formalising legal argumentation, holding 'we must come to consider the legal system as an argumentation framework, that is, as a repertory of material to be used in the struggle of competing arguments and meta-arguments.'[190] Another significant account that has numerous examples applying itself to legal cases and statutes is the 'logocratic method' offered by Brewer which is a theory of argumentation.[191] According to this method the various premises of legal argument can be a mixture of different modes of formal argumentation (deduction, induction, abduction, and analogy), which can be formally represented when one realises that legal argument is often enthymematic, i.e. some of the premises are not expressed.[192] According to these theories of argument the use of particular interpretive methods arises due to their argumentative merit, and this is entailed by the fact that the practices are argumentative. Thus in contrast to Greenberg arguing that the model is what determines the interpretive method which the practices use, it would seem it is practices that may determine the method of interpretation in virtue of their argumentative nature.

---

189 Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Originally published 1978, Ruth Adler and Neil MacCormick trs, Oxford UP 2009).

190 Giovanni Sartor, 'A Formal Model of Legal Argumentation' (1994) 7(2) Ratio Juris 177, 200. On Sartor see the preceding article generally and see also his partly formal account of statutory interpretation, Giovanni Sartor, 'Interpretation, Argumentation, and the Determinacy of Law' (2023) 36(3) Ratio Juris 214.

191 Scott Brewer, 'Logocratic Method and the Analysis of Arguments in Evidence' (2011) 10 L, Probability and Risk 175; Jack Weinstein, Norman Abrams, Scott Brewer and Daniel S Medwed, *Evidence: Cases and Materials* (10th edn, Foundation Press 2017) 10–24; Scott Brewer, 'Interactive Virtue and Vice in Systems of Arguments: A Logocratic Analysis' (2020) 28 Artificial Intelligence and L 151.

192 Brewer, 'Logocratic Method and the Analysis of Arguments in Evidence' (n. 191) 176–80; Weinstein, Abrams, Brewer and Medwed, *Evidence: Cases and Materials* (n. 191) 14–24; Brewer, 'Interactive Virtue and Vice in Systems of Arguments: A Logocratic Analysis' (n. 191) 152–69.

Hart's theory is perfectly compatible with these theories of argument since the rule of recognition is *ex hypothesi* the way in which doubts about primary rules (or obligations) are settled, that this is done argumentatively is permissible – there are links to these ideas in Hart's work on the open texture of language. Sartor's considering of the legal system as 'an argumentative framework' seems to follow from the rule of recognition being a marker of what makes a legal system a legal system. Important to remember is that these points about argumentation do not apply to all legal systems but namely only to those under present consideration, which is common law legal systems, though civil law systems appear to possess similar argumentative processes. Such argumentative processes are not however necessarily present in a legal system like that in the examples of Rex I.

Nonetheless, the diverging rules of nervous shock in Ireland and England could be better explained by way of argumentative differences, or that the arguments are the same but the facts that apply differ. These are perfectly intelligible differences explained without any reference to normative facts about what is right or wrong in a moral or evaluative sense. Similarly, if this were ignored there are no intelligible normative facts that could explain this difference in legal content. It could be supposed that a staunch Greenberg defender might argue that the reason for the argumentative practices to operate in the way they do is because of the model making it so but there are two significant flaws to this response. The first is that the diverging legal content in the nervous shock example is explainable entirely in terms of descriptive facts about what the relevant officials said and did. The second is that if the model does indeed make the practices this way, which are core parts of the legal system of Ireland and the United Kingdom, then it is also a claim about legal systems, but legal systems were explicitly excluded from analysis.

At this point it can no longer be assumed that to talk of models in the way they have been spoken of is acceptable, rather it must be questioned. This point of departure arises from the two flaws that were just drawn. Especially, since Greenberg begins his analysis by working

from the position of a particular legal system but without qualifying what a 'legal system' is, specifically excluding it as being a concern to address. Greenberg's basic argument is that in order to find the 'correct model', i.e. the model that grounds what the legal content is, normative facts about what is right and wrong are the best candidates. Recall that a model explains, among other things, what the law practices are and how disputes between 'aspects' of different practices and legal content are resolved. But this is what the rule of recognition does, as was observed in the preceding section, if the judges share a rule of recognition that legislative enactments are law then this will outweigh or surpass any other obligations and is regarded as decisively determining what the obligations are. It could therefore be supposed that Greenberg's model and Hart's rule of recognition are ostensibly the same thing – an explanation of the conditions, agreements, or understandings between a society of individuals, or at least the officials, for settling the doubt as to what obligations they owe.

It could further be supposed that Greenberg is arguing on one side that the best underlying motivations or reasons that explain acceptance of such an agreement are normative ones about what is right and wrong, whereas Hart is arguing that it need not be.[193] On this construction however a quandary arises if the model and rule of recognition are treated as being the same, this is that Greenberg's model explicitly ignores the legal system but Hart held that the rule of recognition was at the core of the legal system. To explicate this difference, suppose there was a society comprised mostly of monarchists who believe that it is right that the monarchy should lead them, holding 'whatever Rex I says is law'. Here a model for determining the legal practices has come about in Greenberg's normative sense, but also a legal system via a rule of recognition in Hart's sense.[194] Thus, there is an important interplay between the legal system's existence and Greenberg's 'correct model'

193 On Hart see, Hart, *The Concept of Law* (n. 137) 185–6, 250.

194 If it is denied that a model would allow the normative belief of the hypothetical monarchists then it appears that the account denies such legal systems can exist, which would be a much more significant issue for the account to address.

which was somewhat acknowledged by Greenberg when saying that normative considerations must be 'in advance of consideration of the practices of the legal system'.[195] Greenberg's phrasing however suggests that Greenberg has in mind that normative considerations will determine, or guide in an intelligible way, how legal content follows from law practices. This is an implication of the *Roe v Wade* example, which further implies that legal practices should tend towards the same result, i.e. those that are regarded as morally correct or seen as right and proper. A similar point as this was addressed by Greenberg who said that nothing in the argument showed that moral facts and such were real but if all such facts were denied and it was not possible to conceive how the law practices intelligibly contributed to the legal content then the argument would lend support to the existence of moral facts.[196]

There is therefore a significant absence in Greenberg's thought which is that instead of normative considerations comprising *X* such that *X* along with practices contribute to the legal content in virtue of *X* determining the correct model and thus grounding the legal content, it could simply be that *X* is an all-things-considered conclusion about what the legal system can or cannot do. This is supported by the discussion of theories of argumentation and the explanation of divergence in the nervous shock example, particularly relevant is MacCormick's point that legal arguments may be invoked in virtue of the nature of the legal system. The example given of a bent model is that a hypothetical state court judge reads *Roe* such that it denies a woman a right to abortion, which is a non-starter as a model for what makes the legal content the way it is, according to Greenberg, 'these sorts of unacceptable models are unacceptable because there are standards independent of practices that determine that some sorts of factors are irrelevant to the contributions made by practices to legal content.'[197] Greenberg then seeks to offer normative facts as a way to explain what makes the legal

195 Mark Greenberg, 'How Facts Make Law' (n. 114) 193.
196 Greenberg, '*How Facts Make Law* and the Nature of Moral Facts' (n. 119) 173–4.
197 Mark Greenberg, 'How Facts Make Law' (n. 114) 184.

content the way it is, i.e. what makes this hypothetical ruling seem absurd.

If, however, one considers the hypothetical case from the point of view of the legal system, as suggested by theories of argumentation, then the argument would be something along the lines of what follows. The courts in America operate by a principle of *stare decisis* (as do the courts of all common law jurisdictions) whereby judgments of the superior courts must be upheld by the lower courts, for federal law this principle applies in the same way such that decisions of the federal courts are binding on the state courts which are of inferior standing on such matters. Hence a hypothetical decision reading *Roe v Wade* such that a right to abortion is denied, would be a violation of the principle of *stare decisis*, which is a crucial part of the American legal system via the operation of its courts. Nothing about this argument is normative yet it perfectly explains why the content is the way it is, and it does so intelligibly, further it explains the absurdity of the hypothetical argument. The worry for Greenberg should be clear, if an understanding of legal systems can fulfil this explanatory role then it seems that the exclusion of such considerations from the inquiry *ab initio* would, unsurprisingly, lead to an absence of determinacy which was provided by understanding the legal system.

As was pointed out in the previous chapter Hart argues that in order to say 'there is a law', or to the same effect that 'a law exists', one needs to know if there is a legal system in operation with the ability to make, enforce, and change the laws, since 'every law necessarily comes from and belongs to a legal system'. To say similarly that one has a legal right is to say that some provision is a law which gives one the right, which in turn is supported in its existence by the legal system. By excluding legal systems from examination Greenberg's argument is reliant on something else supplying the explanatory role of what a legal system does, which seems to be where a model comes into play. Either that or the analysis means to contest that 'every law necessarily belongs to a legal system', this alternative appears dubious however in light of Greenberg's exclusion of legal systems from analysis. Overall, the

exclusion of legal systems from analysis appears therefore to be entirely detrimental to the argument.

