

Chapter 2

Necessity, Importance, and the Nature of Law

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It is a commonplace among scholars of general jurisprudence that a central goal—perhaps *the* central goal, or perhaps even the only goal—of general jurisprudence is to use the tools of philosophical analysis as a way of helping us to “understand” the “nature of law.”¹ And although the question of what it is to “understand” some phenomenon is invariably a subjective and psychological determination, the object of that understanding—the “nature” of law—is not necessarily either subjective or psychological. Rather, the assumption in much contemporary writing on general jurisprudence is that the nature of the phenomenon of law has an observer-independent or theorist-independent existence, and that the task of the theorist is to discover and explain what that nature is.

There is much that is controversial embedded in the foregoing paragraph, and I will take note of some of these controversies presently. My principal goal in this

This paper was prepared for the conference on Neutrality and Theory of Law, University of Girona, Girona, Spain, May 20–22, 2010. The final version has benefited from audience questions in Girona, and from comments on the written draft by Brian Bix, Charles Barzun, Diana Constantinescu, and Brian Leiter.

¹See Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001), p. 17; Leslie Green, “Positivism and the Inseparability of Law and Morals,” *New York University Law Review*, vol. 83 (2008), pp. 1035–1058, at p. 1036; Kenneth M. Ehrenburg, “Defending the Possibility of a Neutral Functional Theory of Law,” *Oxford Journal of Legal Studies*, vol. 29 (2009), pp. 91–113, at p. 91; Joseph Raz, “On the Nature of Law,” *Archiv für Rechts—und Sozialphilosophie*, vol. 82 (1996), pp. 1–25; Joseph Raz, “Can There Be a Theory of Law,?” in Martin P. Golding & William A. Edmundson, eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2005), 324–342; Joseph Raz, “The Problem about the Nature of Law,” in *Ethics in the Public Domain: Essays on the Morality of Law and Politics* (Oxford: Oxford University Press, 1994), pp. 195–213.

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paper, however, is to address the question of what it is for some phenomenon—law, in particular—to have a nature, and what it is for a theorist to try to ascertain it. More specifically, does the nature of something—or the concept of something, or the nature of the concept of something—consist of its necessary—or essential—properties?² Or does the nature of something consist, as some contemporary legal philosophers maintain, of the subset of the set of necessary or essential properties that are also in some way important, or that might be valuable to our understanding? Or does it, as I shall argue here, possibly consist of those properties that are important but not necessary? That is, might a full account of the nature of something include (or even consist in) those properties that are not exclusive to the phenomenon under analysis but which are, in an empirical and probabilistic way, concentrated in that phenomenon? If so, then might such a characterization be true of law, and might the nature of law thus best, or at least usefully, be explained, in important part if not necessarily entirely, by identifying those aspects of law that can be found elsewhere but which are contingently and empirically concentrated in law?³ Such a conclusion might be philosophically unsatisfying, especially if we simply take an inquiry into the nature of something as necessarily being an inquiry into the concept of something, and then take an inquiry into the concept of something as necessarily being a search for necessary and sufficient conditions. But if the enterprise of jurisprudence is conceived to be about understanding law in its most theoretical way rather than necessarily and exclusively providing a useful application of certain traditional philosophical tools, then the philosophical itch created by probabilistic and empirical rather than logical conclusions perhaps ought still to be a concern, but perhaps not so much as to be fatal to the jurisprudential enterprise.

2.1 Some Preliminary Assumptions

Although this paper is an inquiry into one aspect of jurisprudential methodology, I will nevertheless bracket several other important and interesting methodological questions. Thus, I will not address the questions whether there are concepts at all, what the relationship is between concepts and what they are concepts of, whether conceptual analysis is possible, and, if it is, whether it is a task best (or necessarily) undertaken with non-empirical philosophical tools as opposed to, say, social scientific

²Throughout this paper I will treat “necessary” and “essential” as more or less synonymous. See Brian H. Bix, “Raz on Necessity,” *Law and Philosophy*, vol. 22 (2003), pp. 537–559, at p. 537 n. 2.

³I make a similar claim about legal reasoning in Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Massachusetts: Harvard University Press, 2009), pp. 1–12.

ones.⁴ There are rich debates in the literature on all of these questions, both outside of jurisprudence and within. And I do not deny that the resolution of these debates is highly pertinent to the specific question I address here. Nevertheless, I propose to focus more narrowly on the question of the relationship between conceptual necessity and jurisprudential inquiry, leaving issues about the implications of answers to that question for other occasions, and leaving it to the reader to evaluate the assumptions that may be implicit in my approach and my conclusions.

