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.

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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]

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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-

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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.