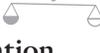


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CHAPTER 1

The Nature of Jurisprudence

Debate **1****What are the central questions of jurisprudence?**

As H.L.A. Hart observed in *The Concept of Law*, jurisprudence has centred on certain persistent puzzles, each of them prompted by the question: What is law?¹ Hart described three: How is law related to coercive threats? What is it to be under a legal obligation, and how does this relate to moral obligation? What are rules and in what way is law about rules? In answering the question – What is law? – philosophers of law have aimed to provide answers to these questions, typically by considering whether there are any necessary connections between law and coercion, law and morality, and law and rules, and elucidating the nature of those connections. In doing so, they normally aim to describe the features of a phenomenon which make it law – they want to know whether, for instance, something has to have a coercive element if it is to count as *law*. If so, then coerciveness is part of what makes law ‘law’.

The main divisions in the philosophy of law can still be broadly understood in terms of differing answers to Hart’s three questions. We can thus identify three broad fault-lines in contemporary jurisprudence.²

The first can be called the *social construction question*. Everyone agrees that, for law to exist, there must be certain kinds of socially constructed institutions (i.e. institutions that exist because of the practice of groups of people) like courts. But a major question is whether law is through-and-through a social construction. Those who believe that whether some rule counts as a *legal* rule is fundamentally a matter of looking at the social practice of legal officials (e.g. did legal official X *say* that Y was the law on this point?) are typically known as *legal positivists*. As we’ll see later, some theorists, such as Ronald Dworkin,

¹ CL, ch. 1 (see list of abbreviations, p. xv).

² These broad divisions are partly analogous to the division in political views between ‘left-wing’ and ‘right-wing’ in terms of how illuminating they are as classifications; they tell us something, but they may also obscure other, relatively fundamental, agreements or disagreements between the parties in each camp.



reject this view: they claim that law is not *entirely* a social construction – the content of the law on some issue necessarily depends upon moral truths, and what is morally the case, in their view, does not depend entirely upon what anyone did, said, believed, practised, or recognised; it is not *entirely* a social construction.³

The second fault-line cuts across the *social construction question*. That is: your view on the *social construction question* need not dictate your view on this question. We can call this the *functionalist question*. The question is whether it is part of the nature of law that it pursues a particular function, where that function is relatively distinctive to law. A functionalist view holds that this is indeed the case. The alternative view holds that there are no functions that law necessarily pursues which mark it out as a distinctive phenomenon. An analogy illustrates the contrast.⁴ We understand what a Swiss army knife is less by reference to the specific purposes to which it can be put (these are many and various) and more by reference to the fact that it has many capabilities bundled together in one implement. By contrast, we understand what a saw is primarily by reference to its specific function: sawing. Is law more like a saw or a Swiss army knife? Depending on how a given legal theory answers this question, we can classify the theory by reference to whether it considers law to be principally a *modal kind* – the sort of thing which is characterised by its *mode* of achieving various goals;⁵ or whether it considers law to be a *functional kind* – the sort of thing which is characterised by the *specific* function or functions it pursues.⁶

The third division concerns the role of coercion in law. The *coercion question* is whether it is part of the nature of law that it is a coercive institution. Should legal rules, for instance, be understood as a kind of threat to impose a sanction in the event of their breach? We explore this issue in Chapter 2. In this debate, we introduce different theories of law, ordered by their position on the *social construction question* and the *functionalist question*. Here is a preview of how the theorists line up:

	<i>Modal</i>	<i>Functionalist</i>
Social constructionist	Hart	Fuller, Finnis, Simmonds
Non-social constructionist	–	Dworkin, Greenberg

³ Greenberg, ‘How facts make law’ (2004) 10 *Legal Theory* 157: ‘a central – perhaps *the* central – debate in the philosophy of law is a debate over whether value facts are among the determinants of the content of the law’.

⁴ Green, ‘Law as a means’ in Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010), 171–73, 184. Aquinas was the first to compare law to a ‘saw’: *Summa Theologica* I-II, q.95, a.3.

⁵ The terminology of ‘modal kinds’ is borrowed from Green, ‘The concept of law revisited’ (1996) 94 *Michigan Law Review* 1687, 1711. It is also used by Gardner, ‘Law in general’ in his *Law as a Leap of Faith* (Oxford University Press, 2012), 293.

⁶ The idea of a ‘functional kind’ is discussed in Moore, ‘Law as a functional kind’ in George (ed.), *Natural Law Theory* (Oxford University Press, 1992).



SOCIAL CONSTRUCTIONIST, MODAL KIND, THEORIES OF LAW

The most influential theory of law's nature in the last 60 years has been that developed by H.L.A. Hart in *The Concept of Law*. In Hart's view, the only function which law necessarily possesses is the very general one of guiding and criticising conduct.⁷ This function does not distinguish law from other things like etiquette. In Hart's view law is distinctive primarily in virtue of the *ways* in which it serves as a guide to conduct. The central ideas of Hart's theory describe the special way in which law guides conduct:

1. Law guides conduct as a *system of rules* – rules which require people to do or not to do certain things (primary rules) and rules about how rules of the system come into existence, how they can be changed, and who can adjudicate upon them (secondary rules).
2. A rule belongs to the system, and hence is a legal rule, if and only if it is recognised as a rule of the system by a master rule – *the rule of recognition*.
3. This rule of recognition exists because of the *practice of officials* who accept the rule.

Law and games: comparisons

We can usefully introduce these ideas by an analogy to the rules of games.⁸ Consider the rules of professional football. In England, the Football Association (FA) determines what these rules are. The FA recognises that the 'FIFA Laws of the Game' govern professional football matches in England. The 'FIFA Laws of the Game' include rules such as: (a) Outfield players must not handle the ball during the course of play; and (b) The referee has the power to determine whether the rules of the game have been infringed by players. Now, this set-up is in some important ways like law, on Hart's account.

1. Games – professional football included – are constituted by rules; there are no games without rules. So, too, according to Hart, law.
2. The rules of professional football are of different kinds. Rule (a) requires the participants in the game to refrain from certain actions. In Hart's terms, this is a primary rule of obligation – a rule which requires human beings to do or refrain from doing certain actions.⁹ Contrastingly, Rule (b) does not itself require the referee to do anything – rather, it confers a

⁷ CL, 249.

⁸ Cf. Hart, 'Definition and theory in jurisprudence' in his *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), 26–27: 'The economist or the scientist often uses a simple model with which to understand the complex; and this can be done for the law. So in what follows I shall use as a simple analogy the rules of a game which at many vital points have the same puzzling logical structure as rules of law.'

⁹ CL, 81.



power on the referee to determine whether the rules have been infringed. In Hart's terms, this is a secondary rule: a rule about the primary rules.¹⁰ So the game of professional football, then, contains primary and secondary rules, just like law.

3. If we consider the question – *what makes a rule a rule of English professional football?* – we can see another connection with Hart's theory. The answer to the question is probably that a rule is one of English professional football if it is recognised by the FA as being such a rule.¹¹ It might be the case that football officials in England (referees and, generally, members of the FA) accept a rule that recognises 'what the FA declares as rules of English football' as the rules of English football. In Hart's view, what determines whether a rule is a rule *of law* is similarly a rule that recognises certain rules as belonging to a system of rules – the rule of recognition. Hart gives as an example of such a rule: 'what the Queen in Parliament enacts is law'. That what the law is ultimately depends upon facts about what the members of a group of officials have accepted in their practices is the core of what makes Hart a *legal positivist* and *social constructivist*.
4. The rules recognised by the FA could be good or bad rules. Some people might think that if the FA introduced a rule that allowed goals scored in the last 10 minutes of a football match to count as two goals that this would be undesirable. Nonetheless, such a rule would become part of the rules of English football by virtue of having been recognised as such by the FA. Similarly, Hart thought that the content of the law could be good or bad – morally praiseworthy or morally heinous. Everything depends upon what rule of recognition the officials of the system accept – if they accept the rule that 'what Parliament enacts is law', then there is no logical guarantee that the content of the law will meet any moral standard.
5. The attitudes that the players of certain games must have to the rules of the game in order to count as playing the game at all bear some important similarities to the attitudes that Hart claimed some people must have in relation to legal rules in order for law to exist. Consider the rule in chess that the bishop must be moved diagonally. A person is not playing the game of chess if they do not accept that they ought to move the bishop diagonally. In Hart's view, the officials (principally, judges) of a legal system must similarly regard the rule of recognition as a binding rule – they must think that they *ought* to follow the rule.