I will assume as well that law has a nature that it would be valuable to identify and understand. This too may not be so, and it is possible that law is such a diverse, loose, and shifting array of phenomena that there is no interesting nature of law itself, and no interesting concept of law.⁵ Nevertheless I assume not only that there are concepts, and not only that they can be analyzed in terms of their necessary or essential properties, but also that there is a concept of law and that the concept of law is one of the concepts that can be so analyzed. This does not follow necessarily from the previous assumptions. It is possible that there are concepts susceptible to philosophical analysis but that the concept of law is not one of them. But I assume the contrary, and thus assume the possibility and even the value of conceptual analysis of the concept of law.

Finally, I assume that the analysis of the concept of law can be a descriptive one. There is, of course, an active debate about the possibility of a descriptive—in the

⁴Debates about some of these questions in the context of jurisprudence were launched, in part, by articles now reprinted in Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007), especially at pp. 121–199. Responses include, for example, Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001), pp. 210–217; Scott Shapiro, *Legality* (Cambridge, Massachusetts: Harvard University Press, 2011), pp. 12–18; Julie Dickson, “Methodology in Jurisprudence: A Critical Survey,” *Legal Theory*, vol. 10 (2004), pp. 117–156; Andrew Halpin, “Methodology and the Articulation of Insight: Some Lessons from MacCormick’s *Institutions of Law*,” in Maksymilian Del Mar & Zenon Bankowski, *Law as Institutional Normative Order* (Farnham, Surrey, England: Ashgate Publishing, 2009), pp. 145–159; Andrew Halpin, “The Methodology of Jurisprudence: Thirty Years Off the point,” *Canadian Journal of Law and Jurisprudence*, vol. 19 (2006), pp. 67–105; Ian Farrell, “H.L.A. Hart and the Methodology of Jurisprudence,” *Texas Law Review*, vol. 84 (2006), pp. 983–1011; John Oberdiek & Dennis Patterson, “Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology,” in Michael Freeman & Ross Harrison, eds., *Current Legal Issues*, vol. 10 (*Law and Philosophy*) (2007), pp. 60–76.

⁵I use the qualification “interesting” to make clear that there may be concepts in a strictly logical sense that have little non-logical interest. There may be a nature or concept of “shoppers at Wal-Mart on December 14, 2005, with last names beginning with the letter ‘R’ who had scrambled eggs for breakfast.” But the analysis of that concept would surely be unilluminating. And the same might hold true of law, if law were only a sociological connection among various phenomena with scarcely more connection than exists with the elements of the “shoppers at Wal-Mart . . .” concept just noted. See Frederick Schauer, “Critical Notice,” *Canadian Journal of Philosophy*, vol. 24 (1994), pp. 495–510. That may well be true, but, again, I will assume the contrary, and thus assume that there is a concept of law susceptible to non-trivial philosophical analysis.

sense of non-morally-normative but not necessarily in the sense of non-normative—analysis of the concept of law, with theorists including H.L.A. Hart,⁶ Jules Coleman⁷ and Andre Marmor⁸ supporting such a possibility and others such as Ronald Dworkin,⁹ John Finnis,¹⁰ and Stephen Perry¹¹ denying it, with Joseph Raz¹² and Julie Dickson,¹³ among others, offering interesting variations that include acknowledging that conceptual analysis necessitates identifying *important* features of the concept to be analyzed, but denying that the admittedly normative identification of importance must be morally-influenced or morally normative in any way. But for purposes of this paper I assume that descriptive analysis of the concept of law is possible,¹⁴ although there is no need to take a position among the descriptivist methodologies of, for example, Coleman, Marmor, Raz, and Dickson.

2.2 On Concepts and Necessity

With these assumptions in hand, we can turn to the central issue: in engaging in the task of understanding the nature of law, is it mandatory that we understand “nature” in terms of conceptual analysis, and thus understand an inquiry into the nature of law as inquiry aimed at identifying properties or features that are *essential* or *necessary* to the concept of law? And, recognizing with Raz and others that some necessary properties may not be important, we can rephrase the question in terms of whether it is vital that we identify the properties that are both necessary and important?

⁶H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, Penelope A. Bulloch & Joseph Raz, eds., 2nd ed., 1994), pp. 239–244. Whether Hart’s claim in the “Postscript” to always having been doing descriptive jurisprudence is consistent with some of his earlier statements, see below, note 9, and see also Dickson, *op. cit.* note 2, at p. 91 n. 14, is hardly clear.

⁷Jules Coleman, *The Practice of Principle*, *op. cit.* note 5, at pp. 175–179.

⁸Andre Marmor, “Legal Positivism: Still Descriptive and Morally Neutral,” *Oxford Journal of Legal Studies*, vol. 26 (2006), pp. 683–704. See also Andre Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001), p. 153; Wil Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994), p. 19.