The overlap of Greenberg and Hart seems quite clear when it is said 'models come at different levels of generality, more specific ones include the metaphysical counterparts of theories of constitutional, statutory, and common-law interpretation.'[198] To come straight to the point whichever of these theories of interpretation is used in a particular legal system depends solely on that legal system rather than the model. In the previous chapter it was shown that in many common law jurisdictions there are statutes of the legislature setting out what interpretive methods are to be employed by the courts. Now even if one falls back on constitutional interpretation as exclusive to the courts this will not do, for in the United Kingdom there is no written constitution and there is a doctrine of 'Parliamentary Supremacy'. Greenberg asks what makes such a model the 'correct one' but this is *suggestio falsi*, since for the 'law practices' to be taken as practices with legal effects they have to be socially accepted as such, asking what makes this in turn correct is an unnecessary reduplication of the simple fact that they are socially approved to have that capacity.[199]

Even though the foregoing objections are all important to understand, there is something even more fundamental about Greenberg's challenge that is deeply misplaced. Greenberg's motivation is ultimately to say that morality or other evaluative reasons, conceived as normative reasons for actions, guides in large part what the legal content of a particular legal system is. But Hart already conceded that this may be true. As was said at length in objecting to the practice theory's view of Hart, nothing in Hart's theory provides an answer as to *why* a society accepts the secondary rules that they do. Hart thus concedes that in large part the underlying motivations for this may be moral.

198 Mark Greenberg, 'How Facts Make Law' (n. 114) 179.

199 If the argument sounds familiar it may be because it appears to be analogous to when Hart argued that Kelsen's *Grundnorm* was an unnecessary reduplication of the fact that a rule is obeyed, Greenberg's argument seems to suffer the same sort of problem, see, Hart, *The Concept of Law* (n. 137) 292–3.

> "Of course it is true that many judges and many ordinary citizens in most legal systems believe and often assert that they have a moral obligation to conform to law as such, and unless this were true and generally believed to be true, legal systems might be much less stable than they are."[200]

This should be unsurprising since Hart said himself that 'it was explicitly acknowledged that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called soft positivism'.[201] It would of course be difficult to understand the way in which Hart can be said to be a soft or inclusive positivist if one followed the mistaken understanding of Hart propagated by the practice theory. But with that misunderstanding dissipated it should be clear that much of what Greenberg argues against has already been conceded.

III.IV – Conclusion

After outlining Greenberg's account in its most updated form section II moved to address 'Hart's practice theory' and to discuss Greenberg's use of it. An examination of Raz's formulation of the practice theory showed that this was imprecise and failed to take proper regard of Hart's distinction of primary and secondary rules but also of mere convergences of behaviour, social rules, and official or legal rules. Greenberg's first reading of Hart tentatively supports this view of Hart, however Greenberg considered that it was more important to render the practice theory. This move makes sense since, as was acknowledged earlier, even other Hartian defenders tend to concede this view of Hart and try to work around it. Here however it was rejected for it was untrue to Hart's original formulation in *CL* and restatement of that view in *Essays on Bentham*.

200 Hart, *Essays on Betham* (n. 169) 160–1.
201 Hart, *The Concept of Law* (n. 137) 250.

Section III went on then to consider if Greenberg's position posed an indirect argument against Hart. At this point theories of argumentation showed significantly more promise in explaining the diverging legal content like that of the nervous shock example than the correct model and normative facts. This led to questioning the interplay present between an analysis of legal systems and the correct model. Most importantly it was held that though there are similarities between the rule of recognition and the correct model, the correct model does not account in any way for the legal system as being capable of impacting the content of the law. Likewise the absence of analysis on legal systems has shown to be detrimental to the account and criticism against Hart. Thus on many fronts Hart's account survives Greenberg's critique.

Chapter IV – A Defence of Definition in Legal Theory

This final substantive chapter will follow the same structure of the previous two chapters. The motivation for this section comes as a response to Nye's article titled 'A Critique of the Concept-Nature Nexus in Joseph Raz's Methodology',[202] which criticises the methods used to make arguments about law based on conceptual understanding of its nature. Section I will be an outline of Nye's argument in line with present considerations, since Nye's argument is directed at Raz most of the construction of Raz will be ignored and the argument will be construed such that the challenge to Hart's methodology can be understood. The second section will, as before, be a challenge to the argument, with a particular focus on the construction and form of the argument. Then section III will outline the nature of law that Hart sought to outline and to elaborate on it. Generally Nye points out and cites the philosophical background that is being drawn from and so in this section there will be some discussion of it.

IV.I – Attack on the Concept-Nature Nexus

Nye begins by setting out Raz's view that is to be the subject of discussion. Understanding the nature of law is to understand necessary truths about law.[203] A concept of law need not be set out in terms of necessary and sufficient conditions but it should produce propositions that are

202 Hillary Nye, 'A Critique of the Concept-Nature Nexus in Joseph Raz's Methodology' (2017) 37(1) Oxford J of L Studies 48.

203 ibid, 50.

necessary truths.[204] The nature of something cannot change, it is universal, not contingent – concepts of law may change but its nature does not.[205] In this way different concepts can apply to the same thing, thus explaining a concept is not coextensive with explaining somethings nature.[206] Importantly concepts are possessed by individuals, making them products of culture and history.[207] In this connection, 'talk of *the* concept of law is talk of *our* concept of law'.[208] Self-understanding is a relevant component to these ideas, 'studying the nature of law is a study of our self-understanding – a major task of legal theory is to advance understanding of society by helping us understand how people understand themselves'.[209]

Nye points out however that when discussing authority Raz uses a 'normative-explanatory' kind of argument, where what is sought after is not the concept of authority that seeks to come closer to the nature of authority, but rather a normative argument arguing for a particular kind of authority in debates about authority and this will be explanatory in the sense that it explains core or important features of the concept.[210] Nye rejects using this kind of argument for law in general because the question is whether law is a normative concept, to use this kind of argument would be question begging.[211] Nye holds this is problematic for Raz however since Raz holds that 'law necessarily claims authority', meaning that 'authority must be part of the nature of law' but this argument is not normative nor normative-explanatory, rather it appears to be conceptual.[212] Thus, Nye understands Raz's overall position to be that to do legal philosophy is to uncover truths about law's nature, and this can be achieved by analysing 'our concept'

204 ibid.
205 ibid, 51–3.
206 ibid, 52.
207 ibid.
208 ibid.
209 ibid, 53–4.
210 ibid, 54–5.
211 ibid, 55.
212 ibid.

of law.[213] The notion that one can examine the concept of something to understand the nature of the thing itself Nye terms the 'concept-nature nexus'.[214] Nye seeks to argue against such a nexus in legal philosophy. To do this three interpretations of how this nexus could be possible are explored and rejected.

First Nye considers 'immodest conceptual' argument as a method of making sense of the concept-nature nexus, immodest arguments propose a fundamental account of the world whereas modest conceptual accounts are based on a fundamental account – this is based on the work of Jackson.[215] Nye follows Jackson and dismisses this as viable since it gives ideas or intuitions too big a place in determining the nature of the world.[216] In further support of this argument Nye posits the following.[217] How can different concepts, e.g. the Roman's concept of law and ours, be convergent upon the same nature? Since not just any account comprises law's nature an account of why one does and one does not is needed, but it would seem prior knowledge of law's nature is needed to answer this. Since this pluralistic concept view is implausible Nye considers if a singular concept view might yield better luck, however it would seem 'an extraordinary stroke of luck' if our particular concept coincided with law's nature and it implies that for the Romans to do conceptual analysis properly they would have to come up with a concept that fits future institutions.

Secondly, Nye considers what is called the 'spotlight view'. This is where it is accepted that 'our concepts' shed light on the nature of the subject, in this case law.[218] This is in light of Raz's commitment to self-understanding. This fails, argues Nye, because concepts can shift,

213 ibid, 49.
214 ibid.
215 ibid, 59–61. See also, Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford UP 1998) 43–44; Frank Jackson, 'Conceptual Analysis and the Coercion Thesis' (2021) 45 Revus <https://doi.org/10.4000/revus.7594> accessed 18 August 2023.
216 ibid.
217 Nye, 'A Critique of the Concept-Nature Nexus in Joseph Raz's Methodology' (n. 202) 61–2.
218 ibid, 63.

our spotlight can set its view elsewhere, thus there is no way to know whether the spotlight accurately tracks law's fixed nature and if there is any necessity it must be a conceptual one in view of this difficulty.[219] Additionally, if different theorists have their spotlights fixed in different places then there is no way to resolve disagreement.[220] This however is not the main objection, which is epistemic access: 'how could any concept provide access to the nature of the thing?'[221] The main issue Nye has is this 'epistemic gap'. As such, disagreement under the immodest and spotlight views are peripheral issues.

Thirdly, Nye considers whether our concept of law at least partly determines its nature.[222] Such that the nature of law is based on what people think, again in view of self-understanding. There are some significant arguments against this view but the simplest and most effective one again is disagreement. Even if it was taken that certain individuals self-understanding was more important than others, e.g. officials, still nothing remedies against disagreement among those individuals. Thus Nye concludes 'someone might be able to show that there is a fourth (or fifth, or *n*th) interpretation that makes good sense of the nexus between our concept of law and the very nature of the thing, I do not deny this possibility, though I am sceptical about its likelihood.'[223] Nye then considers if slimming down the scope of the analysis could succeed.

