

ON THE CONCEPTUAL CONFUSIONS OF JURISPRUDENCE

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INTRODUCTION

For more than half a century, legal theory has focused on a particular objective—to understand and describe the “concept” of law.¹ In that pursuit, theorists have employed a methodology aptly called “conceptual analysis.”² The result has been a series of striking claims about law's nature—that law has a fixed essence, that it is fundamentally normative, that it is based on the “marriage” of primary and secondary rules.³

Both students and scholars have expressed some difficulty in understanding the significance of, and justification for, these claims. What can it mean to affirm, for example, that law represents the marriage of primary and secondary rules? In what sense is that true? Does it reflect some belief in a Platonic ideal of law? If not, what exactly justifies the claim? Questions like these have intensified in recent years, with several scholars going so far as to express doubt about the value of conceptual analysis itself.⁴

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1. Of course, questions about the nature of law have long been the subject of debate among philosophers and ordinary individuals alike. H.L.A. HART, *THE CONCEPT OF LAW* 1 (1961) (“Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question ‘What is law?’”).

2. Conceptual analysis is widely viewed as a dominant, if not the dominant, method of doing legal philosophy today. See Brian Bix, *Joseph Raz and Conceptual Analysis*, 6 *NEWSL. ON PHIL. & LAW* 1, 2 (Spring 2007) (“Many of the prominent modern legal philosophers . . . have argued instead that theories of law do or should focus on *the concept* of law. Conceptual analysis has been central to analytical philosophy . . . as philosophers explored the ‘essential’ or ‘necessary and sufficient’ attributes of various concepts.”) (citations omitted); Brian Leiter, *American Legal Realism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 249, 250 (Dennis Patterson ed., 2010) [hereinafter *Legal Realism*] (“Modern legal philosophy has, like most of twentieth-century Anglo-American philosophy, employed the method of *conceptual analysis*: hence the title of the seminal work of this genre.”).

Prominent among its practitioners are H.L.A. Hart, Joseph Raz, Jules Coleman, Julie Dickson, as well as many other lesser-known theorists. See Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 99, 106 (Jules Coleman ed., 2001) [hereinafter *Incorporationism*] (“The aim of jurisprudence is to shed light on actual legal practice. . . . [T]he distinctive philosophical method is to do so by analysing the concepts that figure prominently within it.”); HART, *supra* note 1; Joseph Raz, *Can There be a Theory of Law?*, in *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* 324 (Martin P. Golding & William A. Edmundson eds., 2006).

3. See *infra* Part I.C.2 (discussing these claims in depth).

4. Bix, *supra* note 2, at 5 (“Most of the influential theories about the nature of law are

Such doubts strike at the heart of modern jurisprudence, for the demise of conceptual analysis would cast a shadow over large swaths of philosophical writings in the discipline. For that reason, Brian Bix has spoken of the need for a full-scale evaluation of the role of conceptual analysis in legal philosophy in order, “to determine whether conceptual analysis is appropriate for legal philosophy (or for any area of philosophy); whether, even if appropriate, it is sufficient (or needs supplementation by moral evaluation); and whether, even if appropriate and sufficient, its objectives and achievements are substantial.”⁵

The real surprise is that no such effort has been made to date. This is not due to a lack of interest, for questions about the methodology of jurisprudence have become a central topic of discussion across the discipline. The principal obstacle is what might be called the “fog of ambiguity” that hangs over the debate. Simply stated, proponents of conceptual analysis have been remarkably vague about their methodological commitments.⁶ Ronald Dworkin has lamented, “it is difficult to find any helpful positive statements of what these methods and ambitions are”⁷

conceptual theories, but these theories are coming increasingly under challenge”). Though common in mainstream philosophy, these questions are certainly not the dominant view in legal philosophy. See Alex Langlais and Brian Leiter, *The Methodology of Legal Philosophy*, to be published in THE OXFORD HANDBOOK OF PHILOSOPHICAL METHODOLOGY (draft on file with author) (“In many areas of philosophy, doubts about the kind of conceptual and linguistic analysis Hart relies upon have become common . . . but not so in legal philosophy, where almost everyone, following Hart, employs the method of appealing to intuitions about possible cases to fix the referent of ‘law,’ . . .”).

5. Bix, *supra* note 2, at 5.

6. JULIE DICKSON, EVALUATION AND LEGAL THEORY 2 (2001) (“All legal theorists take an implicit stand on meta-theoretical or methodological questions such as [the purpose of the theorizing endeavor]. Few, however, address such matters directly, and to the extent to which this does occur, the authors concerned often confine themselves to some relatively brief remarks in the course of pursuing some other agenda.”).

7. RONALD DWORKIN, JUSTICE IN ROBES 165 (2006). See also Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 355, 357 (Jules Coleman ed., 2001) [hereinafter *Legal Realism/Hard Positivism*] (“The nature of conceptual analysis in legal theory is rarely discussed explicitly or at great length, though it is widely acknowledged to be the dominant modus operandi of jurisprudents.”); Nicos Stavropoulos, *Hart’s Semantics*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 59, 69 (Jules Coleman ed., 2001) [hereinafter *Hart’s Semantics*] (“What conceptual analysis is . . . is not altogether clear.”). Even some of the methodology’s proponents seem to acknowledge this fact. See Coleman, *Incorporationism*, *supra* note 2, at 99 (Although the importance of Hart’s work “is undisputed, there is a good deal less consensus regarding its core commitments, both methodological and substantive.”). Andrew Halpin has noted that this may be a problem with conceptual analysis as employed even in mainstream philosophy. See ANDREW HALPIN, REASONING WITH LAW 26 (2001) (“Wider reading on conceptual analysis reveals a lack of agreement on what the technique (or art) of conceptual analysis amounts to.”).

Some of the ambiguities of the methodology can be seen by examining the term “conceptual analysis” itself. “Concepts” are the subject matter of the investigation, but what precisely is this entity? In debates over the concept of law, a concept is widely understood as representing a *category* of phenomena; in this case, the category called “law.”⁸ When an individual speaks of the concept of “law,” she effectively divides the world into two classes—things that warrant the label “law” and those that do not. But that basic understanding merely raises deeper questions: What is the ontological status of this abstract category? Is it a real thing, existing in some transcendental sense? Is it just a human construction?⁹

Questions multiply when one considers the second, operational word in “conceptual analysis.” What does it mean to “analyze” a concept? At least two forms of analysis can be identified. One can *describe* what concepts are like, or one can *prescribe* how the concept of law should be understood. In the right context, either approach might be appropriate. Methodologies, after all, are instrumental: they are useful depending on whether (and to the degree that) they promote a theorist’s preferred goals.¹⁰ Thus, the appropriate kind of analysis depends on one’s theoretical objectives. The real problem is that defenders of conceptual analysis are not always clear or consistent about their ultimate goals, which makes identifying their preferred method of analysis challenging.