Hart thought that officials had to adopt this attitude to the rule of recognition in order for there truly to be a *rule* of recognition rather

¹⁰ CL, 94.

¹¹ See also Green, 'The morality in law' in D'Almeida et al. (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing, 2013), at 180, comparing law to the rules of cricket, where being part of the publication, 'The Laws of Cricket', partly determines whether a rule is one of cricket.



than a mere *habit* of recognition.¹² People may have a habit of going to the cinema on a Tuesday but, according to Hart, there is only a *rule* amongst people of going to the cinema on a Tuesday if they think that they *ought* to go to the cinema on a Tuesday. Why was Hart insistent that law requires the existence of a *rule* of recognition rather than a mere *habit*? The main reason is that a mere habit amongst officials of recognising that ‘whatever Parliament enacts is law’ would not explain the sense in which Parliament has *legal authority* to make law; it would not capture the sense that the officials *ought* to recognise whatever Parliament enacts as law.

6. The rules of a game use normative language. For example, they tell people what they ‘ought’ to do – in chess, the bishop *ought* to be moved diagonally. Furthermore, the ‘ought’ here does not seem to be the same as the ‘ought’ in ‘You ought not to torture children for fun’. It is not a *moral* ought. Similarly, Hart insists that legal obligation is not the same as moral obligation.¹³ From the fact that one is legally obligated to do something, it does not ipso facto follow that one has a moral obligation to do it.
7. Something can be the rule of a game even if there is no threat of a sanction for its breach. The rules of hide and seek could conceivably leave it open whether any negative consequence attaches to failure to comply with the rules. Hart believes that there is no *conceptual* requirement for law to impose sanctions for the breach of primary rules. At most, this is what Hart calls a *natural necessity* – it is something which is necessary because of human nature; if human nature were different, if we lived in a society of angels, then sanctions would not be required.

Law and games: contrasts

We’ve identified six similarities between Hart’s theory of law and certain games. It is also useful in further clarifying Hart’s account if we consider the limits of the analogy with games.

1. It is a *contingent* feature of games that there is a set of officials, whilst this is, according to Hart, a *necessary* feature of law. The game of hide-and-seek goes on perfectly well without there being hide-and-seek officials.¹⁴
2. It is a *contingent* feature of games that there is a rule of recognition practised by players of the game (or, should they exist, officials) identifying which rules belong to the game, whilst this is a *necessary* feature of law, according to Hart.¹⁵ Again, there is no need to think of the participants

¹² CL, 55–57.

¹³ CL, 203.

¹⁴ Though there is a national hide-and-seek association of America: www.playhideandseek.org.

¹⁵ CL, 116–17.



of the game of hide-and-seek as accepting a rule of recognition determining which rules belong to the game.

3. The rules of a game have a narrow scope of application – they govern the game-related activities. The rules of cricket govern the game of cricket only. By its nature, law, as Hart accepts, governs many activities by way of rules.

Summary

In summary, we can see that, for Hart, the key to understanding law's nature is to understand its *modes* of operation: that law governs by different kinds of rule; that those rules form a system by virtue of a master rule – the rule of recognition; that the rule of recognition exists by virtue of the practice of officials in the system; that the law imposes obligations which are genuinely obligations of a kind, but which are not (necessarily) moral obligations; that its rules govern all sorts of human activities.

SOCIAL CONSTRUCTIONIST, FUNCTIONAL KIND, THEORIES OF LAW: FULLER, SIMMONDS AND FINNIS

Lon Fuller: law is like a saw

Just as it might be said we do not understand what a saw is except by reference to its purpose, so Lon Fuller claimed in his book, *The Morality of Law*, that law's *purpose* was central to understanding its nature.¹⁶ As Green puts it, for Fuller, law is 'an institution on a mission'.¹⁷

What mission? The purpose of law is 'to subject human conduct to the governance of rules'.¹⁸ Fuller's main argument for this was that the criteria by which, in his view, we determine whether law exists are only intelligible if one presupposes that law has, by its nature, the purpose of subjecting conduct to the governance of rules. These criteria he calls the 'desiderata' or 'principles' of legality. The eight desiderata are that there must be:¹⁹ (1) rules (2) which are published, (3) prospective (not retrospective), and (4) with which it is possible to comply; they should also be (5) intelligible, (6) non-contradictory, and (7) reasonably stable across time; in addition, (8) officials must act in accordance with the published rules.

If there is too much of a departure from these criteria, then it cannot be said that a legal system is in existence. We simply wouldn't say that there is law if, for example, there were no rules, or if the rules were entirely secret.

If this is right, Fuller says we have to ask: '*to what end* is law being so defined that it cannot "exist" without some minimum respect for the principles of

¹⁶ Fuller, *The Morality of Law*, rev'd edn (Yale University Press 1969).

¹⁷ Green, 'Law as a means' (above, n. 4), 173.

¹⁸ Fuller, *The Morality of Law* (above, n. 16), 106.

¹⁹ *Ibid.*, ch. 2.



legality?’²⁰ And to that question, his answer was that law’s end – law’s purpose – is the governance of human conduct by rules. Only by postulating that this is law’s purpose do we make sense of our settled understanding that law only exists where there are rules which are sufficiently clear, prospective, non-contradictory, and so on.

Why was Fuller so ‘in love with the notion of purpose’?²¹ There are at least two reasons. First, Fuller was long convinced that a central task of jurisprudence is to understand *why* law is important – *why* law is needed in human societies at all. His first book – *The Law in Quest of Itself*²² – repeatedly criticises contemporary jurisprudence for its failure to address the ‘purposive sense of why a lawgiver is needed at all’.²³ Second, as we explain in a later chapter, Fuller thought of law’s purpose – governance by rules – as an intrinsically moral one.²⁴ So, for him, once we realise law’s purpose, we realise that law is in pursuit of a moral aim. That would be an important property of law, if true.

Fuller’s functional theory of law has been built on by two recent legal theorists: Nigel Simmonds and John Finnis.

Nigel Simmonds: law is like a triangle

If you quickly sketch a triangle, it will be an imperfect one. A triangle printed in a mathematical textbook will be a better triangle, though probably still imperfect. Both will not exactly conform to the mathematical definition of a triangle. Nonetheless your triangle and the one in the textbook *are* triangles. They are triangles by virtue of their approximation to the mathematical definition of a triangle. And one is *more* of a triangle by more closely approximating the mathematical definition.

Compare the concept of a ‘bachelor’. A bachelor is an unmarried man. A man is either a bachelor or he is not. It is not a question of degree or approximation to a definition of bachelorhood which determines whether some particular person is a bachelor or not.

Nigel Simmonds offers a theory of law’s nature, in his book *Law as a Moral Idea*, which says that law is more like ‘triangle’ than ‘bachelor’. Simmonds describes concepts like *triangle* as ‘archetypal’ concepts.²⁵ Something counts as an instance of an archetypal concept in virtue of its approximation to an abstract definition – and this will be a matter of degree. By contrast, he designates concepts like *bachelor* as ‘class concepts’.²⁶ Something counts as an

²⁰ Ibid, 198.

²¹ A remark made by H.L.A. Hart in his review of *The Morality of Law* (1968) 78 *Harvard Law Review* 1281, 1296.

²² Fuller, *The Law in Quest of Itself* (Foundation Press, 1940).

²³ See Rundle, *Forms Liberate* (Hart Publishing, 2012), 28.

²⁴ See Chapter 4, below.

²⁵ Simmonds, *Law as a Moral Idea* (Oxford University Press, 2007) (henceforth, *Law as a Moral Idea*), 52–54.

²⁶ Ibid.



instance of a class concept only if it meets certain criteria and, upon meeting those criteria, its being an instance of the concept is not a matter of degree.