Nye thus considers a 'concept only' approach where the interest is in our concepts and how they work, how the world is categorised and framed.[224] This is like Jackson's modest analysis claims Nye, but foundational terms (i.e. the world around us) are used to analyse claims about our concepts, not the thing itself.[225] However, even if this were done there would still be no way to resolve any disagreements about

219 ibid.
220 ibid, 64.
221 ibid, 65.
222 ibid, 65–7.
223 ibid, 68.
224 ibid, 69.
225 ibid.

our concepts.[226] Thus Nye considers a 'nature only' approach pointing to Marmor. According to Nye this position fails because ultimately intuitions are still needed to perform thought experiments about whether particular features are necessary for the existence of a thing or not, and this is the same data that informs our concepts.[227] In the absence of any interpretation making sense of the concept-nature nexus Nye concludes that the endeavour should be given up.[228]

As regards to a challenge to Hart there are substantial differences between Hart and Raz that make things easier for Hart. The first is that Hart made no claim to authority like Raz did, therefore there is no commitment to any sort of normative-explanatory argument and no issues resulting therefrom. Secondly, Hart made no claim that self-understanding was relevant in any way to descriptive and general theories of law. It does figure somewhat in the internal point of view, but that makes it an empirically contingent feature made relevant by the theory – it depends on whether particular individuals actually care about self-understanding. Generally, as was observed in the previous chapters, Hart does not hold that belief in his theory is necessary, thus Hart observes a division between first and second order in his work. Raz and other Razian theorists in general hold that an account of law must make sense of the reasons individuals have for following the law,[229] these theorists must explain for themselves how it is that

226 ibid, 71.
227 ibid, 72–3.
228 ibid, 74.
229 Joseph Raz, *Practical Reason and Norms* (2nd edn, first published 1975, Oxford UP 1999) 149, 170; Joseph Raz, *The Authority of Law* (2nd edn, Oxford UP 2009) 296. Possibly the most avid defender of Raz is his student Julie Dickson, who has in general followed Hart and Raz in defending legal positivism's conceptual or analytical methodology, similarly her work on Hart supports some of the contentions in this essay however on this point Dickson sides with more with Raz in her latest work holding that theories of law need to give greater explanatory weight to self-understanding than Hart gave them, it is beyond the scope of this essay to engage with this point but I completely disagree, partly because of Nye's argument on this but also because I do not think it *needs* to be a consideration of theories of law – to that effect consider the discussion of Hart's search for

self-understanding, normative belief in obedience to law, and the like enhance inquiry about the nature or concept of law.

That being said there are still significant challenges to Hart's enterprise. The first major issue is immodest conceptual analysis. If it is accepted that legal philosophy cannot propose fundamental accounts of the world but must be based on them then it appears Hart has a serious problem, like Dworkin said, 'Hart's theory was original not old hat', Hart's account would certainly fall foul of this constraint on conceptual analysis. For instance, Hart's construction of primary and secondary rules of recognition, change and adjudication are almost certainly immodest forms of conceptual analysis. Another significant question is the epistemic gap between concepts and the nature of a thing, this is a very important point about Hart that needs to be examined as it relates heavily to Hart's pursuit of general and descriptive legal theory.

IV.II – A Critique of the Sceptical-Nature Nexus in Nye's Methodology

In later work Nye argues for eliminativism in legal philosophy, there is no scope in this essay to discuss that particular view now however the vestiges of it appear in present considerations.[230] Nye repeatedly states that she is sceptical about the possibility of examining law from a conceptual perspective and has produced the preceding arguments in order to support that position, for the sake of convenience this can be referred to as the 'sceptical-nature nexus' – which is scepticism that concepts can reveal any information about the nature of law. The most significant of the arguments which supports this is Jackson's claims about conceptual analysis.

---

definition in the following sections, see, Julie Dickson, *Elucidating Law* (Oxford UP 2022) 112, 118.

230 Hilary Nye, 'The One-System View and Dworkin's anti-Archimedean Eliminativism' (2021) 40 L and Philosophy 247; Hilary Nye, 'Does Law 'Exist'? Eliminativism in Legal Philosophy' (2022) 15(1) Washington U Jurisprudence Rev 29.

In essence, Jackson's claim as imported by Nye is that by using conceptual analysis in the way the Raz and Hart do in the immodest form is 'surely too easy a way to make exciting discoveries about the world we live in'.[231] This quasi-sceptical attitude towards conceptual analysis can be defended against by taking some inspiration from the discussion of Dworkin in chapter II.[232] When Dworkin invoked *peritrope* against sceptics it was done in a very strategic way. Dworkin considered the external sceptic of an enterprise who holds that the entire enterprise or inquiry is not actually about anything at all, if at this point the argument maintains that the enterprise is wrong or it stakes a position about it, then it is not external scepticism at all but internal scepticism otherwise it would turn on itself – it must remain entirely indifferent towards the enterprise to be external scepticism, in which case it is completely uninformative and can be ignored for that reason. The point of this recollection is to say that Nye is an internal sceptic of legal philosophy or legal theory broadly. This is so since Nye's desire is for theorists to clarify how the concept-nature nexus can actually provide knowledge about law. Thus when Nye invokes the critique of immodest conceptual analysis it must be considered whether Nye's argument, as a contribution to legal theory, is itself immodest.[233]

In this regard the argument is clearly immodest. It proposes a fundamental account of the world, namely a world in which certain things cannot be known or known in a certain way. Or to put it in Nye's phrasing, if intuitions are being given too big a role in understanding the world then surely this intuition in itself has been given too big a place in understanding the world. Similarly, nothing about the argument is based on the world around us that would make it a modest argument, rather the argument seems entirely to stem from a philosophy of epistemic doubting. This kind of argument has been dealt with by

231 Jackson, 'Conceptual Analysis and the Coercion Thesis' (n. 215) para 16.

232 The following discussion draws from, Ronald Dworkin, *Law's Empire* (Hart Publishing 1986) 76–86; Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP 2011) Chs 3, 5.

233 This argument could probably be applied to Jackson's work in general but that is not the concern here, only Nye's use of Jackson's idea.

Descartes who took doubt to the extreme in order to show that it could not constitute the world or the mind (and thus the perception of the world).[234] Since there is no viable way of construing the argument in a modest way, the argument must be held to be immodest argument and self-defeating since Nye dismissed this form of argument.

Much more difficult to address in the context of Hart is the epistemic gap that Nye takes issue with. It is generally considered that Hart and other philosophers of his time did not make a rigid distinction between the concept of something and its nature, rather they used these interchangeably such that the explanation of a concept was also an explanation of whatever they are a concept of.[235] It would be premature however to hold simply due to these differences in terminology that philosophers of that generation did not pay the distinction any consideration, on the contrary many were quite wise to the fact that there must be some connection between the explanans and the explanandum. Hart and Dworkin frequently express this as the concept of a thing and various conceptions of it.[236] Dworkin is perhaps a special use case however since Dworkin regularly distinguishes between various different kinds or sorts of concepts. Hart's position is quite nuanced.

Hart is better read as intimating that the 'nature of law', 'definition of law' and 'the concept of law' are a search for one and the same thing,

234 This again is another famous use of the principle of *peritrope*, see for instance, Gary Hatfield, 'René Descartes' *The Stanford Encyclopedia of Philosophy* (Summer edn 2018) Ch 3 <https://plato.stanford.edu/archives/sum2018/entries/descartes/> accessed 19 August 2023; Tarek R Dika, 'Descartes' Method' *The Stanford Encyclopedia of Philosophy* (Spring edn 2023) Ch 9 <https://plato.stanford.edu/archives/spr2023/entries/descartes-method/> accessed 19 August 2023.

235 Joseph Raz, 'Can There Be a Theory of Law' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) 325; Dickson, *Elucidating Law* (n. 229) 120–2.

236 See, HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) 160–1, 241, 246; Dworkin, *Law's Empire* (n. 232) 71–4; Ronald Dworkin, 'Hart's Postscript and the Character of Political Philosophy' (2004) 22(1) Oxford J of L Studies 1; Ronald Dworkin, 'Hart's Posthumous Reply' (2017) 130(8) Harvard L Rev 2096, 2107, 2124; Dworkin, *Justice for Hedgehogs* (n. 232) Ch 8.

that is explanans of law (where obviously law is the explanandum).[237] To do this it is absolutely essential to phrase the explanandum in the proper way and not simply ask 'what is law?' or rephrase and ask substantially the same in 'what is the nature of law?'[238] Basically it is argued that a more expansive kind of definition than the simple *per genus et differentiam* is required for law.[239] This point about phrasing the question appropriately is shared by Dworkin.[240] Instead Hart asks 'how is law different or related to; orders backed by threats, and moral obligation?' and 'what is a rule and to what extent is law an affair of rules?'[241] For Hart *if* law has a nature it is to the extent which these inquiries can be answered and hence that law can be defined using this method of definition, thus its nature will be according to this definition.

The reason Hart does not call his book or indeed any of his claims 'the nature of law' is because Hart held that the purpose of *CL* was not to provide such a complete definition of law but to elucidate the character of the municipal legal system and the relationship of law to other social phenomena including morality, in order to advance legal theory.[242] Here Hart says, 'for this reason they are treated as the central features of the concept of law'.[243] This usage would accord with occasionally referring to his and Dworkin's accounts as conceptions of law, meaning that they do not satisfy providing a full definition needed

237 Hart says as much when discussing the search for a definition of law and specifically uses the phrase 'nature' of law, see, Hart, *The Concept of Law* (n. 236) 6–17.