⁹Ronald Dworkin, *Law’s Empire* (Cambridge, Massachusetts: Harvard University Press, 1986), pp. 50–59.

¹⁰John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), pp. 14–17.

¹¹Stephen R. Perry, “Hart’s Methodological Positivism,” in Jules Coleman, ed., *Hart’s Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001), pp. 311–354; Stephen R. Perry, “Interpretation and Methodology in Legal Theory,” in Andre Marmor, ed., *Law and Interpretation* (Oxford: Oxford University Press, 1995), pp. 97–122.

¹²Raz, *op. cit.* note 2.

¹³Dickson, *op. cit.* note 2.

¹⁴For a recent and extensive argument to the contrary, see Dan Priel, “Description and Evaluation in Jurisprudence,” *Law and Philosophy*, vol. 29 (forthcoming 2010).

In order to answer this question, we need to step back and look to the purpose or function of conceptual analysis of the concept of law. And when we do so, we see that for Raz and many others, it is to help us to understand (and to explain) the nature of law. Much then turns on what it is for some phenomenon to have a nature at all. The standard view is that no property can be part of the nature of some object of study unless that property is an essential feature of the object of study. To say that having feathers and a backbone is part of the nature of being a bird is to say that nothing can be a bird if it lacks feathers and lacks a backbone, and thus the properties of having feathers and a backbone are necessary conditions of both birds and the concept of bird, in a way that the property of the capacity for flight is not. Although most birds can fly, and although having feathers is apparently necessary for flight among vertebrates that are not bats,¹⁵ there are some feathered vertebrates that cannot fly—penguins and ostriches, for example—and thus the standard view is that because flight is not necessary for birdness, the capacity for flight is not part of the nature of the concept of birds and not part of the nature of birds.

Birds are natural kinds, and it is more controversial whether the same analysis does or could apply to artifacts or to other social constructions. But it is at least plausible that it could. Perhaps usability for exchange is a necessary condition of the concept of money, for example, just as having pages may be (or may have been in the past) essential to the concept of book. And if that is so, then there is no reason to believe, contra Ronald Dworkin,¹⁶ that the concept of law could not have necessary conditions. It is true that socially constructed concepts can change over time and vary across cultures, but that does not mean that there could not be a snapshot of some culture's concept of something socially constructed at some time. The concept of book might require pictures as well as pages (or may not require pages at all) in some cultures, just as the concept of money at some future time might not require usability for exchange, but *our* concept of book *now* (or at least in the recent past) requires pages and does not require pictures, and the possibility of that conclusion varying with time or place is not inconsistent with its soundness at this time in this place.¹⁷ That the concept of law might be different in other cultures, that it might be different in this culture at other times, and that it

¹⁵So-called flying squirrels and flying fish, as well as flying frogs, flying snakes, and flying squid, are all gliders and not fliers. Bats are the only non-birds that can actually fly. (The foregoing obviously assumes a certain concept of flying, but analysis of *that* concept is obviously not my agenda here.)

¹⁶In Ronald Dworkin, *Justice in Robes*, (Cambridge, Massachusetts: Harvard University Press, 2006), Dworkin's argument for law being an interpretive concept hinges at numerous places on the claim that the concepts of human-created institutions such as law cannot have necessary and sufficient conditions in the way that natural kinds do.

¹⁷Compare Danny Priel, "Jurisprudence and Necessity," *Canadian Journal of Law and Jurisprudence*, vol. 20 (2007), pp. 173–200, which appears to adopt a less time—and culture—bound notion of (contingent) necessity than is actually present in the theorists that it questions.

might be better to have a concept of law other than the one we have¹⁸ are all entirely consistent with there being a concept of law in this culture at this time which we can fruitfully describe.

2.3 The Varieties of Concepts

That there is a concept of law that we can describe, and perhaps describe without making morally normative commitments, does not necessarily mean that we can describe it by recourse to necessary and sufficient conditions. As H.L.A. Hart appeared to suggest in the opening pages of *The Concept of Law* (and then arguably retract later in the book¹⁹), law might well be a family resemblance concept, in Wittgenstein's sense, or a cluster concept, which is very similar but possibly not identical.²⁰ Against a more Fregean understanding of concepts, therefore, there may be no more of a set of necessary and sufficient conditions for the proper grasp and use of the concept of law than there are necessary and sufficient conditions for the proper grasp and use of the concept of game, to use Wittgenstein's example, or the concept of art, which is a common candidate for a family resemblance concept. That law is a family resemblance or cluster concept presupposes that there *are* family resemblance concepts, which remains contested. Moreover, it is possible that there are family resemblance concepts but that law is not among them, assuming that not *all* concepts are family resemblance concepts, which is also contested.