In Simmonds' view, whether something counts as an instance of *law* depends upon the extent to which it conforms to Fuller's eight desiderata, and the more that it does, the more that it counts as an instance of law – the more *law-like* it is. Law's archetype, then, involves conformity to Fuller's desiderata.²⁷ However, conformity to Fuller's desiderata is only a first layer in an understanding of law's archetype for Simmonds. Upon further reflection, the archetype reveals itself to have a deeper layer. His further claim is that law's archetype also reflects *a moral aspiration*. Although law is like a triangle, it differs, according to Simmonds, insofar as law's archetype is a *moral aspiration*.²⁸

What, then, is this moral aspiration? It is that compliance with Fuller's desiderata is intelligible as realising an ideal of liberty.²⁹ Complying with the desiderata (to sufficient extent that the resulting rules would be counted as 'law' by virtue of sufficient proximity to the Fullerian archetype) confers a distinctive kind of liberty on persons subject to the law.³⁰ This is because a system of rules announced prospectively, with which it is possible to comply, will always grant subjects some options as to how to comply with the rules (for example, the law might require a person to drive on the left hand side of the road, but leave open all sorts of things the person can do whilst driving (like whether the person wears a hat or not whilst driving)). Furthermore, these options will enjoy some protection against interference by other subjects, says Simmonds, if the system is concerned (as all legal systems, to some extent, are) with ensuring the effectiveness of the rules of the system.³¹ In short, we can make sense of law's archetype if we come to see it as geared towards serving liberty.

Why should we think of law as an *archetypal* concept rather than a *class* concept in the first place? Simmonds' basic argument is that the archetypal nature of law is reflected in our ordinary discourse about law. On the one hand, we think of law as a 'mundane' instrument, capable of serving good and bad purposes equally; on the other hand, we think of law as embodying a moral ideal. This is so in three ways:

1. *The rule of law*. Simmonds writes: 'Governance by law is regarded as being in itself a virtue of a just political community.'³² We tend to think of the *rule of law* as an ideal or aspiration. For Simmonds, there is an

²⁷ *Law as a Moral Idea*, 65–66. See also Simmonds, 'The nature of law: three problems with one solution' (2011) 12 *German Law Journal* 601, 615–16.

²⁸ *Law as a Moral Idea*, 54, distinguishing aspirational and non-aspirational archetypes.

²⁹ See, further, Chapter 4, below.

³⁰ *Law as a Moral Idea*, 101–10.

³¹ *Ibid*, 104.

³² *Ibid*, 37.



intimate connection between ‘law’ and the ‘rule of law’. The ‘rule of law’ is just the situation where law rules.³³ So, if it’s right to think that law and the ‘rule of law’ are deeply connected, and the rule of law is an aspiration, then there is a deep connection between law and an ideal or aspiration.³⁴

2. *Law is invoked as a justification for sanctions.* Judges offer the fact that a person has breached a rule of law as a justification for sanctioning that person. The fact that the person has breached a rule of *law* (rather than some other rule) is thought to be crucial to justifying the outcome that the person should be sanctioned. Simmonds says that this ordinary understanding we have of the way law is invoked by judges to justify sanctions cannot be understood *simply* by reference to Hart’s idea of a master rule of recognition, which could be followed by officials for any reasons whatever.³⁵ It would not be intelligible, Simmonds claims, for a judge to offer, as a justification for a sanction, the fact that a person has breached a rule, which is identified by a rule (the rule of recognition), which the judge follows purely for, say, selfish or malicious reasons. Rather, the practice of invoking the *law* as a justification for a sanction only makes sense if the status of a rule as one of law is thought by the person invoking it to have some moral significance. So, implicit in our ordinary understanding of law, according to Simmonds, is the idea that law has some special moral quality that could justify imposing sanctions on a citizen. This points towards an aspirational understanding of law as embodying a moral ideal.
3. *Doctrinal argument.* The aspirational aspect to our ordinary understanding of law is also revealed, Simmonds claims, when we consider doctrinal argument about the law in particular cases. Textbook writers often offer, as claims about what the law is, propositions that have never been authoritatively determined by courts. For Simmonds, these kinds of claim can be understood as attempts to move our understanding of particular rules or doctrines of law towards the archetype of law.³⁶

John Finnis: law is like a house

John Finnis has written that it is a ‘philosophical mistake’, in developing a theory of law’s nature, to think that ‘you can answer the question[:] What is it? [b]efore you tackle the question[:] Why choose to have it, create it, maintain it, and comply with it?’³⁷ We’ll explore his reasons for this view in the next debate. The point for now is that, for Finnis, law’s *purpose* is central to

³³ Ibid, 46–47.

³⁴ Ibid, 46–52.

³⁵ Ibid, 130–36.

³⁶ Ibid, 167.

³⁷ Finnis, ‘Law and what I truly should decide’ (2003) 48 *American Journal of Jurisprudence* 107, 129.



understanding law's nature. For Finnis, Fuller's understanding of law as simply existing to guide people's behaviour is too thin. The purpose of having law is not *just* to guide people's behaviour, but to guide people's behaviour in order to enable people to participate in the sort of states and activities that it is good for human beings to participate in: life, knowledge, play, marriage, friendship, aesthetic experience, spirituality, and practical reasonableness.

For Finnis, then – though this is not a comparison he has himself made – law is like a house. To define a house in functional terms as simply existing to provide its occupants with a roof over their head would be to offer an account of the nature of the house that is just as thin and as impoverished as Fuller's account of the purpose of law. Rather, a house, properly understood and properly constructed, exists to provide its occupants with a place to participate in virtually all of the goods that Finnis identifies law as existing to enable people to enjoy. And for Finnis, law is like a house in another sense – and this is a comparison he has made in the past. There are thousands of different ways of designing a house in order to enable the occupants of the house to enjoy the kinds of goods that the occupants of a properly designed house will enjoy. So if a house is to function in the way a house is supposed to, it needs an architect: someone who will *decide how* the house will be designed. In the same way, there are thousands of different combinations of laws that would work equally well to enable the members of a particular community to enjoy the goods that law exists to enable them to enjoy. So if a legal system is to operate in the way it is supposed to do, someone or some body or some combination of bodies needs to *determine* what combination of laws will be given effect by that legal system.

We will discuss Finnis's theory of law in much greater detail in a later chapter.³⁸ For now, we will turn to consider another functional theory of law that sees the function of law as lying not so much in its directive quality, but in its justificatory quality.

NON-SOCIAL CONSTRUCTIONIST, FUNCTIONAL KIND, THEORIES OF LAW: DWORKIN AND GREENBERG

Ronald Dworkin's theory of law's nature can be summarised in four propositions:

- (a) Law is an interpretive concept.
- (b) The function of law is to insist that force be used only to the extent that it is justified by past political decisions about when collective force is justified.
- (c) The law in a system consists of the best moral justification of the past political decisions of that system.
- (d) Law is a branch of morality.

³⁸ See Chapter 5, below.



To understand (a)–(c), it will be helpful to consider an analogy drawn between law and the social practice of *courtesy*, an analogy which Dworkin himself deploys in Chapter 2 of *Law's Empire*.³⁹ We'll consider (d), which is developed in Dworkin's more recent book, *Justice for Hedgehogs*,⁴⁰ later.

Dworkin introduces his theory of law by developing a story about the practice of courtesy in an imaginary community. The story has two important stages:

Stage one. At this stage, the community follows a set of rules, which they call rules of 'courtesy', in certain social interactions. They say things like: 'Courtesy requires that peasants take off their hats to nobility.'⁴¹ The practice of courtesy, during this time, goes largely unquestioned and unchanged by the members of the community. It has the character of taboo: the community thinks that the rules of courtesy just ought to be followed, full stop.

Stage two. At a later stage, there develops in the community what Dworkin calls an 'interpretive attitude' towards the rules of courtesy. This attitude has two distinct components: (1) it involves an assumption that the practice of courtesy has some *point or value or purpose*, which can be stated independently of simply describing the rules of courtesy themselves; (2) it involves a further assumption that what courtesy requires in a particular situation is not wholly determined by what people have thought courtesy requires in the past – rather, the requirements of courtesy are sensitive to its *point, value or purpose*.