238 ibid; HLA Hart, 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (Oxford UP 1983); HLA Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (1957) 105(7) U of Pennsylvania L Rev 953, 958–67.

239 This is argued for other phenomena too which Hart mentions in some of his discussions, see ibid. See this entry for a contemporary overview, Anil Gupta, 'Definitions' *The Stanford Encyclopedia of Philosophy* (Winter edn 2021) <https://plato.stanford.edu/archives/win2021/entries/definitions/> accessed 22 August 2023.

240 See, Dworkin, *Justice for Hedgehogs* (n.232) 40–1.

241 Hart, *The Concept of Law* (n. 236) 13.

242 ibid, 17.

243 ibid.

for calling something the 'nature of law' but rather a partial definition, thus not the concept or nature of law but a conception. Hart's reason for referring to 'the concept of law' is simply because he holds these elements as essential to the 'nature of law'. This difference of usage coheres with context.[244]

Nye's criticism has little to say directly about this search for the definition or nature of law. It has even less to say about this sort of definition over others. Implicitly the sceptical-nature nexus asks, 'how can it be known that the definition accurately describes the nature of something?' Hart answered this objection posed by the sceptical-nature nexus long ago, saying:

> "The question 'Is analysis concerned with words or with things?' incorporates a most misleading dichotomy. Perhaps its misleading character comes out in the following analogy. Suppose a man to be occupied in focusing through a telescope on a battleship lying in the harbor some distance away. A friend comes up to him and says, 'Are you concerned with the image in your glass or with the ship?' Plainly (if well advised) the other would answer 'Both. I am endeavoring to align the image in the glass with the battleship in order to see it better.' It seems to me that similarly in pursuing analytical inquiries we seek to sharpen our awareness of what we talk about when we use our language. There is no clarification of concepts which can fail to increase our understanding of the world to which we apply them… for in elucidating any concept we inevitably draw attention to differences and similarities between the type of phenomenon to which we apply the concept and other phenomena."[245]

Here there is an important point about the endeavour to provide a definition of law in the way Hart advocates. The point is not necessarily

244 Obviously, Dworkin disagrees with Hart about these sorts of questions and their answers but notice there is no criticism from either of them about any of this terminology.

245 Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (n. 238) 967.

to provide a successful definition in one go, but to consistently make progress to that end. Whether a definition is successful or not is clearly not as mysterious a thing as Nye makes it out to be, for in showing that this method of definition was apt for describing law Hart showed how to criticise insufficient definitions. This is clearly shown in Hart's critique of the command theory which is widely regarded as decisive. Likewise there are many philosophical devices which are employed regularly in this spirit, i.e. there is general agreement about their use. For instance, the Occam's Razor principle – roughly stated the idea that the explanation with the fewest entities or assumptions is preferred. In the same fashion, the search for definition need not be restricted to that which individuals are cognisant or aware of either. Hart gives many examples like Augustine's quote about time – 'if you ask me what time is, I cannot say' – or the example of a person who knows their way from A to B but cannot draw a map showing how to get from A to B or explain it to another.[246] These intuitions about things may turn out to be illusory, but it is precisely by trying to define such intuitions it can be known whether they are in fact illusory or whether to the contrary they contain substance.[247] According to Nye disagreement about intuitions, or concepts, or the words indicative thereof, is the end of the matter and there is no clear way to move past this disagreement. Hart objected unequivocally, saying,

> "it seems to me that here, when presented with such divergences [in usage], our attitude should be not 'This is chaos; this is the limit of analysis and its utility; nothing more is to be said.' On the contrary, more often it will be the case that we are faced with divergent usage because the whole conceptual background with which the divergent speaker or writer approaches the subject makes him, as it were, see the classification of phenomena differently from the way the standard user sees it. We have, therefore, in analytical jurisprudence, at this point an important and exciting task to bring

246 For instance, Hart, *The Concept of Law* (n. 236) 13–4.

247 See especially, Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (n. 238) 968–9.

> out the motives for divergence from a standard and with it the whole difference in the structure of thought that leads to divergent classification… It would be just dogmatic to take the view *a priori* that no explanation of the abnormal phenomenon could be found or was worth a search."[248]

Note that the internal and external point of view is an analytic tool that Hart fashions with this sort of endeavour in mind, for being able to examine these usages as an external observer admits significant potential for understanding diverging classifications, certainly without it analytic theory would be hampered, perhaps detrimentally so.[249] In this way an Archimedean second-order way of constructing definitions is permitted. Suppose however, that even after all of this one persists, arguing that disagreement between two or more alternatives which explain these diverging usages cannot be resolved. Here Hart advocated that a reasoned choice between the alternatives (for a concept of law) will be because one is superior in that it will enhance theoretical inquiry, or that it will advance moral deliberations or both.[250]

A couple of final remarks to finish this section. Nye's other remaining arguments for making sense of the concept-nature nexus need not be considered because they were factoring self-understanding into them to accommodate Raz. According to Hart's search for a definition, self-understandings are only a part of the object of study, whose degree of relevance needs to be determined in each case – in accordance with an investigation into diverging usages. This is so since it could be determined that one or more usages out of a set under consideration may be found to be part of a different phenomenon, for Hart morality and moral judgments would be such an example since Hart holds morality to be a different but related phenomenon to law. For the same reason

248 ibid, 970–1.
249 Hart, *The Concept of Law* (n. 236) 88–9.
250 ibid, 209.

Hart would consider Nye's other arguments against the concept-nature nexus to be some sort of *suggestio falsi*.[251]

IV.III – Defining Law, the *n*th Interpretation

> "The onus, then, is on those who do think that metaphysical theories of the essential structure of the universe can be constructed from our conceptual schemes to put forward a plausible account of how that methodology can get us there."[252]

This final substantive section seeks to show by example how it is that Hart's sort of definition actually operates, and how it can reveal information about law. An important clarification to make immediately is that Hart is clearly assuming or taking for granted some kind of realism, this is obvious from his battleship example cited in the previous section because there the battleship is being looked at through a telescope, Hart then draws an analogy of the battleship as law and the telescope as words. Thus words, or language, are used to examine phenomena in the world. Philosophers have argued since ancient times, and still do, over whether this sort of realism is true or right. In chapter I it was said that these debates would be avoided, thus in order to give the inquiry appropriate boundaries it will simply be assumed that; (1) the world exists, (2) it is possible to know, at least some things, about the world, and (3) words, language, concepts, and the like are, at least on some occasions, *about* the world but not always *part* of it. These assumptions should not be controversial since Nye follows them too – Nye's objections are epistemic, not metaphysical. Import-

251 To be clear this is not necessarily because of Nye but rather that Nye tries to accommodate Raz, the problem is Raz. This silent conflict of definition between Hart and Raz is deserving of more attention in legal theory, for Raz and indeed others like Dickson often cite Hart as supporting their claims about analysis or the nature of law but as is observed by considering Hart's search for definition alongside those views they are not entirely compatible.

252 Nye, 'A Critique of the Concept-Nature Nexus in Joseph Raz's Methodology' (n. 202) 68, fn 97.

antly these assumptions are characteristic of legal theory generally.[253] Nye's objection, in essence, is about the extent to which premise (3) is used in legal theory, which obviously requires assuming the first two premises – none of which should be surprising since Nye is an internal sceptic of legal theory. Two things therefore will be worthwhile to explore, the first is that definition can cover classes or categories of things, and the second will be to show that Nye's epistemic gap is a sort of *suggestio falsi* exactly of the kind Hart warned against.

Nye argues that according to the concept-nature nexus for the Romans to do conceptual analysis properly, or to understand law's nature, their concept of law would have to have included scope for the institutions of modern times.[254] Nye follows this ruling out the idea that various concepts may be a way of getting to the same nature because theorists regularly argue that some concepts of law are mistaken, but this would require a prior understanding of law's nature in order to make that determination.[255] There is however much more to this than is made out to be. Recall that in defending analysis Hart said that 'there is no clarification of concepts which can fail to *increase our understanding* of the world to which we apply them', here Hart's argument is that clarifying concepts is abductive, or the inference to best explanation, which is continually improved over time. Thus, one can agree that one explanation is superior to another and still think that the superior account does not fully explain the relevant phenomenon. For example, one can, as many have and still do, accept Hart's critique of the command theory and thus deny that the command theory elucidates the nature of law, but still nonetheless deny that Hart's account

253 To say that no words or concepts are about the world would be self-defeating and generally a sort of sceptical proposition ignored by legal theory. Just to be clear, premise (3) admits it is possible that words, languages, and concepts are both about the world and part of it at all times – Platonic realism, natural law and the like are therefore not ruled out by this premise.