In sum, methods of conceptual analysis vary, depending on assumptions about the nature of concepts, the goals of the theoretical

8. See Liam Murphy, *Razian Concepts*, 6 NEWSL. ON PHIL. & LAW 27, 29 (Spring 2007) (“To keep things terminologically tractable, let me now just stipulate that a conceptual question is a question of basic categorization.”). See also WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1983) (a concept as “an idea, especially a generalized idea of a class of objects”).

The astute reader will note that, in defining concepts, I am engaged here in a kind of conceptual analysis. Agreeing on a preliminary definition of “concepts” is necessary if we are to ensure that we are discussing the same subject matter. My interpretation of the term “concept” reflects my own judgment about the term’s use by legal theorists. This is a form of “empirical conceptual analysis,” which is discussed in more detail later. See Part I.B.

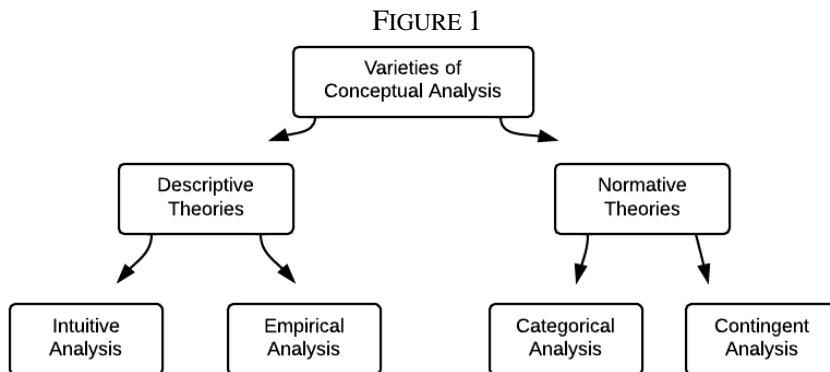
9. Other important and controversial details might also be debated. For example, does the category called “law” have clearly-defined contours or vague borders? Does it have a logical structure? Does it refer to a single concept or several? Subsequent sections examine these and other issues in greater detail.

10. See Tom Campbell, *Prescriptive Conceptualism: Comments on Liam Murphy, ‘Concepts of Law’*, 30 AUSTR. J. LEG. PHIL. 20, 27 (2005) (“The methodology of conceptual analysis is relative to the purpose for which the analysis is undertaken.”). See also Ruth Gavison, *Comment, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 21, 34 (Ruth Gavison ed., 1987) (“Generally speaking, criteria of adequacy for theories of law cannot be uniform. Adequacy is a relative idea: we must always know the tasks we want the theory to fulfill in order to judge its adequacy.”).

endeavor, and other factors. Any effort to cut through the fog of ambiguity thus requires some insight into how different theoretical commitments affect a theorist’s mode of analysis. To advance that objective, this paper surveys the different ways conceptual analysis can be used in legal theory, exposing the underlying assumptions of each approach. The result is a kind of typology of conceptual methodologies.

The effort identifies four primary kinds of conceptual analysis—intuitive, empirical, categorical, and contingent. These four variants, diagrammed in Figure 1, differ based on how they address some of the key factors previously mentioned. For example, one key distinction is the theoretical objective of the endeavor. Intuitive and empirical analyses serve descriptive goals, which represent attempts to model how individuals actually use and understand the concept of law. Categorical and contingent forms of conceptual analysis, by contrast, serve “normative” goals, which are attempts by theorists to say how the concept of law *should* be understood.

Additional assumptions divide these groups further. The two descriptive methods of analysis differ based on their views regarding the nature of concepts. Intuitive analysis assumes that concepts represent transcendental phenomena, while empirical analysis assumes they are human constructs. Analogously, the normative methods differ based on the types of justifications used to prescribe the choice of concepts. Categorical analysis relies on moral principles of justification, while contingent analysis relies on instrumental standards of authority.



This framework makes clear that the term “conceptual analysis” refers, not to a single approach, but to a range of different methodologies. That finding, while interesting in itself, also serves as a necessary step towards

evaluating the various methods of analysis. By exposing the assumptions underlying each approach, an assessment of their merits becomes feasible.

So what can be said about these methods of analysis? Do any of the methodologies seem appealing as a jurisprudential method? This article's preliminary answer is sharply negative. Each type has certain decisive flaws: intuitive analysis rests on unconvincing assumptions about the transcendental nature of concepts; empirical analysis calls for research skills beyond the competence of most legal theorists; categorical analysis relies on deeply flawed moral arguments for choosing a concept of law; and contingent approaches make implausible assumptions about the benefits of certain favored concepts. The implication is that none of the dominant methods of conceptual analysis offer an appealing methodology to ground legal theory.

If that conclusion is correct, legal philosophy faces a reckoning. Theorists in the field must reconsider their theoretical objectives and tools. In other words, they must rethink how legal philosophy is *done*.

These conclusions are, to be sure, preliminary. The investigation does not attempt to offer a comprehensive survey of the various ways legal theorists have analyzed the concept of law. It focuses instead on paradigmatic examples of the major types of analysis. It is conceivable, if not likely, that individual theorists offer unique or idiosyncratic approaches that deserve their own separate treatment. Nonetheless, this discussion at the very least should challenge theorists to clarify their underlying methodological commitments and to defend those commitments more openly and directly. If that happens, the fog of ambiguity covering the field of legal philosophy will start to dissipate, and a real debate over the proper method of jurisprudence can begin.

The discussion proceeds in several parts. Part I examines the first major school of conceptual analysis—descriptive analysis—and its empirical and intuitive variants. Part II scrutinizes normative analysis, including its categorical and contingent forms. The concluding section of this article steps back to consider what methodology, if any, could replace conceptual analysis as the dominant method for “doing jurisprudence.”