To understand what (2) means, think again of the rules of football. We might think that the game of football has some value, or set of values at the heart of it (sometimes people might talk of 'the spirit of the game'), and we might appeal to that value in arguing about whether the rules of football *ought to be changed*. But in arguing about what the rules of football *are right now*, we would not appeal to the value or purpose of the game: the rules are determined by whatever the FA says they are. If, however, we adopt the second aspect of the interpretive attitude, we think that *what the rules of a practice currently are* (not what they *ought* to be) is directly determined by the *point, value or purpose* of the practice (and not just by what anyone actually says the practice requires). So even if a number of the members of the community think that courtesy requires one to say 'Hello' to one's neighbour in the morning, this is not conclusive of what courtesy *actually* requires. Rather, what courtesy actually requires depends upon the conclusion of an argument about what the value of courtesy is and what that value requires in the circumstances.

³⁹ LE, 46–49.

⁴⁰ Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011). We discuss the arguments in this book below, at p. 14.

⁴¹ LE, 47.



If the practice described by some concept – like the concept of courtesy – is one to which participants have taken up the interpretive attitude (that is, they assume (1) and (2)), then that concept is an *interpretive concept*, in Dworkin's terminology.

It is a crucial feature of an interpretive concept, according to Dworkin, that if one makes a claim about what the practice to which that concept refers requires, one necessarily takes a stand on the value of the practice. So if I claim that courtesy requires that men rise when women enter the room, I am implicitly taking a view on what the value of courtesy is. This follows simply from the fact that the community has taken up the interpretive attitude to courtesy. If the interpretive attitude is taken up in relation to some practice like courtesy, it is accepted that what that practice requires is sensitive to the *value* or *purpose* of that practice. So when I say that the practice requires *x*, I am always going to be taking a position on the value of the practice. For example, if I say that courtesy requires you not to try to start a conversation with me about my private life when we are in a public place, I might implicitly be assuming that courtesy serves the value of fostering privacy. According to Dworkin, if someone were to ask you to say what courtesy requires in a particular situation without taking a stand on the *value* of courtesy, you would be like 'a man at the North Pole who is told to go any way but south'.⁴²

Dworkin claims, then, that *law*, like courtesy in his imaginary community, is an interpretive concept. Consequently, whenever we seek to determine what the law on a particular question is, we are always going to be making a claim about what the point, purpose, or value of law is. What, then, does Dworkin contend the *point* of law to be? He writes that:

the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.⁴³

From this abstract starting point, which he claims to be 'uncontroversial',⁴⁴ Dworkin goes on to offer an account of a fundamental part of this starting point: namely, the way in which individual legal rights and responsibilities *flow from* past political decisions. In his words, he goes on to offer an account of the *grounds* of law.⁴⁵ The grounds of law are what make it the case that a certain proposition is a proposition of law.⁴⁶ For example, someone might claim that one ground of law is 'what Parliament enacts'.

⁴² LE, 69.

⁴³ LE, 93.

⁴⁴ LE, 94.

⁴⁵ LE, 4–5.

⁴⁶ LE, 5.



So what is Dworkin's theory of what it is that makes something a proposition of law – what is his account of the *grounds* of law? It needs to be remembered what kind of question this is for Dworkin. Because law is an *interpretive concept*, answering the question involves offering an *interpretation* of legal practice – principally, the practice of recognising the enactments of legislatures as law and the practice of following previous court decisions.⁴⁷

This interpretive exercise involves a working-through of the interpretive attitude in relation to those practices. Dworkin provides an account of how an interpreter should proceed in this task. The account involves three stages of interpretation.⁴⁸ The first 'pre-interpretive' stage involves the identification of the 'rules and standards taken to provide the tentative content of the practice'. In the second stage, the interpreter settles upon a justification of the 'main elements' of the practice identified at the pre-interpretive stage. In the final, 'post-interpretive' stage, the interpreter comes to a better sense of what the practice really requires, in light of justification he or she has identified as being the point of the practice. Dworkin calls the entirety of this process *constructive interpretation*.

To illustrate, consider again the example of courtesy. At the pre-interpretive stage, we might find in our imaginary community that there are many rules identified as rules of courtesy which are concerned with showing due respect for the aristocracy. At the second stage, we might come to think that the best justification for this practice lies in a respect for noble people in general. Although this justification might not fit with all aspects of the practice – perhaps there is also a rule which requires one to doff one's cap to women, regardless of their nobility – it provides a justification of most aspects of the practice and is superior to alternative justifications. It is superior, let us suppose, both in the extent to which the justification *fits* with the rules of courtesy (it explains why we have the rules we do) and in the extent to which it is a *morally good* justification (other justifications, say, claim there is value in servility). At the post-interpretive stage, we might find that the justification of the practice requires us not only to show due respect for the aristocracy, but also to show respect – hitherto unrecognised by the practice – for heroic acts of bravery.

Applying this strategy of constructive interpretation to legal practice, Dworkin arrives at a theory of law which he calls 'law as integrity'. According to *law as integrity*, the law of a community consists in the most morally coherent justification of the community's legal practice. Notice that this isn't merely to re-state the claim that law is an interpretive concept and that therefore, in order to understand what it requires, one needs to determine what the best justification of legal practice is. Rather, Dworkin arrives at law as integrity by arguing that, on the best interpretation of legal practice, the point of legal practice is itself to come up with the best justification of a community's legal practice. This is why he says that law as integrity is 'relentlessly interpretive'

⁴⁷ LE, 99.

⁴⁸ LE, 65–68.



and why ‘it is both the product of and the inspiration for comprehensive interpretation of legal practice’.⁴⁹ Unlike other theories of law (which equally must be arrived at by offering interpretations, since law is an interpretive concept), law as integrity is not *merely* an interpretation of legal practice, but also claims that legal practice *is itself fundamentally interpretive*. Law as integrity itself requires judges themselves to engage in a process of constructive interpretation of the community’s legal practices.

In a compressed concluding chapter to *Justice for Hedgehogs*, Dworkin argues that law is a ‘part of political morality’.⁵⁰ This seems to mean that our legal obligations, in his view, are a sub-set of our moral obligations. Which sub-set? Our legal obligations are those moral obligations which may be ‘enforce[d] on demand ... in adjudicative institutions that direct the executive power of sheriff or police’.⁵¹ The key distinction, then, between *legal* rights and other moral rights is that legal rights may be enforced by courts. If our legal obligations form a sub-set of our moral obligations, how can there ever be unjust laws? Dworkin claims that his view does not collapse the distinction between the law as it is and the law as it ought to be because the way institutions have acted can change our moral entitlements. An analogy: some believe that the UK’s collective decision, reached by referendum, to leave the European Union was not the morally best decision. However, the fact that the decision was made democratically gives us (some) moral reason to carry out the decision, even if it is not the morally best one on the merits. Similarly, the fact that a court has decided X could give us a moral reason to do X even if X is not the morally optimal decision (because of our interest, for instance, in having a clear rule on what to do in certain situations).

The somewhat cryptic re-statement of Dworkin’s legal theory in *Justice for Hedgehogs* raises many questions. Here are two. First, what motivates Dworkin’s position that legal obligations are moral obligations which are *enforceable*? Clearly, Dworkin cannot say that law *is* morality on pain of absurdity (it is surely undeniable that we have some moral obligations that are not also legal obligations). So there needs to be some criterion which delimits distinctively *legal* moral obligations from others; but Dworkin provides no argument whatsoever why the criterion ‘may be enforced by a court’. Moreover, this proposal runs into the objection that there are indeed unenforceable legal obligations: legal obligations which courts might legitimately refuse to enforce because of, for instance, the constitutional impropriety of doing so.⁵² Second, Dworkin’s new account of law tells us little about *what* makes a moral obligation permissibly enforceable by a court, and so, a legal obligation.

Mark Greenberg has developed a non-social constructionist account of law – the ‘moral impact theory’ – which bears similarities to the position sketched

⁴⁹ LE, 226.

⁵⁰ Dworkin, *Justice for Hedgehogs* (above, n. 40), 405.

⁵¹ *Ibid*, 406.

⁵² Dworkin is aware of this objection: *ibid*, 412.



in *Justice for Hedgehogs*.⁵³ Greenberg, like Dworkin, claims that our legal obligations are a kind of moral obligation. His distinguishing criterion is different, however: legal obligations are the subset of moral obligations which arise as a result of the actions of legal institutions.⁵⁴ Some of our moral obligations only arise when someone does a particular thing. For instance, suppose I promise to give you £5 if you wash my car. This creates a *new* moral obligation to pay £5 if you wash my car. Greenberg thinks legal obligations are similar to the obligations created by acts like promising. Under certain conditions, when a legislature issues an enactment, this, like the making of a promise, will create moral obligations. So legal obligations are not distinguished by their enforceability, but rather by their mode of creation: they are moral obligations that arise because of the ‘impact’ of certain social institutions.