254 Nye, 'A Critique of the Concept-Nature Nexus in Joseph Raz's Methodology' (n. 202) 61.

255 ibid, fn 80.

has elucidated law.[256] It is clearly not the case to say that one needs a full understanding of the nature of law to make the determination that one concept may be about the nature of law while another is not – to maintain this argument is to say that legal theory cannot make abductive determinations between various explananda.[257]

If abductive reasoning can be employed, as it regularly is in analytic theory, then there is nothing against designating 'the concept of law' as that which currently best explains law. But what then of 'our concepts' of law? To this question it is clear that to some degree the concept of law must decide which of 'our concepts' are included in virtue of being the best explanation, and the rest is ruled out by having no relevance to the explanandum. As mentioned in chapter III, the focus of legal theory is law in a social context or to rephrase, the explanandum of legal theory is law in a social sense. Therefore concepts about the "laws of physics" and so on are not related to the explanandum of legal theory because they have no social elements or effects – therefore they cannot be conceived of as explanans to the explanandum of law in a social sense. Nothing about this particular argument is an explanans of the nature of law but rather is implied by the explanandum, thus simply asking as Nye does 'how can we know if our concepts shed light on the nature of law?' is problematic, what Nye should be asking is 'how is it known if something is sufficient to qualify as an explanans of law (in a social sense), and even if it does qualify what makes it the best explanation?'[258] This was somewhat addressed already in saying that abduction has an important role to play in this process, i.e. between

256 For instance, Lon L Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71(4) Harvard L Rev 630, 638–9.

257 Additionally, if this argument is followed then what of Nye? Are not many of Nye's arguments abductive in themselves? If this were to be argued by Nye it would be self-defeating.

258 Perhaps in the future Nye might formulate a better argument addressed not just at the explanans of law but taken together with the construction of the explanandum, this seems a more productive line of inquiry for Nye than the present, or at least a more productive consideration that could be made within the present inquiry.

various conflicting explananda abductive reasoning is conducted in order to decide which are included and which are not.

How can more than one concept of a thing converge on the same nature? This question seems to encourage a most misleading idea of what it means for something to have a nature. Is not the purpose or function of any definition of any kind to be a way for referring to general classes of things and to elucidate their nature in this way? Or to construct systems of classification so that many things may be differentiated from each other and thus explicate their characteristics? Take for example the differences between various kinds of animals. By differentiating them understanding of them can be deepened, for instance by constructing claims about them and analysing whether those claims are true or false. To this effect it is paradigmatic of almost all mammals that they engage in playful behaviour – which is another reason to distinguish them from other things like reptiles which do not exhibit this behaviour.[259] Here there is a claim which is true of a whole class of creatures, which are identifiable by having certain physical traits, namely that they secrete milk for their offspring, are warm-blooded vertebrates, etc. To follow on and ask as Nye does 'how do we know that our concept provides access to the nature of a thing?' seems very much absurd. The classification of these things is observed and classified *based on* those observations or what is already known, to say that something additional about them provides access to knowing about them is plainly *suggestio falsi*.

It is true that ordinarily definition is associated with *a priori* conditions of some sort, and that definition or true statements of natural kinds are usually based on *a posteriori* conditions. Such that the back and forth here, and in Hart's work, between these positions may give cause for concern about the nature of the definitions used. However, it seems beyond doubt, considering Hart's battleship example and

259 For instance, Stephen M Siviy, 'Neurobiological substrates of play behavior: glimpses into the structure and function of mammalian playfulness' in Marc Bekoff and John A Buyers (eds), *Animal Play: Evolutionary, Comparative and Ecological Perspectives* (Cambridge UP 2009).

writings on the inaptness of *per genus et differentiam* definitions for defining law, that Hart, and perhaps Bentham, are advocating for use of what contemporary philosophers call 'real definitions'.[260] These definitions are situated in grounding terminology such that the definition expresses what grounds the essence of the item in question.[261] Thus the fact that a natural kind has what a metaphysician might call 'a natural essence' is something which must be included in the definition of a thing, it *is not* predicated or entailed by it – the definition does not make it that way.

What then of law? It seems strange when put in this context to find this recurring objection to the nature of law, that various concepts cannot converge on the same nature – for law it is often argued to the same effect that the concept of law is parochial applying only to certain legal systems or jurisdictions and is not universal or general.[262] Definition is of course not restricted to natural kinds but open to many different kinds of phenomena since 'the essence' of a thing is expressed in the definition, not entailed, provided, or predicated by it. Law, as positivists have been saying since Austin (or even Hobbes), is a social phenomenon, or as Dworkin says the core of law is normative, thus law is not like natural kinds nor should it be taken as analogous to them for the kind of definition required by each is different (as Hart regularly expressed).[263]

---

260 See especially, Gideon Rosen, 'Real Definition' (2015) 56(3) Analytic Philosophy 189; Gideon Rosen, 'Metaphysical Dependence: Grounding and Reduction' in Bob Hale and Aviv Hoffman (eds), *Modality: Metaphysics, Logic, and Epistemology* (Oxford UP 2010). See also, Kit Fine, 'Guide to Ground' in Fabrice Correia and Benjamin Schneider (eds), *Metaphysical Grounding: Understanding the Structure of Reality* (Cambridge UP 2012); Anil Gupta, 'Definitions' (n. 239).

261 ibid.

262 See this discussion, Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (n. 238) 968–72. See also, Raz, 'Can There Be a Theory of Law' (n. 235) 331–4.

263 For instance Hart says, 'legal notions however fundamental can be elucidated by methods properly adapted to their special character', Hart, 'Definition and Theory in Jurisprudence' (n. 238) 21. Note this search for definition is the same thing Dickson calls 'the philosophy of legal philosophy', see, Dickson, *Elucidating Law* (n. 229) 1–3.

Therefore when it is expressed by Hart that legal systems are the union of primary and secondary rules one should not think they would actually find an entity that *is* primary rules and secondary rules but rather other entities that are instances of them, since that is what it means for it to be defined. To do otherwise would be the same as trying to find a creature 'mammal' even though this is a definition applicable to various animals, it is not itself an animal. Clearly in this regard the definition of a mammal applies to the various animals denoted by it even if a large number of people do not know about the classification but only of specific animals to which it would apply. Likewise, Hart's classification of legal system, and law as obtaining from legal systems, still maintains even if the individuals within that system do not necessarily think of it as such. This is another significant factor underlying the argument in chapters II and III, and especially in the argument against the practice theory. Due to these considerations it can be said that the Romans could have engaged in conceptual analysis or in defining phenomena such that they captured the nature of law without knowing about contemporary institutions – or that theorists now may capture future institutions. This is clearly so since it is possible to understand that a creature is a mammal or a reptile even if it is newly discovered.

Much has been said here defending definitions in legal theory but limitations must be acknowledged as well. Some definitions are subject to revision where they are found to be inadequate. Scientific definitions are a pertinent example, like how the definition of a mammal had to be revised upon discovery of the platypus, much to controversy at the time. Definitions in legal theory may therefore also be subject to revision with sufficient cause. Debates about the nature of the European Union or the current state of international law seem to be leading contenders in this regard.[264] This should only be done however if it actually

264 Baker held that Hart's advocating that legal concepts are both irreducible to other concepts and defeasible (and so subject to revision) was in error since both ideas were at odds with each other. This however fails to distinguish between first and second order claims that were made by Hart – the clear indication of this is the lack of analysis regarding legal systems which is a necessary condition of Hart's

enhances theoretical inquiry. To get to that stage though it must be clear what is being revised, that is, what is the most accepted definition in legal theory. Hart's theory is, as has been defended and advocated throughout this essay, the most appropriate and successful point to begin these considerations. Mostly due to the fact that Hart specifically had as his aim to work towards a definition of law. Dworkin, Raz and most other major theorists have different inquiries in mind in their work, but even in that regard exploration of some of their work shows it is insufficient as competing definitions and as criticisms of defining law in the way Hart advocated.

A limited discussion of the philosophy should be made about what it means to search for definitions or qualify them since Nye holds that the onus is on those who think that such endeavours are worthwhile to show their plausibility. For a platonic realist definitions are very real things, to ask 'what is virtue' or to state '7 is prime' is to inquire or state facts about real abstract objects that are mind-independent.[265] But it is not necessary at all to go to such lengths or controversial rationalist philosophical positions in order to say that a search for definitions is permissible.[266] Even empiricists admit that knowledge of things can be acquired even if it is mind-dependent, take Locke's locution, 'for nobody, I think, ever denied that the mind was capable of knowing sev-

---

account of first order legal concepts. According to Baker's view it does not seem possible to construe Hart's point to be that part of what grounds legal concepts in the concept of law is their defeasibility – which conforms to the view of Hart generally defended in this essay. What is discussed here is not first order legal concepts, like the law of products liability in Scotland, but rather the revision of the concept or the (real) definition of law. See, GP Baker, 'Defeasibility and Meaning' in PMS Hacker and J Raz (eds), *Law, Morality, and Society: Essays in Honour of HLA Hart* (Clarendon Press 1977).

265 Alexander Miller, 'Realism' *The Stanford Encyclopedia of Philosophy* (Winter edn 2021) Ch 2 <https://plato.stanford.edu/archives/win2021/entries/realism/> accessed 19 August 2023.