I. DESCRIBING CONCEPTS

The first major school of conceptual analysis is descriptive analysis, which serves “descriptive” goals. Although the term “description” is used in various ways in the literature, for purposes of this paper it will refer to

attempts to mirror or model the external reality of some phenomena.¹¹ Descriptive analysis of this sort has proved particularly popular in legal philosophy. H.L.A. Hart, perhaps the most influential legal theorist of the last century, made clear that he was primarily engaged in a descriptive project, a work of “descriptive sociology” as he called it.¹² Hart understood “description” in the same way we are using the term, as an effort to report—in a non-evaluative way—how human beings use and understand concepts, and specifically the concept of law.¹³

Descriptive theories of conceptual analysis, of course, rest on certain assumptions. Perhaps the most basic is that concepts exist in some form that can be modeled and described.¹⁴ But what form is this? Do concepts exist independently of human thought? Or are they just figments of our minds? Theorists inevitably make assumptions about the nature of concepts. As views about the nature of concepts have changed over time, so has the methodology used to describe them. The following sections trace the evolution of belief from earlier periods into the modern day.

A. *Intuitive Conceptual Analysis*

The traditional approach to descriptive analysis embraced a *realist* view of concepts.¹⁵ The approach drew upon an ancient idea, rooted in

11. The idea of modeling reality makes intuitive sense, but it also raises complex issues. What exactly is modeled—is it a replica of a physical object’s dimensions, an attempt to predict a procedure’s output, or something else entirely? Some of these issues are addressed below in more detail, but the discussion does not do justice to the complexity of the subject matter. For a survey of some of the issues raised by scientific modeling, see *Models in Science*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 25, 2012), available at <http://plato.stanford.edu/entries/models-science/>.

12. HART, *supra* note 1, at v. See also *id.* at 239 (“My aim in this book was to provide a theory of what law is which is both general and descriptive.”). See also H.L.A. Hart, *Comment*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 35, 37 (Ruth Gavison ed., 1987) [hereinafter *Comment*] (“[T]here is a standing need for a form of legal theory or jurisprudence that is descriptive and general in scope.”).

13. HART, *supra* note 1, at 240 (“My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law”). See DWORKIN, *supra* note 7, at 140 (Hart asserts that his descriptive project “aims to understand but not to evaluate the pervasive and elaborate social practices of law.”); Stephen Perry, *Hart’s Methodological Positivism*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 311, 312 (Jules Coleman ed., 2001) [hereinafter *Methodological Positivism*] (Hart’s statements represent “very good evidence that he meant to adopt a framework of methodological positivism.”); W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 64 (1994).

14. Bix, *supra* note 2, at 2 (“To ask the question, what is law? is to assume that there is a sensible answer, which in turn seems to assume that there is some object or category ‘law’ one can discuss and describe”).

15. See Alexander Miller, *Realism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2012 ed.), available at <http://plato.stanford.edu/entries/realism/>.

Plato's theory of the forms, that abstract universals existed on a separate metaphysical plane as ideal forms or types. Traditional theorists thus assumed that concept-categories arose independently of human thought. Theorists, in this way, embraced a striking ontology, at least to modern ears. Concepts were not simply products of the human psyche, but part of the "furniture" of the universe.

The realist view created a challenge for theorists. If concepts existed in a transcendental realm, theorists could not use empirical tools to identify them. What method, then, might give access to this higher reality? The answer was that human beings could perceive the concept's essence through some kind of human intuition or innate reasoning ability, a kind of special *a priori* insight.¹⁶ For that reason, we might call this the "intuitive" approach to conceptual analysis.

Historically, intuitionists claimed that concepts possessed a distinctive structure, grounded on certain necessary and sufficient criteria that did not change over time or across communities. These fixed and fundamental criteria determined the concept's meaning and application. Thus, in deciding whether a given entity fell within the concept's scope, one simply asked if the phenomena satisfied the necessary and sufficient criteria that comprised the concept. In this sense, the criteria *defined* the concept.

The intuitive methodology offered immediate appeal, especially to armchair philosophers. It meant that concepts could be described without engaging in the messy business of empirical studies. It meant that philosophers—who claimed some insight into the conceptual realm—had a privileged role in identifying transcendental concepts. And it meant that concepts were logically structured, reflecting a highly ordered reality.

Despite these appealing features, the intuitive approach has little explicit support today. The reasons might be obvious. The idea that concepts somehow exist in the nature of things seems difficult for modern citizens to accept. As Brian Bix stated, "Platonists are not thick on the ground, and they seem particularly rare in the area of theorizing about social practices and institutions."¹⁷

16. JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE* 179 (2001) ("On the classic understanding of it, the aim of conceptual analysis is to identify an interesting set of analytic truths about the concept that are discernible *a priori*. These truths enable us to identify necessary or essential features of instances of the concept . . ."). An *a priori* truth is one that "does not depend for its authority upon the evidence of experience;" that is, it can be discovered without any observations of the world. This contrasts with a posteriori truths, which require observation of the world. See "a priori" and "a posteriori", in *THE OXFORD COMPANION TO PHILOSOPHY* (Ted Honderich ed., 1995).

17. Bix, *supra* note 2, at 2. This may be a bit of an overstatement. Some theorists today view themselves as Platonists, at least with respect to certain kinds of concepts. See Mark Balaguer,

During the 20th century, the intuitive approach was subject to further attacks by mainstream philosophers. Of particular note was the publication of Quine's *Two Dogmas* in 1951, which undermined the idea that necessary truths about categories could be discovered.¹⁸ This was a grievous wound. If concepts lacked fixed, necessary features, what was left for intuitive analysis to discover? In the face of this onslaught, by the mid-20th century, the traditional approach to concepts was on the way out, at least in mainstream philosophy. In its place rose a different, more naturalistic, approach to concepts.

B. Empirical Conceptual Analysis

The dominant approach to concepts today reflects modernity's general skepticism of transcendental entities. Rather than viewing concepts as ideal forms, this approach conceives of concepts as human constructs. The world does not come pre-segmented into categories; human beings *impose* categories onto reality. These concepts might encompass concrete objects (like the concept of a table or car) or they might refer to more abstract ideas (such as the concepts of Justice, Art, or Law).