Greenberg offers four arguments for his theory.⁵⁵ First, he claims that we think of law as defective to the extent that it fails to create moral obligations; a legal system that fails to create moral obligations is like a clock that doesn’t tell the time. Consequently: ‘If a legal system is, by its nature, supposed to change moral obligations, it is not surprising that the central feature of law – its content – is made up of the moral obligations that the legal system brings about.’⁵⁶ Second, many believe that legal interpretation has some connection to moral reasoning. The moral impact theory explains this connection without claiming that legal interpretation is a matter of asking (with Dworkin) ‘What is the morally best interpretation of this statute, decision, etc.?’ Rather, Greenberg’s theory asks – ‘To what moral obligation does this statute give rise, given that it was enacted by a democratic legislature, under the following circumstances ...?’ Third, legal systems claim to impose genuine obligations upon people. Greenberg takes it as a virtue of his theory that it can ‘vindicate’ this claim. Other theories are forced to defy ‘commonsense’ by accepting that ‘it can be true that one has a legal obligation despite the fact that one has no obligation.’⁵⁷ Fourth, the moral impact theory makes sense of our ‘dominating concern with law’.⁵⁸ If the law was just a morally inert social practice, engaged in by legal officials, why would we generally treat the fact that the law requires us to do X as generally excluding other

⁵³ Greenberg, ‘The Moral Impact Theory of Law’ (2014) 123 *Yale Law Journal* 1288.

⁵⁴ *Ibid*, 1306.

⁵⁵ Greenberg also has a complex fifth argument for his theory (see Greenberg, ‘How facts make law’, above, n. 3). This argument purports to show that any purely social constructionist theory cannot explain how facts contribute to the content of the law. The relation between social facts, such as a legislative enactment, and a legal proposition (e.g. ‘Drive on the left’) is a normative relationship – the social fact provides a reason for the legal proposition. Greenberg claims that this relationship can only be accounted for if moral facts explain the content of the law.

⁵⁶ *Ibid*, 1294.

⁵⁷ *Ibid*, 1304.

⁵⁸ *Ibid*, 1304–05.



reasons not to do X? However, if the law creates moral obligations for us by its nature then it is readily understandable why we would be so concerned to know its content.

IN PLACE OF A CONCLUSION

It would be premature to reach any conclusions at this stage as to which theory of law's nature is superior to the others: there would be little point in the rest of this book if we could. However, we can make some preliminary observations about the contrasts between Hart's modal way of thinking about law, and the two principal functional theories of law advanced by Fuller and Dworkin, respectively.

Hart v Fuller

On the face of it, there is a clear disagreement between Hart's modal theory, which claims that law is primarily distinguished by its *mode* of performing the various functions to which it is put, and functional theories like Fuller's, which claim that law must be understood by reference to a distinctive *function*.

Yet, on closer inspection, this disagreement between Hart and Fuller is thin. Hart accepts that law necessarily, by its nature, has the function of guiding and criticising conduct and that it does so by the *modality* of primary and secondary rules. Fuller accepts that law necessarily, by its nature, has the *function* of subjecting conduct to the governance of rules. The difference here is simply that, for Hart, guiding is the function, and rules are the modality, whilst for Fuller, *guiding by rules* is the composite function. This is a terminological difference about what goes to 'function' and what goes to 'mode'.

Hart and Fuller do disagree in two respects, however. First, even if both accept that guiding conduct by rules is central to law's nature, Hart thinks that this feature only goes part of the way to distinguishing law from other kinds of thing. Quite apart from the existence of *rules*, Hart would importantly add: (1) the rules of any legal system gain their status as law by virtue of the actions (whether deliberate or not) of officials of the system; (2) in any legal system, the practice of officials gives rise to a rule of recognition which determines which rules are rules of law. By contrast, these ideas seem to play little role in Fuller's theory, though they are logically consistent with it. Second, they disagree about the moral value of one of law's *modal* features. They disagree about the moral value of Fuller's eight desiderata. We discuss this disagreement in much more detail in a later chapter.⁵⁹

⁵⁹ See Chapter 4, below.



Hart v Dworkin

The extent to which Hart and Dworkin truly disagree, as opposed to simply being engaged in different enterprises – one (Hart’s) concerned with *describing* the concept of law and one (Dworkin’s) concerned with *normatively justifying* law – is a notoriously tricky issue.⁶⁰ However, there seem to be three ways in which they do genuinely disagree:

1. Hart does not share Dworkin’s supposedly ‘uncontroversial’ starting point that law’s primary function is to justify coercion.⁶¹ Of course, Hart accepts that law is often invoked as the reason for state coercion. However, Hart denies that the existence of sanctions for the breach of legal obligations is a necessary condition for the existence of law.⁶² This is a topic that we discuss in much more detail in Chapter 2.
2. Dworkin denies Hart’s claim that what the law is necessarily depends upon criteria identified by the rule of recognition. There are disagreements – ‘theoretical disagreements’ – about what the law is in certain cases which, Dworkin claims, cannot be modelled as disputes about whether the criteria under the rule of recognition have been satisfied. We discuss and reject this argument in Chapter 3.
3. In Dworkin’s view, it is *necessarily* the case that whether a proposition is a proposition of law depends, even if wholly implicitly, upon the conclusion of a *moral* argument, whereas Hart thinks that this is a *contingent* matter, dependent upon the criteria contained in the rule of recognition. Dworkin’s position follows from his insistence that law is an interpretive concept. If law is an interpretive concept, then what it requires depends upon coming up with the best justification for its main features.

Dworkin seems to have two main arguments for the claim that law is an interpretive concept. The first argument is simply that this is the only explanation of the phenomenon of theoretical disagreement. To the extent that this argument fails – as we later suggest it does – this undermines Dworkin’s position on this third disagreement.

Dworkin’s second argument seems to rest upon a general thesis that the only way to interpret social practices is to engage in the process of constructive interpretation.⁶³ This thesis is quite distinct from the claim about theoretical

⁶⁰ See Shapiro, ‘The Hart-Dworkin debate: a guide for the perplexed’ in Ripstein (ed.), *Ronald Dworkin* (Cambridge University Press, 2007); and Himma, ‘Immodesty in Dworkin’s theory: the lines dividing different kinds of conceptual theory of law’ in Waluchow and Sciaraffa (eds), *The Legacy of Ronald Dworkin* (Oxford University Press, 2016).

⁶¹ Dworkin emphasises in ‘Hart’s posthumous reply’ (2017) 130 *Harvard Law Review* 2096, at 2114, that he is not committed to the claim that this is law’s *only* function.

⁶² CL, 219–20.

⁶³ See LE, 64–65.



disagreement. It is possible to reject Hart's position on the rule of recognition for reasons relating to the phenomenon of theoretical disagreement, without buying into Dworkin's claim about interpretation. One might simply think that Hart provided a poor description of the nature of law. The converse is also true. One might think that there is no such thing as theoretical disagreement, and yet think that the interpretation of social practices always involves the three-stage inquiry that Dworkin describes. Ultimately, this second argument is an independent thesis about jurisprudential methodology. We discuss and reject this thesis in the next debate.

Debate 2

Can there be purely descriptive theories of law's nature?

Hart insisted that his account of law in *The Concept of Law* was 'descriptive' in that it is morally neutral and has no justificatory aims.⁶⁴ However, the possibility of remaining aloof from *evaluative* questions in developing a theory of law's nature has been challenged. We discuss two primary challenges here: that made by John Finnis in Chapter 1 of *Natural Law and Natural Rights*, and that made by Ronald Dworkin in *Law's Empire* and later writings. Before we address the criticisms made of purely descriptive legal theory, it is necessary first to set out in more detail Hart's own conception of descriptive theory.