266 If there is any doubt as to what is meant here by rationalism it is meant as the same discussed in this entry, Peter Markie and M Folescu, 'Rationalism vs. Empiricism' *The Stanford Encyclopedia of Philosophy* (Spring edn 2023) <https://plato.stanford.edu/archives/spr2023/entries/rationalism-empiricism/> accessed 11 May 2023.

eral truths, the capacity, they say, is innate; the knowledge, acquired.'[267] Locke even mirrors Hart's defence of analysis concerning the use of words arguing;

> "Verbal propositions, which are words, the signs of our ideas, put together or separated in affirmative or negative sentences. By which way of affirming or denying, these signs, made by sounds, are, as it were, put together or separated one from another. So that proposition consists in joining or separating signs, and truth consists in the putting together or separating those signs, according as the things, which they stand for, agree or disagree."[268]

Importantly for Locke for there to be any truth in the ideas of the mind they must agree or align with that which is observed in nature.[269] In other words they must be amenable to example. Perhaps more relevant considering Nye's challenge Locke, paradigmatically taken as a representative of empiricism,[270] said, 'truths belonging to essences of things (that is, to abstract ideas) are eternal, and are to be found out by the contemplation only of those essences: as the existences of things are to be known only from experience.'[271] Against metaphysics Locke simply said that most writers use loose and uncertain words since it is convenient to shelter their ignorance or obstinacy.[272] If even empiricists allow that definitions can be constructed in order to capture knowledge or understanding since 'contemplation of essences' is something the mind is capable of, then it seems that Nye's challenge has been answered. It would be prudent to note that Hart has very close affinity with Locke on these points. Where Locke says ideas and words represent true things in the world only where they agree with those things in

267 John Locke, *An Essay Concerning Human Understanding* (Originally published 1689, 25th edn, M'Dowell 1824) Book I Ch II § 5.
268 ibid, Book IV Ch V § 5.
269 ibid, §§ 6–8.
270 As a representative of empiricism, see, Peter Markie and M Folescu, 'Rationalism vs. Empiricism' (n. 266) Chs 1–3.
271 Locke, *An Essay Concerning Human Understanding* (n. 267) Book IV Ch III § 31.
272 ibid, Ch VIII § 11.

the world Hart adds that from the disagreement, including among different people, one can examine their diverging usages in order to better understand how this corresponds to the way the world is. To this end both Locke and Hart say that it is not silly or wasteful but very important to ask if words actually stand for something specific or to things generally, or if they stand for anything at all, as Locke says, 'this, perhaps, if well heeded, might save us a great deal of useless amusement and dispute, and very much shorten our trouble and wandering in the search of real and true knowledge.'[273]

One should not really find the affinity of Hart and empiricists like Locke all that surprising. Recall as was set out in chapter I that legal positivism originated with Bentham and Austin as a response to natural law, particularly as it was expressed by Blackstone. In order to move away from ontological accounts of law they very much were influenced by the rich tradition of empiricism that originated in Britain with authors like Locke, Hume, and Reid. Thus when Hart follows in the tradition established by Bentham and Austin, part of the import generally is this empiricist line of thinking. These three positivists, one may even include Hobbes among them, all turn to actual ways in which people act or the consequences thereof in order generate their explanations of law. This is most notable in their disagreement from one to the next, take Hart's critique of the command theory for example, for Hart the problem at its core is that Austin's understanding of why people follow the law is simply out of a 'habit of obedience' which exists out of 'fear of sanction', what then of the person who wishes to follow the law?[274] The nature of this disagreement is empirical in that there is a fact of the matter as to whether this characterisation is accurate or misleading about what people actually think or what motivates them

273 ibid, § 13. On Hart see, Hart, 'Definition and Theory in Jurisprudence' (n. 238) 21–6; Hart, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (n. 238) 961–71; Hart, *The Concept of Law* (n. 236) 4–13.

274 Hart, *The Concept of Law* (n. 236) 40.

to do so. Disagreement over something like natural law is clearly not amenable to disagreement, or correction, in this way.[275]

The most important reason to be clear about this is that many critics take after Dworkin in overstating how it is that Hart comes to argue for his 'general and descriptive' theory. As mentioned in chapter II, Dworkin at various point considers whether Hart meant for his theory to be taken as analogous to natural kinds and repeatedly states in this connection 'law has no DNA', but this is much removed from the empiricism evident at the root of Hart's methodology and in his search for definition which already qualified that law is very different to natural kinds. Nye's challenge against the concept-nature nexus is another sort of critique which seems to ignore this moderate path advocated for by Hart which is supported philosophically in at least some forms of empiricism, though especially in Locke.

IV.IV – Conclusion

In this chapter what it means for law to have a 'nature' was considered in light of Nye's critique of the concept-nature nexus. Various different points were considered but to reiterate the most important it would be that in legal theory immodest analysis is permissible. This is at base because the argument against immodest analysis in legal theory is similarly immodest and therefore impermissible. It is defeated by *peritrope*. At this point however it seems that the philosophical basis supporting Hart's search for a definition of law is not much divorced from Jackson's descriptions of modest conceptual analysis, especially when considered alongside Locke. If it does therefore turn out to be the case that the argument against immodest conceptual analysis here goes too far in criticising it because in fact what Hart is doing is actually modest conceptual analysis, then this can be conceded since it would be so much the worse for the sceptical-nature nexus. The end result

275 See for instance in chapter II.II the discussion of the similarities between Aquinas and Dworkin.

either way is that this kind of internal scepticism in legal theory is unwarranted.

Nonetheless, Nye says that the onus is on those who advocate otherwise to explain why legal theory should remain committed to the concept-nature nexus, this is of course rightly demanded. To this extent Hart's search for a definition was explored in light of Nye's challenge. Here points about definitions in general were made in order to show that various kinds of legal systems and thus laws are capable of being defined. Most importantly in this regard is that the essence of something, or it's 'nature', is expressed in the definition, not entailed, or implied by it *ipso facto*. Hart advocated that a particular kind of definition be used for defining law and since nothing specifically in Nye's challenge goes against the search for definitions in general, nothing thus speaks against using this sort of definition for law. To support the use of definitions in general no grandiose rationalist or metaphysically obscure arguments were used but some of the basic contentions of empiricism. These contentions are; that the mind has the capacity to learn and acquire knowledge, to name and classify things according to words and concepts, and to inquire about the accuracy of these things in the world. The use of definitions is the obvious extension of these contentions. Now as to what kind of definitions can be used or the scope they can have is open to debate, but that is not what Nye challenged.

Chapter V – Expanding Analytic Theory

Legal theory post-Hart has gone awry. Not in every way, but in important ways. This essay began by setting out its objective to defend Hart's concept of law as an elucidation of legal systems and not of law *simpliciter*. It was shown in the criticisms of Dworkin and Greenberg against Hart that this point has been deeply misunderstood. Perhaps even more misunderstood however is the way and method in which Hart came to argue about law. This was observed most clearly in Raz's practice theory which completely went against what Hart actually said. Hart outlined in the beginning of *CL* that law is a social phenomenon or socially constructed phenomenon, to this then Hart asked what makes legal rules different to social rules when considering if law is an affair of rules. To these questions Hart worked through them until he settled on the idea that legal rules have an 'official' component to them, thus differentiating legal and social rules even though they are both social. Hart also offers explanation as to how this official aspect of rules can come to be. Even in Hart's inaugural lecture when formulating what it means to say one has a right Hart included the condition 'there is in existence a legal system'.[276] How can Raz fairly categorise Hart's 'practice theory of rules' and leave out the legal system as a criteria along with everything Hart depicted in *CL* which showed how to identify a legal system?

The answer plainly and without exception is that no categorisation of Hart in *CL* can be considered a fair one if it excludes legal systems, since that was the whole point of the book and the majority of Hart's

276 HLA Hart, 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (Oxford UP 1983) 35.

work in general. Greenberg is one of the only critics of Hart to even question or doubt the practice theory's representation of Hart, which is quite a dire situation because even others who have tried to defend Hart's project have often conceded this point. In general this situation stems from a lack of attention to Hart's work about definitions in legal theory, which is how Hart came to argue that law comes from legal systems. This points to another flaw in the practice theory, and of Greenberg and Dworkin's critique of Hart, which is that definition does not directly provide reasons for action.

Definitions can be a reason for acting indirectly if a person acts based on the information provided by a definition but notice nothing specific is outlined about the permissible ways one can act based on the information, this is left open. This allows for the division of first-order and second-order discussions about law, whereby there is no *necessary* correlation between the discussions of each order.[277] Dworkin, Raz, Greenberg and others seem to focus much of their efforts into inquiring about specific ways that it is permissible to act, in terms of reasons for action. These sorts of inquiries are valid, they can be done, but only in the proper way. The single most important defect of these criticisms in their present form is their lack of attention to the place the legal system has in making practices and arguments 'legal' rather than merely social. Dworkin for instance works from the starting point that judges in courtrooms are legal *ab initio*, rather than asking 'are judges in courtrooms legal?' Similarly, Dworkin acknowledges there is more to the 'legal drama' than just the judiciary but proceeds over many years to criticise Hart's depiction of law as being parochial and not general, arguing that it takes sides in disputes and such. These arguments are much removed from a search for a definition but Hart still took the time to note the flaws of this line of thought, though admittedly not always with the same clarity as *CL*.

Even in the simple legal system where what 'Rex I says is law', one can observe that Dworkin's interpretivism does not apply. For one

277 Though there is necessarily *some* connection between them.

thing in this legal system there are no judges, only the king's court and so it seems ruled out by Dworkin in *LE* and later work by saying the argument is restricted to being about judges. Even if one moves past this restriction and decides to apply interpretivism anyway it is clear that it cannot succeed. For Rex I could say 'take only as law what I say in exact and literal terms, where there is doubt as to my meaning return and seek clarity', here there is no room for any sort of interpretation. An attempt to do so and not return to Rex I and ask for clarity would be a violation of the law. This point was elucidated in relation to the various interpretation acts passed in common law jurisdictions.