This seems commonsensical. After all, human beings use and develop categories all the time, and it is not surprising that they do. Concepts are extremely useful in daily life. Without the mental concept of a tomato for example, every tomato one comes across must be treated as a new phenomenon, unrelated to any other. We need mental categories to live effectively.¹⁹

As human constructs, concepts are contingent phenomena, subject to change as people's beliefs change. They can come in and out of existence; their contours constantly change in scope. The implication is that there are no *necessarily* true statements about concepts, at least in the sense of fixed and permanent truths. Rather, concepts depend on human practice and understanding, which is ever-varying.

Platonism in Metaphysics, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2014 ed.), available at <http://plato.stanford.edu/entries/platonism/>. For an assessment of the view that concepts have real essences, see Eric Margolis & Stephen Laurence, *The Ontology of Concepts—Abstract Objects or Mental Representations*, 41 NOÛS 561 (2007).

18. WILLIAM VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in FROM A LOGICAL POINT OF VIEW 20 (1980).

19. GREGORY L. MURPHY, THE BIG BOOK OF CONCEPTS 1 (2002) [hereinafter BIG BOOK] (concepts are essential for ordinary living); EDWARD E. SMITH & DOUGLAS L. MEDIN, CATEGORIES AND CONCEPTS 1 (1981) (similar).

This new ontology implies a different mode of analysis. Rather than relying on a mysterious sense of intuition to engage with a transcendental reality, theorists can instead examine earthly conceptual practices. The theorist's goal then is to model how individuals decide what falls within the concept's scope and what does not. Since the goal is to understand certain *facts* about human psychology, we might call this an "empirical" analysis of the concept's use and understanding.²⁰

The empirical approach has led to a profound change in our understanding of conceptual practice. Under the traditional approach, theorists believed that concepts could be defined in terms of necessary and sufficient criteria.²¹ But in the latter part of the twentieth century, that dominant view began to fray. As Jerry Fodor stated, the idea that concepts could be defined in terms of necessary and sufficient criteria ran up against the disconcerting fact that no such definitions could explain how concepts were used in ordinary conversation.²² The concept of a "bachelor" offers a straightforward example of the problem. The term is typically used to refer to an "unmarried adult male." That definition may work for most cases, but it does not quite capture our full understanding of the concept. Is the Pope a bachelor? Is a widower? Is a gay man living in a long-term relationship?

Even more powerful attacks on the definitional view came from other disciplines. Notably, as descriptive analysis increasingly focused on the empirical, it became natural for scientists to become involved in their study. Using the tools of the scientific method, the emerging field of cognitive science began to examine how individuals used and understood concepts. Their findings further undercut the view that concepts could be defined in terms of necessary and sufficient criteria. Notably, researchers

20. Although he does not go into detail, Stephen Perry appears to describe a similar methodology when he refers to the "descriptive-explanatory" approach to conceptual analysis. Under that method, a concept's meaning "would be determined by the relative explanatory power of accepting one way of categorizing and describing social practices over another, where 'explanatory power' would in turn depend on such standard metatheoretical criteria as the following: predictive power, coherence, range of phenomena explained . . ." Perry, *Methodological Positivism*, *supra* note 13, at 314. Perry says that the "descriptive-explanatory" approach is the "most straightforward understanding" of descriptive analysis, which he called "methodological positivism." *Id.* at 320.

21. This was not, as Lakoff notes, the "result of empirical study. . . . It was a philosophical position arrived at on the basis of a priori speculation. Over the centuries it simply became part of the background assumptions taken for granted in most scholarly disciplines. In fact, until very recently, the classical theory of categories was not even thought of as a *theory*. It was taught in most disciplines not as an empirical hypothesis but as an unquestionable, definitional truth." GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 6 (1987).

22. JERRY A. FODOR, *REPRESENTATIONS: PHILOSOPHICAL ESSAYS ON THE FOUNDATIONS OF COGNITIVE SCIENCE* 284–85 (1981).

found that this simple “definitional” view conflicted with the actual ways in which concepts were used.

For example, the definitional approach implied that concepts possessed sharply defined boundaries. As George Lakoff explained, traditionally, concepts “were assumed to be abstract containers, with things either inside or outside the category. Things were assumed to be in the same category if and only if they had certain properties in common.”²³ That meant theorists believed that no in-between cases—no ambiguity about the concept’s meaning—could exist.²⁴ Moreover, under the definitional model, one entity could not be a more typical example of a concept than another.²⁵ An entity either satisfied the definition or did not; every member of the concept was on equal footing.

However, cognitive researchers discovered that these claims did not hold up to empirical research. For example, researchers discovered that concepts are actually quite “fuzzy” or inexact.²⁶ Individuals are often uncertain about whether an entity lay within a concept’s scope or not (e.g., Are carpets furniture? Are penguins birds?). The classical approach refused to allow for this kind of indeterminacy in category membership.²⁷ Empirical studies also showed that concepts exhibit *typicality* effects; that is, some elements of a concept-category are viewed as more “typical” than others. An apple is a more typical fruit than a fig, even though both are deemed to be fruits by most individuals. The definitional approach cannot account for these features.

In short, cognitive scientists demonstrated quite decisively that individuals do not utilize concepts by invoking necessary and sufficient criteria. Some other mechanism, they argued, must explain how individuals use concepts in ordinary conversations. In recent years, cognitive scientists have offered various theories to better explain conceptual practices, with names such as the prototype, exemplar, and the theory-theory models.²⁸ The details of these models need not concern us here; rather, the important point is that cognitive science has persuasively demonstrated that ordinary concepts are not based on a simple definitional model.

23. LAKOFF, *supra* note 21, at 6.

24. See MURPHY, BIG BOOK, *supra* note 19, at 15.

25. *Id.* at 15.

26. *Id.* at 19.

27. Stephen Laurence & Eric Margolis, Introduction to CONCEPTS: CORE READINGS 23 (Stephen Laurence & Eric Margolis eds., 2000) [hereinafter CORE READINGS].

28. For an overview of some leading models, see Dennis Earle, *Concepts*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/concepts/> (last visited May 12, 2014).

C. *Descriptive Conceptual Analysis in Legal Theory*

The discussion thus far has focused on key changes in the practice of conceptual analysis. We have seen how the realist view of concepts has been replaced by a naturalistic one, and how this change has led to a concomitant modification in the method of analysis. This is, to be sure, a somewhat simplified version of recent history. It leaves out certain key developments in mainstream philosophy, including efforts by some theorists to revitalize conceptual analysis as a philosophical practice.²⁹ Nonetheless, the storyline allows us to see how assumptions about the nature of concepts relate to the ways in which descriptive analysis is carried out. It also offers a basic overview of key methodological questions, which serves as useful background as we turn to explore the way descriptive conceptual analysis is used in legal philosophy.