¹⁸On the possibility (and *not* the inevitability, and not necessarily the desirability) of normatively prescribing what concept of law we ought to have, see Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," *Oxford Journal of Legal Studies*, vol. 25 (2005), pp. 493–501. Hart seems sympathetic to a normatively-selected concept of law in *The Concept of Law* (Oxford: Clarendon Press, 2nd ed., Penelope A. Bulloch & Joseph Raz eds., 1994), at 209–11, and in H.L.A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, vol. 71 (1958), pp. 593–629, as does, *inter alia*, Liam Murphy, "The Political Question of the Concept of Law," in Jules Coleman, ed., *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001), pp. 371–409. And see also Liam Murphy, "Better to See Law this Way," *New York University Law Review*, vol. 83 (2008), pp. 1088–1107; Frederick Schauer, "Positivism Before Hart" (paper presented at University College London, 16 December 2009); Jeremy Waldron, "Normative (or Ethical) Positivism," in Coleman, *ibid.*, pp. 411–433. This conclusion and this interpretation of Hart is questioned in Green, *op. cit.* note 3, at 1039, and perhaps by Hart himself in the "Postscript" to *The Concept of Law*, at 240, leading Julie Dickson to describe Hart's seemingly two-faced view of the issue as "awkward." Julie Dickson, "Is Bad Law Still Law? Is Bad Law Really Law.?" in Maksymilian Del Mar and Zenon Bankowski, eds., *Law as Institutional Normative Order* (Farnham, UK: Aldershot, 2009), pp. 161–183, at p. 164.

¹⁹"There are therefore two minimum conditions necessary and sufficient for the existence of a legal system." *The Concept of Law*, *op. cit.* note 5, at p. 116.

²⁰See Max Black, *Problems of Analysis* (London: Routledge & Kegan Paul, 1954), Chap. 2; Max Black, "The Nature of Representation," in *Caveats and Critiques: Philosophical Essays in Language, Logic, and Art* (Ithaca, New York: Cornell University Press, 1975), pp. 139–179, and especially at pp. 177–179.

It could also be, as Ronald Dworkin has argued,²¹ that law is an essentially contested concept, in W.B. Gallie's sense,²² although it is again contested whether there are such concepts, whether all concepts are essentially contested, and whether Dworkin's understanding of the idea of an essentially contested concept is the correct one. For example, it may be that essentially contested concepts require an exemplar, and although whether that is so is again contested, to the extent that an exemplar is required it should be possible to identify the properties of the exemplar (or ideal-type, or paradigm case, or prototype case) which make it an exemplar in the first place, and without which it would not be an exemplar even though it might still lie within the domain of essential contestation. Moreover, Dworkin's application of the idea is even more challengeable, because it hardly follows from the fact of a concept being essentially contested that the contestation must be on moral or political grounds, as Dworkin maintains.

Although these are all valuable cautions to recognize before plunging headlong into the enterprise of searching for the necessary and sufficient conditions of the concept of law, they are no more than cautions. All of these cautions presuppose contested questions about the nature of concepts and about how we might go about recognizing and explaining them, and while it is important to recognize the contested nature of some of the assumptions, it is nevertheless far from unreasonable to engage in conceptual analysis of the concept of law on the assumption that there is a concept to be analyzed, and that the analysis will yield a set of necessary and sufficient conditions for application of the concept.

2.4 Necessity and Importance

That the concept of law may have necessary and sufficient conditions for its proper application does not entail the conclusion that philosophical analysis is the appropriate way of uncovering them. One or another variety of the challenge from naturalism²³ would suggest that even if there are concepts with necessary and sufficient conditions for their proper application, the way to discover those necessary and sufficient conditions is by empirical research and not by philosophical speculation.

Given that few legal theorists maintain that the necessary properties of the concept of law are necessary a priori or necessary by definition, however, it is not clear that the naturalist challenge is a fundamental rather than a methodological one. Most of the theorists who offer analyses of the concept of law acknowledge that they are describing empirical and contingent features of the world—in this case the

²¹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1978), p. 103.

²² W.B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society*, vol. 56 (1965), pp. 167–183.

²³ See Leiter, *op. cit.* note 5.

features that explain how people in some culture use the concept of law. Whether such description is better done by perceptive philosophers or instead by empirical social scientists is an interesting and important question, but there may be less disagreement than is commonly supposed between naturalists and non-naturalists except about the resources that should be used to learn about the concept of law that is used in this or that culture at this or that time.

There *is* disagreement, however, about whether such description can be divorced from morally-laden considerations about the value of law²⁴ and about the features of law that will best enable it to serve its essential functions. These debates are ongoing and important, but because they are peripheral to my main theme here I will put them to one side and assume that some description of the necessary features of the concept of law is possible, and that such description may not require making moral judgments.