HART: DESCRIPTIVE LEGAL THEORY AS CONCEPTUAL ANALYSIS

In the preface to *The Concept of Law*, H.L.A. Hart wrote that his book could be considered as both 'an essay in analytical jurisprudence' and 'an essay in descriptive sociology'.⁶⁵ By the former, he seemed to mean that the book could be understood as an exercise in analysing the meaning of and interrelationships between the concepts (like obligation, rule, validity) which are essential to the concept of law, and which, combined in certain way, differentiate law from other phenomena. Thus he writes:

My aim in this book has been to further the understanding of law, coercion, and morality as different but related social phenomena.... The lawyer will regard the book as an essay in analytical jurisprudence, for it is concerned with the clarification of the general framework of legal thought ... [A]t many points, I have raised questions which may well be said to be about the meanings of words. Thus I have considered: how 'being obliged' differs from 'having an obligation'; how the statement that a rule is a valid rule of law differs from a prediction of the behaviour of officials ...⁶⁶

⁶⁴ CL, Postscript, 240 (emphasis in original).

⁶⁵ CL, vi–vii.

⁶⁶ CL, vi.



After giving this flavour of what is meant by ‘analytical jurisprudence’, Hart *then* says that the book could *also* be regarded as an essay in descriptive sociology. The reason he gives is that:

the suggestion that inquiries into the meanings of words merely throw light on words is false. Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions. In this field of study it is particularly true that we may use, as Professor J.L. Austin said, ‘a sharpened awareness of words to sharpen our perception of the phenomena’.⁶⁷

The reason the book is *also* an exercise in descriptive sociology, then, is not because it adopts some *additional* method – above and beyond the analysis of concepts – but because the analysis of concepts itself gives us access to the nature of the thing to which those concepts refer.

The reason this can be described as *sociological* is – as John Gardner plausibly maintains – because sociology has itself been concerned with *conceptual, classificatory* questions and not the purely empirical questions of clipboard-carrying field work. As Gardner writes:

Are their [sociologists’] questions only the empirical ones that arise in applying classifications provided by others, perhaps philosophers? It is hard to see how this could be so. It would expel from the sociological canon the most celebrated work of such major figures of the discipline as Durkheim, Tönnies, Weber, and Mauss, arch-classifiers all four.⁶⁸

It follows, then, that we can safely describe Hart’s method as one of *conceptual analysis*, the aim of which is to describe the features in virtue of which some phenomenon should be classified as ‘law’.

What does Hart understand by ‘conceptual analysis’? Frequently, he writes of providing an ‘elucidation’ or ‘clarification’ of the concept of law.⁶⁹ However, as Schauer notes, Hart does not give sustained attention to the question of what it is to *analyse* a concept.⁷⁰ Nonetheless, Hart’s intentions seem to be reasonably clear from various scattered remarks in *The Concept of Law*. In Chapter 1, Hart emphasises that he is not attempting to provide a set of necessary and sufficient conditions for the appropriate use of the word ‘law’, such that we can definitively determine whether we ought to describe a certain phenomenon as law or not.⁷¹ Rather his aim is to identify, and explain the nature of, the features of the ‘central’ or ‘standard’ or ‘paradigm’ case of law.⁷² This leaves open

⁶⁷ Ibid.

⁶⁸ Gardner, ‘Law in general’ (above, n. 5), 278.

⁶⁹ See, for example, CL, 219.

⁷⁰ Schauer, ‘Hart’s anti-essentialism’ in *Reading HLA Hart’s The Concept of Law* (above, n. 11), 241–44.

⁷¹ CL 4, 17.

⁷² CL, 16–17.



the possibility that an instance of law might lack some of the features of the paradigm or standard case, and yet still be classifiable as such. The conclusion to be drawn from something's lacking all of the features of the paradigm case is only that this instance is less law-like: it is a non-central case of law.

Furthermore, according to Hart, the extent to which a potential instance of law, which lacks all of the features of the paradigm case, is classifiable as law is a question of how far removed it is from the standard or paradigm case. As Endicott points out, it doesn't follow that Hart's method is not concerned with finding necessary truths about law.⁷³ On Hart's method, something counts as an instance of law only if it is sufficiently analogous to the paradigm case of law. Necessarily, then, something only belongs to the concept 'law' if it partakes of sufficient features of the paradigm case. This rules out – as a matter of necessary truth – many things as *not-law* (dogs, houses, rain, the Isle of Skye, John Finnis).

FINNIS'S CHALLENGE TO DESCRIPTIVE LEGAL THEORY

In Chapter 1 of *Natural Law and Natural Rights*, John Finnis argues that a theory of law cannot be developed without the theorist becoming involved in evaluation. In his words:

no theorist can give a theoretical description and analysis of social facts [law being such] without also participating in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.⁷⁴

It will be useful to set out the general structure of Finnis's argument first, before going on to reflect upon each stage. In essence, the argument is:

1. Descriptive theories of law need to make judgments about what is *important* and *significant* to include within a general description of law. If they do not, they will just list a miscellaneous bunch of facts about law.
2. The descriptive theorist must treat as important and significant the perspective of those within the law who consider the law as potentially giving them reason to take certain actions.
3. Having identified as important the internal perspective of those within the law, one ought to accept that the 'central case' of that perspective is the one which regards the creation of law as a moral requirement. The descriptive theorist, whose primary concern is with law's central case, must consequently build up a general picture of law from the perspective of one who considers the establishment of law as morally required.

⁷³ Endicott, 'The generality of law' in *Reading HLA Hart's The Concept of Law* (above, n. 11), 28–33.

⁷⁴ NLNR, 3.



Consider (1). The basic point is quite simple. It is obvious that in constructing a theory of law's nature, some judgments need to be made as to what to include and what to leave out. For example, the average size of the judges' shoes in each system would not merit inclusion, nor would the dimensions of court buildings. And this is true even if it turned out that the average judicial shoe size was the same in every recorded historical instance of a legal system. Consequently: 'there is no escaping the theoretical requirement that a judgment of *significance* and *importance* be made if theory is to be more than a vast rubbish heap of miscellaneous facts ...'.⁷⁵

So the issue is then: how is a theorist to go about making these judgments of significance and importance? This is stage (2). Finnis says that he or she must place significance on the perspectives of people within the social practice of law. Recall that in our description of Hart's theory above, we noted that Hart draws attention to the particular kinds of 'internal' attitude which officials must have towards the rule of recognition if law, in his view, is to exist. Hart said that the officials must *accept* the rule as binding – although their reasons for acceptance, he claimed, could vary entirely from self-interest to a sense of moral duty. At stage (2) of the argument, Finnis is simply agreeing with Hart that it is crucial for the theorist to reflect the internal point of view of participants to legal practice in constructing a general descriptive theory. Why, though, is the internal perspective so important – why was Hart right to focus on it in the first place? The reason, for Finnis, is that it is impossible to understand a practice which exists partly by virtue of the understandings of participants to the practice 'without understanding their point, objective, significance or importance "*as conceived by the people who performed them, engaged them, etc.*"'.⁷⁶

The crucial move comes at stage (3). Here Finnis argues: once the theorist has accepted the internal perspective as crucial to constructing a descriptive theory of law, the theorist is committed to taking up the internal perspective of a fully reasonable agent within the practice. So instead of describing the attitudes of the judge who follows the rule of recognition for purely self-interested reasons, or the anarchist judge who follows the rule merely to defeat the system from within, the theorist should describe law through the lens of a person within the practice who is fully reasonable. If the fully reasonable agent would consider the creation of law to be 'a moral ideal if not a compelling demand of justice', that is the perspective which should be taken up in constructing a general theory of law's nature. In determining what aspects of the law the fully reasonable person would consider to be central to law's nature, the theorist will become entangled in evaluative questions.⁷⁷

⁷⁵ NLNR, 17.

⁷⁶ Finnis, 'Law and what I truly should decide' (above, n. 37), 118 (emphasis in original). See also 112: 'The primary reality of the law is rather in its claim ... on my deliberating about what to decide ... to choose and do.'

⁷⁷ NLNR, 15.