Greenberg's analysis likewise suffers the same sort of problem by excluding legal systems from consideration. Greenberg would likely respond that his restriction on legal systems included ones in which legal practices did not determine the content of the law, in which case this Rex I example would be excluded. It might be rightly asked then in what jurisdictions can the argument actually apply, what is its utility? In chapter III it was argued that Greenberg's argument does not even apply in America, which is where one of his only examples is given. Why not say that what makes a model the 'correct model' for legal practices making legal content the way it is, is the already accepted rules of the legal system? For instance, those rules accepted which make the federal courts operate by rules of the common law, e.g. *stare decisis*. Such rules entertain certain possibilities of making legal content the way it is and deny others, in this connection why not suppose these rules to form an argumentative framework like Sartor suggests? If this is accepted not only would examining legal content potentially benefit from techniques of formal logic for these legal systems, but it provides for a more straightforward assessment of 'what makes the legal content the way it is'. It is mystifying to speak of 'models' which explain what makes the legal content the way it is when such explanations already stand to provide clear insights, and without making the analysis more difficult by adding in questions about what is right and wrong in terms of reasons for action.

This environment created by misunderstanding Hart as proposing a theory of reasons for action led to a situation where Nye's challenge questioned the foundations of legal theory. An important point in this challenge was that in order for the Romans to do conceptual analysis they would need to know about future institutions which did not exist. While constructing this point Nye was trying to fit self-understanding within the argument, it still nonetheless questions how general legal theory is possible. All of this has been considered by Hart particularly in his early work on definitions, the *CL* was a major breakthrough that followed this work in that by saying that all laws come from legal systems one could define the necessary conditions needed to say a legal system exists and thus laws. Additionally by saying that laws come from legal systems Hart managed to avoid the problems outlined by Austin in saying anything called "law" is the explanandum of legal theory but also allowed that law may have any content as Kelsen argued.[278] Certainly one cannot give fair scope to this feature of law if the inquiry is taken only from the point of view of practices, this is far too narrow and it does not well allow for capturing the differences between power-conferring and duty-imposing rules – since the existence of a practice is likely due to a power-conferring rule of some sort. By leaving the content of law open-ended and focusing on whether the rules come from a legal system one can construct a general theory of law.

With this in mind it is definitely possible to do general legal theory, though one should not view the process as a 'one and done' attempt. Rather continual progress is made in order to better understand different aspects of the nature of law. Asking questions like 'what provides access to the nature of a thing?' or 'how does one know if they know the nature of a thing?' while interesting in some respects are not generally the sort of propositions that legal theory has proceeded upon. The epistemic background at play in Hart at least is one of empiricism with awareness of modern developments in philosophy of language. What is at play in Raz is a rather different question, one which Nye

278 On Kelsen, Hans Kelsen, *General Theory of Law & State* (Originally published 1949, Routledge 2017) 161.

is rightly pointing out, for it seems Raz's arguments imply some of these unorthodox questions that Nye posits. Thus, it would not be fair to say that Raz's account of what it means to do legal philosophy should be taken as a representative of legal positivism in general – the Razian school of thought is much different in its methodology to other forms of legal positivism.[279] Likewise Nye's challenge does not have the wholesale scope that it implies.

Some may argue that a return to discussions of structures and institutions is undesirable since the idea is that legal theory may move beyond these recurring debates onto new material. This would be misplaced. There is much work that still needs to be done in order to advance analytic theory into other areas of legal theory. Hart later said that he should have described *CL* as 'providing the tools for descriptive sociology' rather than 'as an essay in descriptive sociology'.[280] Hart thus envisioned that analytic theory would be used to facilitate other areas of legal theory, like legal sociology, but this has not played out as Hart anticipated. Instead after *CL* there was 'a dramatic shift to investigating problems of value – things like justice, liberty, etc.'[281] There remains a crying need for analytic theory in these other areas.

Sociology is a pertinent example where legal pluralists have for a while argued that mainstream analytic theories are inadequate for use in sociology of law.[282] This has progressed to the point where legal pluralists have begun to propose their own conceptions of law, which would be fine but it has led to proposals like that of Tamanaha,

279 Hart once echoed a similar point, HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982) 153.

280 David Sugerman and HLA Hart, 'Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman' (2005) 32(2) J of L and Society 267, 291.

281 Leslie Green, 'Introduction' in HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) liv.

282 For instance, John Griffiths, 'What is Legal Pluralism?' (1986) 24 J of L Pluralism and Unofficial L 1; Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) L and Society Rev 869; Jorge L Fabra-Zamora, 'The Conceptual Problems Arising from Legal Pluralism' (2022) 37(1) Canadian J of L and Society 155. My view of how analytic theory can engage with legal pluralism and how Hart's theory can contribute is set out here, Cameron Moss, 'The Embryology of Legal Systems & Legal Pluralism' (2024) 4 Plassey LR 75.

who recently published a book which proposed that 'law is whatever people collectively view as law within social communities'.[283] But this would admit that any further investigation may have to consider "laws" that are not social in nature, precisely as Austin warned against.[284] A similar conclusion was reached by another author writing about comparative legal history, holding that 'legal history may modify or even metamorphosise into another tradition when its premise – a set of assumptions about law – changes.'[285] The problem of what is 'law' has also arisen in comparative law, creating methodological problems and difficulties in constructing comparative law as its own discipline.[286] An analytical focus on these problems in legal theory is long overdue. But notice that no talk of 'law as interpretation' or of the 'correct model' explaining what makes the legal content the way it is will be of any use in providing answers to these disciplines of legal theory as to what they should isolate as part of their phenomena of study. Likewise, Raz's views on self-understanding appear only tenuously relevant for these other disciplines, if at all.

Hart's theory however has the potential to aid in outlining how to address these issues. For legal sociology and history the questions that need to be asked are along the lines of 'does this society have primary and secondary rules?' For comparative law the 'legal' aspect can be supplied by asking 'is this rule one that comes from the legal system?' or if the comparable rule under investigation appears to be social ask 'is there an interplay between this social rule and the legal regime?' It

283 Brian Z Tamanaha, *Legal Pluralism Explained: History, Theory and Consequences* (Oxford UP 2021) 175.

284 This concern is shared, Cormac Mac Amhlaigh, 'Book Review: *Legal Pluralism Explained: History, Theory, Consequences*' (2022) 49 J of L and Society 430, 433.

285 Adolfo Giuliani, 'What is Comparative Legal History? Legal Historiography and the Revolt against Formalism, 1930–60' in Olivier Moréteau, Aniceto Mansferrer and Kjell A Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019) 76.

286 For instance, Catherine Valcke, 'Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems' (2004) 52(3) The American Journal of Comparative Law 713, 713–720; Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 165–178.

is not strange to suppose that a legislature might legislate around social customs it does not wish to intrude on or have time to debate. Thus there would be legal relevance in the social background of the regimes under comparison. Further than this Hart fashioned the internal and external point of view for use *inter alia* in these sorts of inquiries, moving past the objection that talking about the laws of a jurisdiction was to take part in them and the resulting theoretical difficulties this would cause.

A further rejoinder to this objection is the legal historical aspect to legal theory, for it is patently absurd to say that a documentation or discussion of the laws of ancient Egypt, Greece, or China means that one is engaging in the legal systems of long extinct regimes. Bearing these other areas of legal theory in mind it seems that the 'the reasoned choice between theories of law' will naturally be towards whichever theory aids in explaining the conundrums and theoretical difficulties of non-analytic areas of legal theory since it furthers theoretical inquiry overall. Inquiries into values such as morality and the like are of course included in this wider purview of legal theory, but in recent times it has overshadowed other areas and often remained ignorant of them. Those who disagree are challenged to show that their inquiries help rather than obscure these non-analytic areas of legal theory. For now at least Hart's theory is clearly the reasoned choice over rival theories to begin examining the nature of law in respect of non-analytic areas of legal theory, perhaps in time these areas may develop an analytic framework.

References

Table of Cases

Ireland

Mullaly v Bus Éireann [1992] ILRM 722 (HC).
Kelly v Hennessy [1995] IESC 8, [1995] 3 IR 253.
Sheehan v Bus Éireann [2022] IECA 28.

United Kingdom

McLoughlin v O'Brian [1983] 1 AC 410.
Alcock v Chief Constable of South Yorkshire Police [1991] UKHL 5, [1992] 1 AC 310.
R (Miller) v Prime Minister [2019] UKSC 41.

United States

Roe v Wade 410 U.S. 113 (1973).

Table of Legislation

Australia

Acts Interpretation Act 1901

Canada

Interpretation Act 1985

Ireland

Interpretation Act 2005

New Zealand

Legislation Act 2019.

United Kingdom

Interpretation Act 1889

Interpretation Act 1978

Bibliography

Albert R, 'The World's Most Difficult Constitution to Amend?' (2022) 110 California L Rev 2005.

Alexy R, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Originally published 1978, Ruth Adler and Neil MacCormick trs, Oxford UP 2009).

Austin J, *The Province of Jurisprudence Determined* (John Murray (London) 1832).

Aquinas T, *Summa Theologiae* (written c.1265–1274).