That which is necessary or essential, however, may not be important.²⁵ And thus it should come as little surprise that numerous theorists, perhaps most notably on this issue Joseph Raz and Julie Dickson, have emphasized that of the set of necessary truths about the concept of law, the primary focus of general jurisprudence is and should be on the subset of those necessary truths consisting of the necessary truths that are in some way important, or whose identification and explanation will assist in our understanding. This conclusion—some would say concession, although I would not—has led some theorists to conclude that the enterprise of conceptual analysis of the concept of law is inevitably normative, but as long as we recognize, with Hart, that not all oughts are moral oughts, then we can acknowledge that selecting the important necessary truths from out of all the necessary truths requires choice and evaluation without committing to the view that moral choice or moral evaluation is necessarily part of so-called descriptive general jurisprudence.

2.5 On the Importance of the Contingent

But now we have reached the heart of the matter. If trying to “understand” the “nature of law” requires that we identify the necessary truths that are also important, then what about those important truths that are not necessary? And I do not refer here to those important truths that are simply contingent. There is nothing oxymoronic in the idea of a contingent necessary truth, for that which is necessary now and here could have been otherwise, and still may be otherwise. Rather, the question is whether there are things (ideas, or empirical observations, or philosophical explanations) of importance to the nature of law that are not—at this time and in this culture—necessary to the concept of law?

Of course if we understand and define the nature of something as being necessarily about the concept of that thing, and understand the concept of something as necessarily being about necessary or essential properties, then there is no question to be asked.

²⁴ See above, notes 6–13 and accompanying text.

²⁵ As Leslie Green says, with examples, “not all necessary truths are important truths.” Green, *op. cit.* note 2, at 1043.

But might there instead be another understanding of the nature of something that could also (and *not* instead) be useful? And to entertain this possibility, it will be useful to return to birds. More particularly, we should ask whether there is not something about *flying* that will help us to “understand” the “nature” (in the non-technical sense) of birds. It is true that penguins and emus are birds and do not fly, and that bats fly but are not birds, so flying is neither a necessary nor a sufficient condition for birdness. But it is surely of great interest that almost all birds fly and almost all non-bird vertebrates do not fly, and thus if we think about why, how, and when birds fly we are likely to learn something of great interest about birds. Moreover, what we learn may increase knowledge for its own sake, but may also have practical importance for understanding birds and understanding the physics of flight.

Flying is thus a property highly concentrated in birds but neither exclusive nor necessary for birds, yet still of great importance. Much the same might be said about the Maasai and the Mandinka of Africa, tribes whose women average close to 2 m in height and the men well over that. There are, of course, short Massai and Mandinka, and very tall people of other ethnicities, but to fail to note or consider the height of these peoples is to miss something of importance and interest. And so too with the whiteness of swans or the promptness of German trains, properties that are again not exclusive to these objects or institutions, but whose probabilistic concentration makes them of substantial importance to *us*—and it is *our* understanding that is at issue, just as it is *our* concept of law that we are considering when we look for the necessary properties of that concept.

If I am right about the foregoing examples, then it is plausible to suppose that much the same might apply to law. If there are properties that are highly concentrated in law, that probabilistically are far more likely to be concentrated in law than in other institutions even if their presence is neither necessary nor sufficient for law, would it not be a mistake to ignore their importance?²⁶

2.6 Coercion and the Nature of Law

With respect to law, it may well be that coercion is the most important of these non-necessary but probabilistically concentrated properties. It is true, as numerous theorists, including Hart but also before²⁷ and after²⁸ him, have observed, that coercion

²⁶A stronger but compatible claim is hinted at in Ehrenburg, *op. cit.* note 2, at p. 193, suggesting that law may consist in a “particular combination[] of non-unique elements.”

²⁷“[I]t is because a rule is regarded as obligatory that a measure of coercion may be attached to it; it is not obligatory because there is coercion.” Arthur L. Goodhart, *English Law and Moral Law* (London: Stevens & Sons, 1953), p. 17.

²⁸For example, John Gardner, “How Law Claims, What Law Claims” (paper presented at Symposium on “Rights, Law, and Morality: Themes from the Legal Philosophy of Robert Alexy,” New College, Oxford University, September 10–11, 2008); Leslie Green, “Law and Obligations,” in Jules Coleman & Scott Shapiro, eds., *Oxford Encyclopedia of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2008), pp. 514–547; Joseph Raz, “Authority, Law, and Morality,” *The Monist*, vol. 68 (1985), pp. 295–324.

is not (or at least may not be) a necessary condition for law. If we had a group of officials who non-coercively accepted the ultimate rule of recognition, if we had a population that similarly accepted the same ultimate rule of recognition, and if pursuant to that ultimate rule of recognition we had a system of primary and secondary rules, we would have law and a legal system even with no coercion whatsoever.