Like their fellow practitioners in science and philosophy, descriptive *legal* theorists must, at least implicitly, take a position on the nature of concepts. Though theorists rarely confront the issue directly, several speak as if they are committed to the traditional view that the concept of law is a real thing, with a kind of transcendental existence. Of course, legal theorists never say so explicitly, but the commitment to a kind of Platonism is implicit in certain claims advanced. Specifically, a surprisingly large number of legal philosophers contend that the goal of legal theory is to identify the *necessary* or *essential* features of the concept of law.³⁰

Colloquially at least, the language of necessity implies that the concept of law possesses an invariable and inherent form or structure. Thus, saying that the law is necessarily normative suggests that normativity is a fixed,

29. Perhaps the leading advocate today is Frank Jackson, whose recent writings have sparked renewed debate about the role of conceptual analysis in philosophy. See FRANK JACKSON, *FROM METAPHYSICS TO ETHICS* (1998). For criticism of Jackson, see Alexander Miller, *Jackson, Serious Metaphysics and Conceptual Analysis*, 71 *ANALYSIS REVS.* 574 (2011). A full evaluation of Jackson's work is beyond the scope of this Article.

30. See, e.g., DICKSON, *supra* note 6, at 17 (noting that a "successful theory of law" is one "that consists of propositions of law which are necessarily true," and that a theory of law must "at least consist[] of necessarily true propositions."); Danny Priel, *Jurisprudence and Necessity*, 20 *CAL. J.L. & JURIS.* 173, 200 (2007) (noting that, during the 20th century, "legal philosophers tried to find those features that are necessarily true of any possible legal system, including that of a society of angels."); Frederick Schauer, *Necessity, Importance, and the Nature of Law*, in *NEUTRALITY AND THE THEORY OF LAW* (Jordi Ferrer Beltrán, ed. 2013) ("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.").

inherent, unchanging part of the law.³¹ Brian Leiter has rightly criticized these claims:

[L]egal philosophy is, indeed, descriptive, and trivially so, in exactly the way most other branches of practical philosophy have an important descriptive component. The real worry about jurisprudence isn't that it is descriptive . . . but rather that it relies on two central argumentative devices—analyses of concepts and appeals to intuition—that are epistemologically bankrupt.³²

Legal theorists, Leiter continues, seem to be acting as if Quine's challenge to necessary conditions had not been made, and that a pre-modern view of concepts remains persuasive.³³ It is, of course, conceivable that theorists, when speaking of the search for the “necessary” or “essential” features of law, are using those terms in special or idiosyncratic ways.³⁴ But if that is so, it behooves them to articulate clearly what that special meaning is.

Let us assume, charitably, that legal theorists do not really mean to adopt a realist view of concepts when they speak of seeking the “necessary” and “essential” features of the law. If that is so, legal theorists must instead adopt the naturalist's perspective—the view that concepts reflect mental processes. The implication is that legal theorists and cognitive scientists share the same general goal—to model how human beings use and understand concepts. For legal theorists, the focus is on a specific concept—the concept of law.³⁵

31. See Dennis Patterson, *Notes on the Methodology Debate in Contemporary Jurisprudence: Why Sociologists Might Be Interested*, 8 LAW & SOC. 254, 256 (2006) (“Since Plato, philosophers have endeavored to develop accounts of concepts that unpack their content in terms of necessities. According to the so-called ‘Classical Theory of Concepts,’ most concepts are ‘structured mental representations that encode a set of necessary and sufficient conditions for their application. . . .’”) (quoting CORE READINGS, *supra* note 27, at 8, 10).

32. Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 43–44 (2003).

33. *Id.* at 46–47 (claims about necessary and essential truths “depend on the assumption that Quine is fundamentally wrong about analyticity, an assumption that, at this late date, requires some explicit defense if we are to take the results of jurisprudential inquiry seriously.”).

34. Joseph Raz is one prominent theorist who asserts that his goal is to articulate the necessary features of “law.” He also, however, seems to adopt a highly idiosyncratic—and not particularly clear—definition of “necessity.” See Brian Bix, *Raz on Necessity*, 22 LAW & PHIL. 537, 555 (2003) (“Raz’s idea of ‘necessity’ is distinctly different from what one finds elsewhere in philosophy: sharply different from logical necessity, and almost as distant from the type of necessity discussed in the context of Platonic philosophy and ‘natural kinds’ theories.”). Without further clarity, one cannot tell precisely what form of conceptual analysis Raz is employing. See *id.* at 556 (Raz’s “view of necessity requires further elaboration, and it carries no automatic immunity to the recent general criticisms of conceptual analysis in jurisprudence, nor does it offer any easy answers to those challenges.”).

35. To be sure, legal theorists typically lack the institutional competence to employ the same rigorous empirical methods used by cognitive scientists. At best, legal theorists must rely on their own

The question remains: can this kind of empirical approach offer an appealing method of jurisprudence? It is easy to be skeptical. The empirical approach faces formidable obstacles when applied to the concept of law. Perhaps the most significant is the problem of polysemy.

1. *Polysemy and the Law*

Polysemy is the property of having multiple meanings.³⁶ A moment's reflection makes clear that the term "law," itself, is polysemous. As Joseph Raz points out, the term can be used to refer to religious law, scientific law, natural law, and what we might call "juridical" law (or "law in the legal sense").³⁷ These different categories share certain features. Among other things, all refer to phenomena that are thought to possess certain "rule-like" behavior. But these are not identical concepts, and they encompass different sets of phenomena.

Legal theorists are not typically interested in examining scientific or religious law. They are interested in analyzing juridical law. Nonetheless, even if we limit our attention to that concept, polysemy remains. Ronald Dworkin has identified several significant ways that the term "law" is used in the legal field.³⁸ Law, for example, might refer to a "type of institutional social structure," as in the sentence: "Law first appeared in England in the first century."³⁹ Or the term might be used to refer to the system of rules and regulations within a designated jurisdiction, as in the sentence: "United States law reflects the power of money and corporations in the political process."⁴⁰

These are relatively abstract concepts of law. But other more focused conceptual understandings are possible as well. Ronald Dworkin identifies one such concept, which he calls the "doctrinal" concept of law.⁴¹ This term refers to the specific rulings existing within a given jurisdiction at a given time. An example is the claim that "under Rhode Island law a

knowledge and familiarity with the legal regime to develop hypotheses of how human beings understand the concept of law. If these tools are more rudimentary, the overriding goal is similar; it is to model how individuals use and understand the category labeled law.

36. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

37. See JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 196 (1994).

38. See generally DWORKIN, *supra* note 7, at 2–5, 140–86 (discussing various concepts of law).

39. *Id.* at 3. Dworkin calls this the "sociological" concept of law. *Id.*

40. *Id.* See also Kenneth M. Ehrenberg, *Law is Not (Best Considered) an Essentially Contested Concept*, 7 INT'L J. OF LAW IN CONTEXT 209 (2011).

41. DWORKIN, *supra* note 7, at 5 ("Our main question is about the nature of the doctrinal concept of law.").

contract signed by someone under the age of twelve is invalid.”⁴² Dworkin suggests that most legal theorists are particularly interested in analyzing the scope and content of doctrinal law.⁴³

In fact, Dworkin’s preliminary list of concepts understates the complexity of the conceptual landscape. Upon reflection, one can see that doctrinal law itself encompasses several different categories, with subtly different contours. For example, we might speak of doctrinal law as referring to past rules promulgated by authoritative institutions. This concept, which might be called “precedential law,” can be illustrated by a statement such as: “the holding of *Bush v. Gore* is the law.” By contrast, a different concept, which might be called “prescriptive law,” refers to legal decisions justified according to favored standards of interpretation. This concept is employed in the sentence: “*Bush v. Gore* was certainly contrary to the law.”

As these two examples highlight, the many meanings of “law” allow us to say seemingly paradoxical things, such as: “*Bush v. Gore* may be the law, but it was also contrary to law.” That statement makes sense only because the sentence uses the term “law” in two different ways. The first use refers to the precedential concept, the second to the prescriptive one. Both are variants on doctrinal law. No doubt, additional variations of doctrinal law can be identified upon further reflection.⁴⁴ But the overriding point by now should be clear: the term “law” can refer to a multitude of concepts, even when limited to its juridical sense.

2. Hart’s Descriptive Conceptualism

Polysemy poses a serious problem for legal theorists engaged in descriptive conceptual analysis. To illustrate the depth of these difficulties, this section considers several influential claims advanced by H.L.A. Hart, who is widely viewed as the most influential legal philosopher of the last half-century. Hart, like many of his fellow conceptualists, claimed to be describing “the” concept of law. But we can see that this ambition is deeply problematic. It makes no sense to speak of “the” concept of law

42. *Id.* at 2. *See id.* at 263 n.1 (“The doctrinal concept collects valid normative claims or propositions . . .”).

43. *Id.* at 30 (noting that Hart and many of his followers seemed most concerned with analyzing doctrinal concepts of law, while also “wondering whether some of Hart’s followers should now be understood as defending” other concepts of law as well).

44. *See supra* Part I.B regarding “predictive” concept of law.

when we have a myriad of different concepts. None of these concepts are privileged over the others.⁴⁵

Hart's other claims about the concept of law are similarly suspect. A central goal of his analysis, for example, is to demonstrate that law is fundamentally "normative." By this, Hart means that individuals view law as imposing obligations of obedience. Thus, says Hart, it is perfectly intelligible to say that one should stop at a red light because "it is the law," even if failure to stop poses no risk of punishment.⁴⁶

Hart's argument here again overlooks the problem of polysemy. It is certainly true that individuals speak of the "law" as imposing an obligation of obedience. But individuals also commonly invoke the term "law" to refer to a risk of punishment. An individual, for example, might ask his tax attorney whether a certain deduction is "against the law." The individual is interested in only one thing: whether the action will make him subject to sanction. He is using "law" in a "predictive" sense, which lacks any normative aspect.

The point is that individuals sometimes use the term "law" to refer to the normative conception of the law, sometimes to a predictive conception, and sometimes to other concepts of law. None of these concepts is more correct than the others. The most charitable interpretation of Hart's descriptive approach is that he recognizes the multitude of possible concepts associated with the term "law," but simply chooses to examine one normative concept in detail.

If that is the case, which concept is Hart's target? Hart seems most interested in analyzing the scope of existing legal rules, so it seems plausible to view his analysis as targeting a version of doctrinal law. One option is the concept of "prescriptive" law which, recall, encompasses court rulings that are justified according to favored principles of interpretation. The problem is that if we adopt this more limited focus, Hart's remaining claims seem patently false.

Perhaps Hart's most prominent claim is that the concept of law is grounded upon a "rule of recognition" which sets forth a set of criteria for determining what counts as valid law. The rule of recognition is supposedly structured in a hierarchal way to ensure that it is possible to offer a determinate answer to the question, "What is the law?" Moreover,

45. To claim that a specific concept is right or best would require a theorist to rely on some standard of normative value, which is out of bounds in any descriptive analysis. Dan Priel, *Description and Evaluation in Jurisprudence*, 29 *LAW & PHIL.* 633, 633–51 (2010).

46. See, e.g., HART, *supra* note 1, at 82. Hart sharply attacks John Austin's interpretation of the concept of law for failing to account for law's normativity. *Id.* at 82–91.

Hart says, the rule of recognition is shared by public officials.⁴⁷ Agreement on the rule of recognition means that public officials in a given jurisdiction share a common concept of doctrinal law. This idea of a shared concept grounded on criteria of legal validity might be referred to as Hart's "conventionality thesis."

As a claim about how public officials actually think, however, the conventionality thesis is wildly implausible.⁴⁸ Certainly, if we examine how public officials actually reach decisions about cases, we will find some agreement on certain, very general, criteria of validity. In constitutional decision-making, for example, most judges would likely agree that precedent, text, and original intent are relevant to some degree in deciding on the appropriate result in a given case. But public officials disagree on certain criteria too—like the relevance of public morality—and they plainly disagree on the weight given to each factor.

What we do not find is agreement on a structured, hierarchal set of criteria that determines what is valid law in each case. The plain fact that public officials disagree on what the law is, demonstrates the falsity of that view. In the end, empirical analysis of prescriptive law tells us nothing except what we already know—that officials share certain basic criteria, disagree on others, and disagree on how those criteria apply to specific cases.