What reasons does Finnis give for his claim that there is an inexorable path from taking into account the internal attitudes of participants in law to describing law from the perspective of a fully reasonable participant in law? There are two reasons. First, this follows from the ‘central case’ method.⁷⁸ The theorist should seek to identify the *central case* of some concept, not the borderline or watered-down version of the concept. So the theorist of tables (a strange character) does not, we might say, identify a *broken* table as the central case of a table, albeit that it is still a table in virtue of its sharing features with the central case. Finnis claims that the central case of law is morally good law. Morally good law is a more central case of law than morally wicked law. Notice that this is not simply the tautology that *good* law is *better* law – it is that *good* law is *more* law-like, just as the unbroken table is more table-like than the broken.

The second reason seems to be that, if the theorist does not take up the evaluative stance of a fully reasonable agent within law, the resulting theory of law will be overly parochial or insufficiently *general*.⁷⁹ Finnis begins Chapter 1 of *Natural Law and Natural Rights* by observing that jurisprudence aspires to do more than provide a ‘local’ lexicography of the concept of law – it aims to do more than simply to set out the rules which particular societies use or have used in deciding whether a social institution counts as law. Jurisprudence aims to provide a *general* theory of the nature of law, by reference to which particular social formations throughout different cultures can be understood as more or less central instances. Unless the theorist describes law from the perspective of a fully practical reasonable agent – which Finnis would say is a universal, objective perspective, cutting across all cultures – it is difficult to see how jurisprudence could meet its aim to be more than a local history of the use of the word ‘law’. So the generality of jurisprudence’s aspirations is met by the generality and universality of the perspective of the practically reasonable agent.

DWORKIN’S CHALLENGE TO DESCRIPTIVE LEGAL THEORY

Consider the following conversation:

- A: Abortion is always wrong.
- B: You’re wrong: abortion is permissible sometimes.
- C: You’re both wrong – abortion is neither morally prohibited nor morally permissible – it’s like washing your hair; morality has nothing to say about it.
- D: This conversation is really weird: you are all assuming that there is a right answer here – morality is totally subjective and none of you can be said either to be right or wrong.

⁷⁸ NLNR, 10–11.

⁷⁹ This is also the reasoning given for this perspective in G. Webber, ‘Asking why in the study of human affairs’ (2015) 60 *American Journal of Jurisprudence* 51, 66–70.



It's clear in this conversation that A, B and C are all taking a (different) moral position on abortion. On the face of it, though, D is not taking a moral position. D is just making a descriptive claim *about* morality, not a claim *within* morality – D is saying that morality, as a descriptive matter, is purely subjective.

Ronald Dworkin rejects this characterisation of what D is saying. Dworkin says that D is actually making a claim *within* morality – just like A, B and C.⁸⁰ This is because it follows from D's position that there are no moral prohibitions or moral permissions in relation to abortion. So if A said to D: 'Abortion is morally wrong?', D would be committed to saying: 'No, it's not true that abortion is morally wrong (it's neither true nor false).' So, although D's position looks to be a purely factual and descriptive one about the nature of morality, Dworkin says that taking such a position ultimately means taking a stand on questions *within* morality. Do you want to deny that moral claims can be true or false? Then you must accept that propositions like 'Torturing babies for fun' are neither true or false and so, it follows, no one has a duty not to torture babies for fun.

Dworkin thinks that descriptive theories of law make claims about law like D makes about morality. On the face of it, these theories of law are purely descriptive, and make no moral claims, but in reality, once we see what those theories entail, they do end up making moral claims. If so, then descriptive theories are ultimately always normative, evaluative, theories.

Dworkin illustrates this argument with a hypothetical legal case which he calls *Sorenson's Case*.⁸¹ The claimant in this case, Mrs Sorenson, suffered from rheumatoid arthritis for many years and took a drug called 'inventum' to relieve her suffering. During that period, inventum was manufactured by 11 different drug companies under different trade names. In fact the drug had serious undisclosed side-effects, about which the manufacturers should have known, and Mrs Sorenson suffered permanent cardiac damage from taking the drug. She sues the manufacturers and argues that, although she cannot prove which manufacturer's drug was a cause of her injury, each manufacturer should be liable in proportion to the share of the market it had during the period in which she took the drug.

Dworkin then asks: How should people decide what the law requires in *Sorenson's Case*?⁸² On his theory of law – law as integrity – the judge ought to look at the past precedents and interpret them in their best light, trying to identify the most morally coherent principle which underlies those precedents, and ask whether that principle would justify recovery for Mrs Sorenson.

⁸⁰ Dworkin, 'Objectivity and truth: you'd better believe it' (1996) 25 *Philosophy and Public Affairs* 87, 96–97; *Justice for Hedgehogs* (above, n. 40), ch. 1.

⁸¹ See Dworkin, 'Hart's Postscript and the character of political philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1, 3–5. The case is based upon the Californian case, *Sindell v Abbott Laboratories*, 607 P 2d 924 (1980).

⁸² Dworkin, 'Hart's Postscript and the character of political philosophy' (above, n. 81), 4.



The result of that inquiry identifies what the law is in *Sorenson's Case*. By contrast, he says, on Hart's theory of law, the judge must look only to whatever sources of law are incorporated within the rule of recognition. The rule of recognition might require the judge to look to a certain moral principle, but it might not – it all depends upon what rule the officials have followed in a certain system. So, on Hart's view, if the past precedents do not support Mrs Sorenson, and there is no principle incorporated in the rule of recognition which would allow the judges to go beyond those past precedents, then Mrs Sorenson – so far as the law is concerned – should lose. The difference between Hart's and Dworkin's view here, according to Dworkin, is that in Dworkin's view, identifying what the law says *necessarily* involves making a moral argument, whilst for Hart, identifying what the law says may or may not – it all depends upon the content of the rule of recognition.

Now here is where Dworkin makes the analogy with Hart's supposedly descriptive theory and his characterisation of D's position in the conversation about abortion. He says: Hart's supposedly descriptive account of law's nature, in terms of a rule of recognition, is 'far from neutral between the parties in Mrs Sorenson's case'.⁸³ It is not neutral because it means that, unless the rule of recognition has already incorporated moral principles into the law, Mrs Sorenson must lose. And more generally:

Hart's view is not neutral in the argument: it takes sides. It takes sides in fact in every difficult legal dispute, in favour of those who insist that the legal rights of the parties are to be settled entirely by consulting the traditional sources of law.⁸⁴

So Hart's descriptive account, Dworkin claims, has knock-on effects on how cases like Mrs Sorenson's are to be decided. The theory implicitly takes a stand on the moral issue of how such cases are to be decided. Consequently, Hart's theory is ultimately evaluative in nature. Any descriptive theory, it seems, will end up taking a stand on moral questions about how cases are to be decided.

CONCLUSIONS

Are Finnis and Dworkin successful in establishing that a purely descriptive theory of law is impossible? Let's begin with Finnis.

Finnis's arguments

Must the descriptive theorist inevitably engage in moral evaluation in order to construct a theory of law's nature? If Finnis is right, then that will be true. So is Finnis's argument sound? It seems to us that virtually everyone will accept

⁸³ Ibid, 20.

⁸⁴ Ibid.



his first premise (1) – that we have to avoid presenting a rubbish heap of miscellaneous facts in coming up with a theory of law. And it also seems hard to deny (2) – surely any account of law that misses out what legal officials think about law will miss something ‘important and significant’. So it is stage (3) that is attackable, if any is. More precisely, it is that part of stage (3) that claims that the theorist *must* take up the viewpoint of someone who thinks that bringing law as a social order into existence is morally required. What’s controversial about (3) is thus not the *central case* method itself – it’s hard to deny that there are more and less central instances of a concept – but rather the *criteria by which we determine whether something counts as central or not*. Finnis thinks these criteria are moral in nature. There are at least three objections one can make to this.

- (1) *Objection 1: Importance and significance can be determined indirectly by non-moral criteria.* First, one might contend that it is possible to make judgments of importance and significance which do not involve moral evaluation of law’s features. Julie Dickson develops a position of this kind.⁸⁵ Dickson rejects the distinction between ‘descriptive’ and ‘evaluative’ theories, partly for the reason that the distinction creates the impression that descriptive theories are entirely value-free. As she points out, even Hart – arch-descriptivist that he was – accepted that a theory of law’s nature ‘will be guided by judgements, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values’.⁸⁶

However, Dickson insists that not all evaluation need be *moral* evaluation. She draws a distinction between *indirectly* and *directly* evaluative theories. Finnis’s theory is directly evaluative, requiring the theorist directly to make judgments as to the moral value of law. The *indirectly* evaluative theorist, however, makes judgments of importance and significance by reference to features of the law which are ‘already considered important and significant about law by those living under and guiding their conduct by it’.⁸⁷ The indirectly evaluative theorist, then, makes evaluations *indirectly* in the sense that his or her primary source of what to include within a theory of law’s nature are the judgments of *other people* – the judgments of importance and significance already made by those living under the law.⁸⁸ So it would be important for a theory of law’s nature to explain the role of coercion because this is judged important by those living under the law.