As Hart and countless others have recognized, however, it is likely that no such legal system exists now, and none may have existed even in the past. All or at least almost all actual legal systems have their coercive elements, and thus it is a salient feature of real legal systems that they coerce at least some subjects into compliance with the system's laws.²⁹ Indeed, even though Hart is undoubtedly correct in identifying the figure of the puzzled man who wishes simply to know what the law is so he can comply, and then in claiming that at least some such subjects exist in most real legal systems, it is an open question as to just how many such people there are in any legal system. Yet although we are uncertain, it is plausible to suppose that puzzled men are far outnumbered by bad (in Holmes's and Hart's sense) men, which explains why coercion is an omnipresent even if contingent and even if non-necessary feature of all or virtually all actual legal systems.

Thus, if we take "nature" to refer to salient and important characteristics rather than strictly essential or necessary ones, or if we substitute a word like "character" for "nature," it is highly plausible that coercion is as much part of the actual character of law as flying is of birds. To say this is to remain agnostic on questions relating to concepts or conceptual analysis, but only to conclude that there may be highly important and probabilistically concentrated features of some phenomenon that are not strictly necessary to the phenomenon, that may not be part of the concept of the phenomenon, but which may nonetheless be important to understanding the phenomenon as it exists in the world, and whose importance may well be illuminated by the use of broad theoretical, including philosophical, tools.

It is important to emphasize that I am using coercion here only as an example. Although I do believe that coercion is, post-Hart, an unfortunately neglected feature of law,³⁰ supporting that claim is not my agenda here. Attention to the importance of pervasive and concentrated but non-essential features of law may well support an increased focus on the role of sanctions and coercion, but even if it does not, there may be other such pervasive and concentrated but non-essential features whose importance should be noticed and analyzed with philosophical tools. Thus, although coercion may well be a good example of the consequences of my methodological

²⁹Increased attention to the coercive dimensions of law is urged in Leslie Green, "The Concept of Law Revisited," *Michigan Law Review*, vol. 94 (1996), pp. 1687–1717. See also Danny Priel, "Sanction and Obligation in Hart's Theory of Law," *Ratio Juris*, vol. 21 (2008), pp. 404–411.

³⁰Frederick Schauer, "Was Austin Right All Along?: On the Role of Sanctions in a Theory of Law", *Ratio Juris*, vol. 26 (2010), pp. 1–21.

claim, nothing in that claim depends on the ultimate soundness of coercion as an example.

That said, it is possible, as a claim about the history of ideas, that Austin's insistence on the central role of sanctions and coercion³¹ has played a causal role in generating some of the contemporary methodological stances. Once Hart was taken to have demonstrated that sanctions could not be essential to legality and legal obligation, there remained the question of how something so obviously important to how law is actually lived, experienced, and structured in the legal systems we know could not be part of the theoretical explanation for the nature of law. One answer to this question, therefore, could be that the theoretical explanation of the nature of law was—and this is an answer plainly suggested by the title of Hart's book and by the philosophical methodological controversies of the day—an inquiry into the essential or necessary features of the concept of law and not an inquiry into what is important about law as it is actually experienced. Moreover, if part of the increasingly dominant positivist project was (and is) to distinguish law from other normative rule systems—etiquette, for example—then it was seen to be necessary to search for the features of law without which it would not be law at all, and which in addition were not present in seemingly similar non-law institutions and phenomena.³² Hence (although my causal claim is a highly tentative one) there arose the focus on the necessary and sufficient conditions for the concept of law, as opposed to the jurisprudential examination on the important features of actual legal systems, and thus a decreased focus on coercion.

My reconstruction of the history of the modern methodology of jurisprudence may well be mistaken, and in addition omits the important methodological roles played by Joseph Raz, by the opening portions of John Finnis's *Natural Law and Natural Rights*, by the increasing philosophication of jurisprudence,³³ and by responses to Ronald Dworkin's proud refusal to give either a definition of "law" or to abjure doing what others have denigrated as particular as opposed to general jurisprudence. Nevertheless, for whatever reason, the enterprise of jurisprudence has increasingly avoided attention to that which is important but not necessary, and it is by no means clear that this development has been entirely or even substantially for the good.

³¹ John Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, W.E. Rumble, ed., 1995) (1st ed. 1832).