Perhaps, though, we are mistaken about Hart's focus. Perhaps Hart is interested in analyzing a different kind of doctrinal law—"precedential" law. That concept, recall, refers to the rules previously promulgated by authoritative institutions, rules that individuals believe count as valid precedent. Would this alternative perspective change our conclusions about the descriptive methodology's appeal?

Unfortunately, it would not. Once again, the analysis reveals little of interest. Such an analysis would no doubt demonstrate that public officials share certain basic criteria (e.g., rulings by the Supreme Court that have not been reversed count as precedent). It would also show that they disagree (or at least fail to agree) on certain points of controversy (e.g., Do very old decisions still count as precedent? Do decisions whose rationale have been discredited, but have yet to be overruled, still count as

47. HART, *supra* note 1, at 115 ("Here what is crucial is that there should be a unified or shared official acceptance of the rule of recognition containing the system's criteria of validity.")

48. Kenneth Einar Himma, *Ambiguously Stung: Dworkin's Semantic Sting Reconfigured*, 8 LEGAL THEORY 145, 159 (2002) (finding the empirical claim that individual's share criteria "is so obviously implausible that it cannot charitably be attributed to any reasonably sophisticated theory of law.").

precedent?). But as empirical findings, these results are banal. They tell us what we already know about the rules of precedent—that we agree on many rules defined at a general level but disagree on others in particular cases.

Hart's claims about a shared rule of recognition face serious problems. Attempts to analyze the concepts of precedential or prescriptive law demonstrate that public officials do not share a structured, hierarchal set of validity criteria. To the extent that we share criteria of validity at all, the criteria must be characterized at high levels of abstraction, which drains the conclusions of interest. If Hart's theory is the most influential example of the empirical approach in legal theory, the prospects for that method are not promising.

D. Reconsidering Descriptive Analysis of the Law

Our analysis has raised serious questions about the appeal of descriptive conceptual analysis in jurisprudence. Traditional forms of "intuitive analysis" rest on unacceptable assumptions about the existence of a transcendent concept of law. Meanwhile, the empirical approach faces daunting obstacles, including the fact that law is intractably polysemous. Many concepts of law exist, and little of significance can be said about any of these on descriptive grounds.

To be sure, empirical forms of conceptual analysis can generate interesting insights about the human mind. Cognitive scientists continue to make important findings about the way human beings form and understand categories of thought. But that kind of empirical study falls outside the institutional competence of legal theorists, and it does not necessarily yield insights of unique interest to the legal academy. If conceptual analysis is to have a central role to play in legal philosophy, it will have to be through its "normative"—rather than descriptive—forms.

II. NORMATIVE CONCEPTUAL ANALYSIS

Normative forms of conceptual analysis do not attempt to model existing conceptual practices; they attempt to say how concepts "should" be structured. To make these claims, normative theorists must rely on some standard of justification; the methods vary based on the standard of justification employed. Some normative theorists rely on moral arguments for their prescriptions, others on instrumental goals. These two major categories of normative conceptual analysis are examined, each in turn, below.

A. Categorical Conceptual Analysis

Moral principles generate categorical obligations for choosing a certain course or conduct.⁴⁹ Thus, in the context of conceptual analysis, moral arguments can generate categorical obligations for adopting a specific concept of law. One might find it strange to think that morality has anything to do with how we interpret or understand the concept of law. Nonetheless, a number of theorists have made precisely that argument. These theorists argue, on moral grounds, that a single concept of law should be adopted as *the* concept of law.⁵⁰

1. Concepts and Consequences

The moral arguments are, invariably, consequentialist in nature; the idea is that the adoption of a specific concept of law will have good consequences for society.⁵¹ As Frederick Schauer put it, “the moral question is not one about the morality of a definition *per se*, but rather about the moral consequences of a society having this rather than that understanding of some social phenomenon”⁵²

49. See Aaron Rappaport, *The Logic of Legal Theory: Reflections on the Purpose and Methodology of Jurisprudence*, 73 MISS. L.J. 559, 585 (2004) (“Moral principles, then, are any ultimate, non-instrumental principle that generate categorical obligations.”).

50. Examples of moralists include Neil MacCormick, Tom Campbell, Gerald Postema, Frederick Schauer, and until recently Liam Murphy. See Neil MacCormick, *A Moralistic Case for A-moralistic Law?*, 20 VAL. U. L. REV. 1 (1985); Campbell, *supra* note 10; GERALD POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 332 (1989); Frederick Schauer, *Positivism as Pariah*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 31, 32 (Robert P. George ed., 1999) [hereinafter *Positivism as Pariah*]. Liam Murphy’s views on this matter are evolving. In an article written in 2001, he suggested that normative considerations alone determine which conceptual approach should predominate. But in a more recent article, Murphy repudiated that position. See Liam Murphy, *Better To See Law This Way*, 83 N.Y.U. L. REV. 1088 (2008).

51. Liam Murphy, *The Political Question of the Concept of Law*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 384 (Jules Coleman ed., 2001) [hereinafter *Political Question*] (“The dispute about the concept of law is a political argument for control over a concept that has great ideological significance The dispute comprises the practical question of the social consequences of accepting one rather than another regimentation as well as the political question of which consequences we should be aiming at.”); Philip Soper, *Choosing a Legal Theory on Moral Grounds*, 4 SOC. PHIL. & POL’Y 31, 31 (1986) (“According to this theory, the reason we must see law and morality as separate is not . . . because of the logic of our language, but because of the practical implications” of a conceptual approach.).

52. Schauer, *Positivism as Pariah*, *supra* note 50, at 34. Oddly, Julie Dickson critiques Schauer’s attempts to offer this kind of normative approach, saying it represents “wishful thinking” about what the concept might be, not a description of what law really is. See DICKSON, *supra* note 6, at 88. Dickson mistakenly assumes that the only approach to conceptual analysis is descriptive, and she fails to realize that Schauer is offering a normative claim about how the law should be understood, not a descriptive claim about how the concept of law is. See Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493 (2005). See also

This argument is premised on the assumption that conceptual schemes influence human perception and, ultimately, behavior. How is that possible? In effect, the moralists argue that the way in which we conceptualize “law” affects the way we view government authority. On this line of thinking, individuals tend to view government rules as falling within a concept of “obligatory law”—a concept that assumes these rules impose obligations of obedience on individual citizens. More specifically, the existence of a government rule is treated as a criterion of identification for the application of the label “law,” and that in turn is associated with the concept of obligatory law.⁵³ The result is that individuals tend to move quickly from the view that something is a government rule to the idea that it automatically (or presumptively) generates obligations of obedience (see Figure 2).⁵⁴

FIGURE 2



This is not problematic, of course, *if* government rules really deserve obedience. But moralists dispute such a view, which is why they worry that individuals apply the concept of obligatory law indiscriminately and erroneously to all government rules.