Baker GP, 'Defeasibility and Meaning' in PMS Hacker and J Raz (eds), *Law, Morality, and Society: Essays in Honour of HLA Hart* (Clarendon Press 1977).

Bonazzi M, 'Protagoras' *The Stanford Encyclopedia of Philosophy* (Fall edn 2020) <https://plato.stanford.edu/archives/fall2020/entries/protagoras/> accessed 30 July 2023.

Brewer S, 'Logocratic Method and the Analysis of Arguments in Evidence' (2011) 10 L, Probability and Risk 175.

— — 'Interactive Virtue and Vice in Systems of Arguments: A Logocratic Analysis' (2020) 28 Artificial Intelligence and L 151.

— — Abrams N, Medwed DS, and Weinstein J, *Evidence: Cases and Materials* (10th edn, Foundation Press 2017).

Chivlovi S and Pavlakos G, 'Law Determination as Grounding: A Common Grounding Framework for Jurisprudence' (2019) 25 L Theory 53.

Coleman J, *The Practice of Principle* (Oxford UP 2001).

Dickson J, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) Oxford J of L Studies 373.

— — *Elucidating Law* (Oxford UP 2022).

Dika TR, 'Descartes' Method' *The Stanford Encyclopedia of Philosophy* (Spring edn 2023) <https://plato.stanford.edu/archives/spr2023/entries/descartes-method/> accessed 19 August 2023.

Dworkin R, *Law's Empire* (Hart Publishing 1986).

— — 'Objectivity and Truth: You'd Better Believe It' (1996) 25(2) Philosophy & Public Affairs 87.

— — 'Hart's Postscript and the Character of Political Philosophy' (2004) 22(1) Oxford J of L Studies 1.

— — *Justice for Hedgehogs* (Harvard UP 2011).

— — 'Hart's Posthumous Reply' (2017) 130(8) Harvard L Rev 2096.

Fabra-Zamora JL, 'The Conceptual Problems Arising from Legal Pluralism' (2022) 37(1) Canadian J of L and Society 155.

Fine K, 'Guide to Ground' in Fabrice Correia and Benjamin Schneider (eds), *Metaphysical Grounding: Understanding the Structure of Reality* (Cambridge UP 2012).

Fuller LL, 'Positivism and Fidelity to Law – A Reply to Professor Hart' (1958) 71(4) Harvard L Rev 630.

Green L, 'Introduction' in HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012).

Greenberg M, 'How Facts Make Law' (2004) 10 L Theory 157.

— — 'On Practices and the Law' (2006) 12 L Theory 113.

— — 'Hartian Positivism and Normative Facts: How Facts Make Law II' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford UP 2008).

— — '*How Facts Make Law* and the Nature of Moral Facts' (2012) 40 Direito, Estado e Sociedade 165.

Giuliani A, 'What is Comparative Legal History? Legal Historiography and the Revolt against Formalism, 1930–60' in Olivier Moréteau, Aniceto Mansferrer and Kjell A Modéer (eds), *Comparative Legal History* (Edward Elgar Publishing 2019).

Griffiths J, 'What is Legal Pluralism?' (1986) 24 J of L Pluralism and Unofficial L 1.

Gupta A, 'Definitions' *The Stanford Encyclopedia of Philosophy* (Winter edn 2021) <https://plato.stanford.edu/archives/win2021/entries/definitions/> accessed 22 August 2023.

Hart HLA, 'Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer' (1957) 105(7) U of Pennsylvania L Rev 953, 958–67.

— — 'Bentham on Sovereignty' (1967) 2(2) Irish Jurist (ns) 327.

— — *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982).

— — 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (Oxford UP 1983).

— — 'The New Challenge to Legal Positivism (1979)' Andrzej Grabowski (tr) (2016) 36(3) Oxford J of L Studies 459.

— — *The Concept of Law* (3rd edn, Oxford UP 2012).

— — and Sugerman D, 'Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman' (2005) 32(2) J of L and Society 267.

Hatfield G, 'René Descartes' *The Stanford Encyclopedia of Philosophy* (Summer edn 2018) <https://plato.stanford.edu/archives/sum2018/entries/descartes/> accessed 19 August 2023.

Himma KE, 'How Much Can a Theory of Law Tell Us about the Nature of Morality: A Response to Mark Greenberg's *How Facts Make Law*' (2012) 40 Direito, Estado e Sociedade 132.

Holmes OW, 'The Path of Law' (1897) 10(8) Harvard L Rev 457.

Jackson F, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford UP 1998).

— — 'Conceptual Analysis and the Coercion Thesis' (2021) 45 Revus <https://doi.org/10.4000/revus.7594> accessed 18 August 2023.

Kant I, *The Critique of Pure Reason* (first edn published 1781, second edn published 1787, Cambridge edn, Cambridge UP 1998).

Kaplan J, 'In Defense of Hart's Supposedly Refuted Theory of Rules' (2021) 34(4) Ratio Juris 331.

Kelsen H, 'Law, State and Justice in the Pure Theory of Law' (1948) 57(3) Yale L J 377.

— — *General Theory of Law & State* (Originally published 1949, Routledge 2017).

Locke J, *An Essay Concerning Human Understanding* (Originally published 1689, 25th edn, M'Dowell 1824).

Mac Amhlaigh C, 'Book Review: *Legal Pluralism Explained: History, Theory, Consequences*' (2022) 49 J of L and Society 430.

MacCormick N, 'Argumentation and Interpretation in Law' (1993) 6(1) Ratio Juris 16.

Mahoney J, 'Objectivity, Interpretation, and Rights: A Critique of Dworkin' (2004) 23(2) Law and Philosophy 187.

Markie P and Folescu M, 'Rationalism vs. Empiricism' *The Stanford Encyclopedia of Philosophy* (Spring edn 2023) <https://plato.stanford.edu/archives/spr2023/entries/rationalism-empiricism/> accessed 11 May 2023.

Marmor A and Sarch A, 'The Nature of Law' *The Stanford Encyclopedia of Philosophy* (Fall edn 2019) <https://plato.stanford.edu/archives/fall2019/entries/lawphil-nature/> accessed 13 May 2023.

Merry SE, 'Legal Pluralism' (1988) 22(5) L and Society Rev 869.

Miller A, 'Realism' *The Stanford Encyclopedia of Philosophy* (Winter edn 2021) <https://plato.stanford.edu/archives/win2021/entries/realism/> accessed 19 August 2023.

Moss C, 'The Embryology of Legal Systems & Legal Pluralism' (2024) 4 Plassey LR 75.

Neta R, 'On the Normative Significance of Normative Brute Facts' (2004) 10 L Theory 199.

Nye H, 'A Critique of the Concept-Nature Nexus in Joseph Raz's Methodology' (2017) 37(1) Oxford J of L Studies 48.

— — 'The One-System View and Dworkin's anti-Archimedean Eliminativism' (2021) 40 L and Philosophy 247.

— — 'Does Law 'Exist'? Eliminativism in Legal Philosophy' (2022) 15(1) Washington U Jurisprudence Rev 29.

Payne M, 'Hart's Concept of a Legal System' (1976) 18(2) William and Mary L Rev 287.

Plunkett D and Sundell T, 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' (2013) 13 L Theory 242.

Raz J, *The Concept of a Legal System* (2nd edn, Oxford UP 1980).

— — *Practical Reason and Norms* (2nd edn, first published 1975, Oxford UP 1999).

— — 'Can There Be a Theory of Law' in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005).

— — *The Authority of Law* (2nd edn, Oxford UP 2009).

Rodriguez-Blanco V, 'From Shared Agency to the Normativity of Law: Shapiro's and Coleman's Defence to Hart's Practice Theory of Rules Reconsidered' (2009) 28(1) L and Philosophy 59.

Rosen G, 'Metaphysical Dependence: Grounding and Reduction' in Bob Hale and Aviv Hoffman (eds), *Modality: Metaphysics, Logic, and Epistemology* (Oxford UP 2010).

— — 'Real Definition' (2015) 56(3) Analytic Philosophy 189.

Russell B, '*A Priori* Justification and Knowledge' *The Stanford Encyclopedia of Philosophy* (Summer edn 2020) <https://plato.stanford.edu/archives/sum2020/entries/apriori/> accessed 11 May 2023.

Shapiro S, 'Law, Plans, and Practical Reason' (2002) 8 L Theory 387.

Sartor G, 'A Formal Model of Legal Argumentation' (1994) 7(2) Ratio Juris 177.

— — 'Interpretation, Argumentation, and the Determinacy of Law' (2023) 36(3) Ratio Juris 214.

Siviy SM, 'Neurobiological substrates of play behavior: glimpses into the structure and function of mammalian playfulness' in Marc Bekoff and John A Buyers (eds), *Animal Play: Evolutionary, Comparative and Ecological Perspectives* (Cambridge UP 2009).

Smith GH, 'The Theory of the State' (1895) 34(148) Proceedings of the American Philosophical Society 182.

Stavropoulos N, 'The Debate That Never Was' (2017) 130(8) Harvard L Rev 2082.

Tamanaha BZ, *Legal Pluralism Explained: History, Theory and Consequences* (Oxford UP 2021).

Valcke C, 'Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems' (2004) 52(3) The American Journal of Comparative Law 713.

Van Hoecke M, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004).