⁸⁵ Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001). For a short introduction to her position, see Dickson, ‘Descriptive legal theory’ (available on the online *IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law*).

⁸⁶ Hart, ‘Comment’ in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy: The Influence of HLA Hart* (Oxford University Press, 1987), 39.

⁸⁷ Dickson, ‘Descriptive legal theory’ (above, n. 85), section 2.

⁸⁸ Dickson, *Evaluation and Legal Theory* (above, n. 85), ch. 3.



An objection to Dickson's approach is that there will be many different perspectives upon what is central and important to law adopted by those living under it.⁸⁹ In a recent essay, she herself draws attention to the attitudes to the law of those who engaged in rioting in London in 2011, as reported by empirical studies. To these people, she says, a core characteristic of the law is its (overbroad) use of force.⁹⁰ But one wonders how the theorist is to do justice to different (potentially conflicting) perspectives of what is important and significant about the law, without having some criterion of ranking or priority. As Finnis himself says: 'any general theory of law, however merely descriptive its ambition, necessarily prefers one concept of law over countless others.'⁹¹ Finnis at least has a clear account of how to make such a choice: the viewpoint of those who morally support law's existence is central.

- (2) *Objection 2: Law's function is less central to its nature than Finnis claims: law is more like the concept of a 'painting' than the concept of 'medicine'.* In a footnote to his article, 'Law and what I truly should decide', Finnis recounts the following objection made to his methodological arguments by Joseph Raz, and a response to it:

Joseph Raz asked why law should be thought to be like argument, medicine or contracts, rather than like novels or paintings, or people, that are still novels or paintings, or people, even if they are bad. One answer is that, like argument, medicines, and contracts, law has a focused and normative point to which everything else about it is properly to be regarded as subordinate. Novels and paintings, on the other hand, can have incompatible points, e.g. to entertain or arouse (like kitsch or porn) or to tell a truth with artistry.⁹²

It seems true to say that my terrible attempt to paint a portrait of van Gogh is just as much a painting as van Gogh's splendid self-portrait, but that medicine which doesn't work is no medicine at all, or only medicine in a diluted sense. To be sure, van Gogh's is a much better painting than mine. But it is not *more* painting-like in virtue of being a better painting. So, Raz's question is – Why think of law as becoming more law-like the more morally good it is (or, conversely, less law-like the more morally problematic it is)?

Finnis's response is a little obscure, but it seems to be that law's main point – to co-ordinate activity for the sake of the common good – is so central to its nature that its failure to achieve that purpose is much more determinative of whether we say that an object is law than a novel's being bad. This is because a novel's being bad might only constitute a failure to

⁸⁹ For a similar objection, see Madden Dempsey, 'On Finnis' way in' (2012) 57 *Villanova Law Review* 827, 838.

⁹⁰ Dickson, 'Law and its theory: a question of priorities' in Keown and George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford University Press, 2013), 372.

⁹¹ Finnis, 'Law and what I truly should decide' (above, n. 37), 119.

⁹² *Ibid.*, 114, fn. 9.



achieve *one* of its *many* possible purposes. Even if a novel failed in some of those purposes, it might still achieve others and so merit its status as a ‘novel’. By contrast, since law’s *central* purpose is to achieve the common good, if it fails in that central purpose, it becomes less law-like.

- (3) *Objection 3: The theory of law does not claim the universality which Finnis alleges.* The major appeal of Finnis’s argument is that it provides the theorist with a way of deciding between competing judgments of what is important and significant about law in developing a theory of law’s nature. In this way, the theorist avoids the charge – so long as we assume, with Finnis, that morality is objective and universal – of producing a parochial history of the concept of law as it was understood in, say, 1950s Oxford.

Joseph Raz denies that descriptive theories of the concept of law need to be non-parochial. In Raz’s view, descriptive theories of law *do* simply provide analyses of *our* concept of law.⁹³ Raz is not particularly clear on what he means by ‘our’ concept of law. He simply speaks of ‘our society’s’ concept of law.⁹⁴ It does not follow, according to Raz, that legal theory is wholly parochial. It is general in two respects. First, he claims, ‘our’ concept of law has itself evolved so as to take into account our engagement with other cultures and our increased knowledge of history.⁹⁵ Secondly, we can still ask whether *other* societies or cultures have the social institutions which our concept of law picks out as central to law. So we can sensibly ask whether ancient Egyptian society had *law* in our sense.⁹⁶ The reason this is possible is that other societies can have law in our sense – that is, they can have the social institutions to which our concept of law refers – without themselves possessing our concept of law.

It is difficult to assess Raz’s view without his clarifying further to whom he is referring in speaking of *our* concept of law. It seems to us that the wider the group of people to whom this refers, the more likely it is that Raz will face the problem with which Finnis’s argument is intended to deal. That is – the more perspectives on what is important and significant about law that one takes into account in developing a general theory of law’s nature, the more likely it is that one will be faced by multiple views as to law’s nature and, in order to decide between them, moral criteria will need to be used.

Dworkin’s arguments

In our view, Dworkin’s argument fails for two reasons:

First, his own theory of law relies upon making purely descriptive claims about law’s nature. Take the claim that law is an interpretive concept. As this

⁹³ Raz, ‘Can there be a theory of law?’ in his *Between Authority and Interpretation* (Oxford University Press, 2009), 36.

⁹⁴ *Ibid*, 32.

⁹⁵ *Ibid*, 33.

⁹⁶ *Ibid*, 37.



idea is presented in Chapter 2 of *Law's Empire*, by reference to the imaginary community's concept of courtesy, it seems that whether a concept is an interpretive concept is a descriptive or analytical issue. Dworkin says that a concept becomes an interpretive one once the interpretive attitude sets in in relation to that concept. But surely whether the interpretive attitude exists is itself a descriptive claim. It requires no moral argument to establish that people do in fact have a certain attitude towards their practices. So Dworkin's argument is self-defeating. If Dworkin is right that descriptive legal theories are untenable, then his own theory of law is in trouble.

Second, the analogy Dworkin draws between the conversation about abortion and *Sorenson's Case*, and law in general, is not convincing. First, unlike (arguably) D's position in the abortion conversation, Hart's argument has no significant moral consequences. It simply does not follow on Hart's account of the concept of law that people like Mrs Sorenson should lose their cases; nor are people like Mrs Sorenson systematically disadvantaged by Hart's account. That would only follow if Hart *also* claimed that, *as a moral matter* or as a *moral principle of adjudication*, judges should not develop the law in accordance with the moral principles underlying it. But Hart makes no such claim.⁹⁷ Second, Dworkin's argument proves way too much. In essence, Dworkin's argument is: If a descriptive account of some concept leads to some moral consequence, then that account makes a moral argument and needs to defend itself on moral grounds. But the idea that a claim which has moral consequences is itself a moral position is far too broad. The claim that water is H₂O has moral consequences (if you know that water is H₂O, you oughtn't to tell schoolchildren that it is HO), but whether it is true or not has nothing to do with morality. Dworkin would, of course, accept this – he would say that 'water' is different from 'law'. Water is a 'natural kind' concept – it has a definite, scientifically determined nature, a nature constituted wholly independently of human evaluations. Nonetheless, Dworkin's argument that law is different, so that law requires a moral argument in order to say what it is, seems to rest on the overly broad claim that defining law in one way or another has moral consequences for people. As such, it is subject to the objection that it proves too much.

FURTHER READING

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Dworkin, LE, chs 1–3.

Finnis, NLNR, ch. 1, Postscript 417–19, 426–36.

⁹⁷ See, further, Endicott, 'Adjudication and the law' (2007) 27 *Oxford Journal of Legal Studies* 311.



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