³² See Joseph Raz, "Incorporation by Law," *Legal Theory*, vol. 10 (2004), pp. 1–26; Joseph Raz, "Legal Principles and the Limits of Law," *Yale Law Journal*, vol. 81 (1972), pp. 823–48, at p. 842. See also Ruth Gavison, "Comment," in Ruth Gavison, ed., *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart* (Oxford: Oxford University Press, 1987), pp. 21–28, at p. 25. For the view that distinguishing law from institutions that are similar in some but not all important aspects is unlikely to be fruitful, see Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001).

³³ See Frederick Schauer, "(Re)Taking Hart," *Harvard Law Review*, vol. 119 (2006), pp. 852–883.

2.7 The Boundaries of Jurisprudence

I cannot emphasize strongly enough what I am not claiming here. Although a number of prominent legal theorists have questioned the value of some are all of the debates in contemporary jurisprudence,³⁴ I do not join them. Thus it is not my goal here to challenge the usefulness of conceptual analysis of the concept of law as a worthy jurisprudential exercise. What I do challenge is the view that conceptual analysis of the concept of law—and a conceptual analysis seeking to explain with philosophical tools the necessary or essential features of law—is the *only* worthy jurisprudential enterprise. And thus I offer a challenge to any definition of jurisprudence that would exclude from the field anything other than a search for those necessary features. I question not conceptual analysis's importance, but only its hegemony.

My target is hardly made of straw. Joseph Raz has described the analysis of features present in anything less than all possible legal systems as (mere) sociology of law, as opposed to philosophy of law,³⁵ as if it were impossible to employ philosophical methods to illuminate our understanding of features present in some or all actual legal systems even if not a defining feature of legality itself. Julie Dickson follows suit, producing a definition of jurisprudence which understands Dworkin, for example, as not simply being mistaken in his jurisprudential claims, but as not doing jurisprudence, or at least not analytical jurisprudence, at all.³⁶ Under Jules Coleman's definition of jurisprudence, it is a field which excludes attention to sanctions and other methods of enforcement,³⁷ thereby excluding Austin and Bentham, among others, from jurisprudence entirely. If the field or discipline of jurisprudence is defined so as to assume the conclusion of jurisprudential inquiry, and also to exclude from the field not only Dworkin and Austin, but also a host of others who

³⁴Thus, Brian Bix thinks it appropriate to ask whether the objectives and achievements of conceptual analysis of the concept of law are "substantial." Brian Bix, "Joseph Raz and Conceptual Analysis," *APA Newsletter on Philosophy and Law*, vol. 6(2) (2007), pp. 1–6, at p. 5. Kent Greenawalt suggests that the question about what is true of all and all possible legal systems "does not seem very important for understanding the legal systems under which we live." Kent Greenawalt, "Too Thin and Too Rich: Distinguishing Features of Legal Positivism," in Robert P. George, ed., *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996), pp. 1–30, at p. 14. To much the same (skeptical) effect is Danny Priel, "The Boundaries of Law and the Scope of Legal Philosophy," *Law and Philosophy*, vol. 27 (2008), pp. 643–695.

³⁵"Sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess." Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 104–105.

³⁶Dickson, *op. cit.* note 2, at pp. 17–25.

³⁷Coleman, *op. cit.* note 5, at p. 72 n. 12.

have sought to look philosophically at features present in some or most legal systems,³⁸ then something seems gravely wrong at the level of field definition.³⁹

Thus, I do not deny that understanding the conceptual aspect of law is important, nor that seeking to understand legality just for sake of understanding is an important application of the philosophical enterprise. Kenneth Himma worries that challenges to conceptual analysis in jurisprudence have an odor of anti-intellectualism,⁴⁰ but Himma's charge is well-placed only if aimed at those who question the value in seeking knowledge for its own sake, or who question the philosophical enterprise more generally. But to question a too-narrow definition of jurisprudence or the philosophy of law is to object neither to conceptual analysis nor to non-practically-useful philosophical pursuit.⁴¹ On the contrary, it is to object to a definition of the philosophy of law that excludes so much from the field as to narrow rather than broaden the domains in which we may seek knowledge simply for its own sake.⁴²

2.8 Necessity and Logical Priority

One argument for the primacy, even if not the exclusivity, of conceptual analysis is the argument from logical priority. How could we think about or research law at all unless we knew what we were talking about and what we were researching?

³⁸Ironically, Raz's definition of the philosophy of law may exclude some of his own work, such as his valuable analysis of precedent (Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 180–193), a form of legal decision-making neither definitional of law nor present in even all actual legal systems.

³⁹Thus, Brian Leiter appears to question the attitude under which “proximity to High Street in Oxford [is] a necessary condition for entry into the halls of serious legal philosophy.” Brian Leiter, “Why Legal Positivism,?” paper presented at the annual meeting of the Association of American Law Schools, January 9, 2010 (draft of December 10, 2009, at pp. 2–3). And Andrew Halpin quotes in the context of a discussion of jurisprudential methodology Simon Blackburn's observation that that many methodological disputes are “political bids for ascendancy within a discipline.” Andrew Halpin, “Methodology,” in Dennis Patterson, ed., *Blackwell Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 2nd ed., forthcoming).

⁴⁰Kenneth Einar Himma, “Substance and Method in Conceptual Jurisprudence and Legal Theory,” *Virginia Law Review*, vol. 88 (2002), pp. 1119–1228, at pp. 1218–1227. See also Brian Bix, “Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate,” *Canadian Journal of Law and Jurisprudence*, vol. 12 (1999), pp. 17–33, at p. 24, arguing for the value of analytical jurisprudence as producing knowledge for its own sake.

⁴¹It is important, however, to avoid defining the scope of jurisprudence in such a way as to treat it exclusively as a philosopher's subject. To treat non-philosophers such as Lon Fuller and Arthur Goodhart as not doing jurisprudence at all seems a knowledge-limiting and insight-limiting mistake. See Schauer, *op. cit.* note 28.

⁴²Thus, Ronald Dworkin has observed that “[t]he philosophy of law studies philosophical problems raised by the existence and practice of law,” R.M. Dworkin, “Introduction,” in *The Philosophy of Law* (Oxford: Oxford University Press, 1977), pp. 1–16, at p. 1. That definition seems correct, and it is one significantly and unfortunately narrowed by limiting it to *only* the philosophical problems raised in trying to identify the essential features of the concept of law itself.

Conceptual analysis of the concept of law is the necessary prologue to any attempt to understand actual legal systems by any method, so the argument goes, and is thus entitled to a special or even exclusive place in the jurisprudential pantheon.

Two responses to such a claim are possible. First, as Roger Shiner⁴³ and, more recently, Brian Leiter have argued,⁴⁴ the concept of law we need to ground further empirical or even philosophical work need not be a fully worked-out one, and can rely simply on common linguistic usage or on the institutions that are ordinarily designated as legal ones. On further analysis, we may discover that some of the things commonly thought of as legal may best be understood as otherwise, and vice versa, but there is no reason to believe that a complete analysis of the concept of law is necessary in order to examine the institutions that people commonly and pre-theoretically think and talk about as “law.”

In addition, it is often the case that that which is presupposed or logically prior is not necessarily that which is most or exclusively important, or at least most or exclusively important in some context or domain. Even if conceptual analysis is logically prior to evaluation,⁴⁵ that which is logically subsequent may sometimes be more important or more conducive to understanding. Consider the theory of natural selection. In order for the theory of natural selection to be sound, there must exist a mind-independent physical reality, which some people deny. Thus, there is a form of epistemic objectivism, controversial in some circles (but not mine), which is a necessary condition for the soundness of the evolutionary theory of natural selection. Still, to take the claim about a mind-independent physical reality is being in some way more important or more central than the claim about natural selection misses the point of natural selection entirely. Even though the theory of natural selection, like any other scientific theory, is a descriptive one, a descriptive theory—or account—has a point, and we lose the point of a descriptive theory if we treat it as necessarily subservient to the sometimes contested facts and theories that are preconditions of its plausibility. Even if, the previous paragraph notwithstanding, conceptual analysis is logically prior to fruitful empirical or philosophical observation about law, it does not follow from this that the latter is of lesser importance or less entitled to be a significant part of jurisprudence.

⁴³Roger Shiner, *Norm and Nature: The Movements of Legal Thought* (Oxford: Clarendon Press, 1992), pp. 4–9. Shiner refers to certain “preanalytic” and “philosophically aseptic” facts about the world (and about our commonsense understanding of law) as sufficient to get the analytic and philosophical enterprises started.

⁴⁴Brian Leiter, “Naturalism in Legal Philosophy,” *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/lawphil-naturalism/> (last revised February 20, 2007).

⁴⁵See David Lyons, “Founders and Foundations of Legal Positivism,” *Michigan Law Review*, vol. 82 (1984), pp. 722–739.

2.9 Conclusion

Thus, the goal of this paper is not, to repeat, to challenge the agenda of conceptual analysis of the concept of law, but only to challenge its jurisprudential hegemony. That which is contingent, non-essential, and even particular may be vitally important, and in need of empirical and philosophical illumination. If the non-essential is excluded from the “province of jurisprudence,” we may hinder rather than help the effort to understand the nature of law, and thus frustrate the very goal that conceptual analysis is designed to serve. “What law is” is an important area of inquiry, but so too is “What law is like.” The two are not the same, and there is no reason why the two cannot co-exist within the province of jurisprudence.

Neutrality and Theory of Law

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2013, XII, 273 p., Hardcover

ISBN: 978-94-007-6066-0