Campbell, supra note 10, at 27–28. (“The prescriptive conceptualist might be accused of fallacious argumentation in drawing conceptual conclusions from prescriptive premises. . . . This would certainly be the case, if the positivist is claiming that her conclusions are about how a concept is actually used in practice, but it is not invalid if what is going on is a recommendation about how a term ought to be used.”).

53. The use of criteria of identification is common when employing concepts. For example in determining whether something is an orange, human beings rely on various criteria, including the color and shape of the object. If we see a round, orange-colored, appropriately textured object, we might assume it is an orange. Texture, shape, color all serve to identify the concept-category. Of course, the use of criteria of identification can lead to mistakes. If we bite into the round, orange thing and taste bitterness, we might reconsider whether the thing really falls within the concept of an “orange.” (Perhaps it is a persimmon).

54. Hans Kelsen, *Law, State and Justice in the Pure Theory of Law*, YALE L.J. 377, 383–84 (1948) (“[T]he real effect of the terminological identification of law and justice is an illicit justification of any positive law.”).

According to the moralists, this error has serious negative consequences. It leads to a kind of “quietism,” an unthinking obedience to government actions, and that in turn undermines social welfare. The moralists’ chief case in point is the rise of the Nazi party in Germany prior to World War II. According to some theorists, German citizens during that period applied the concept of obligatory law to all of the government rules of the Nazi regime. That contributed to an unthinking obedience to the directives of a deeply immoral regime.⁵⁵

The central question for the moralists is how to respond to the overly quick move from government rule to obligation. In practice, moralists tend to disagree on the best solution. Natural lawyers tend to target the inferential jump from government rule to “law.” They argue that the best way to avoid error is to encourage individuals to pause and consider the morality of the government rule before attaching the label “law.” In effect, citizens are asked to apply a “moral test” to government edicts. Using this test, German citizens would refuse to call Nazi rules “law” because those rules fail the moral test.

Traditional positivists—at least those in the tradition of John Austin—take a different tact.⁵⁶ Rather than targeting the move from government rule to “law,” they seek to alter the concept associated with the word “law.” The term should refer not to a concept of obligation, but simply to the existence of the government rule itself.⁵⁷ By marking a clear separation between law and obligation, positivists attempt to counter the presumption that government rules are always binding.⁵⁸ From this perspective, Nazi rules would still be called “law,” but they would not be treated as generating duties of obedience.

55. Perhaps the most famous argument along these lines was presented by Richard Radbruch who, according to Hart, argued that the Germans’ willingness to equate “law” with “obligation” contributed to the horrors of World War II. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 617 (1957).

56. Austin rejected the idea that the concept of law implies the existence of a moral obligation. For him, law was rooted in the idea of punishment and sanction. See, e.g., Murphy, *supra* note 50, at 1093 (describing differences among positivists old and new).

57. Schauer, *Positivism as Pariah*, *supra* note 50, at 37 (“If no moral evaluation is incorporated into the identification of legality, then the identification of legality would have no moral import, and the fact of legality would be a morally neutral social fact. And it therefore comes as no surprise to discover that theorists holding these traditional conceptions of positivism have been among the leading proponents of the view that there is *no* moral obligation to obey the law.”). See also Murphy, *supra* note 50, at 1099 (“A person with a nonpositivist understanding of law may adopt an uncritical attitude toward the legal materials the state produces. He may think: This is presented as law, so it probably is law and, therefore, given the nature of law, is probably not too bad.”).

58. HART, *supra* note 1, at 50–60.

In the past, natural lawyers and positivists argued vehemently over which approach was best. Nonetheless, it is important to recognize that both have the same ultimate goal: to disrupt the unreflective assumption that government rules always generate obligations of obedience. The two sides differ merely in the means to that end. Natural lawyers say that Nazi rules are “not law”—and hence not binding—because they are immoral. Positivists argue that Nazi rules are “law”—but do not bind—because law is not obligatory.

2. *Critiquing the Consequentialist Argument*

Though the moralists’ argument may have some initial appeal, it ultimately suffers from several core deficiencies. One might begin by quibbling with the core premise that greater skepticism of government rules will promote social welfare. That certainly seems debatable; increased skepticism of government power might reduce welfare if it undermines social cohesion and respect for law to an excessive degree.⁵⁹ Even if one accepts the idea that skepticism is a good thing, the moralists’ argument faces a profound problem. It rests on highly implausible assumptions about conceptual practices.

As an initial matter, it assumes that conceptual understandings are easily manipulated and modified. But the reality is that conceptual understandings about social arrangements are often deeply entrenched. Beliefs about the obligatory force of government rules, for example, are likely the product of powerful social and cultural forces. Social institutions, especially those with economic and political power, desire stability and obedience. Through subtle and explicit means, government institutions tend to foster beliefs in the binding nature of their directives. As Philip Soper points out, “most regimes will claim that their official directives are just.”⁶⁰ One would, therefore, expect citizens to be subject to enormous social pressure to believe that they have a duty to obey the law.

59. See, e.g., Murphy, *Political Question*, *supra* note 51, at 390 (“Why should we believe it—why not, indeed, believe the contrary claim that the denial of the social thesis leads not to quietism but rather to excessive *disrespect* for the legal regime?”). Great skepticism might also have other unintended effects, like encouraging institutional actors to change their conduct in problematic ways. For example, it might lead judges to give less deference to precedent, undermining rule of law principles. These kinds of effects would have to be incorporated into the consequentialist framework, and they might not all be positive. See *id.* at 394 (noting different factors to consider). See also Murphy, *supra* note 50, at 1095–1100. This criticism might not be decisive, but it makes clear that the moralists’ claims rest on assumptions that are not self-evidently true and might be relative to a specific time and place.

60. Soper, *supra* note 51, at 45.

That informal pressure will be, on occasion, backed by formal sanctions, a concrete demonstration of a government's power and force.

If this is an accurate depiction, it is not surprising that a term like "law" is applied to government rules that are associated with obligations of obedience; individuals are socialized to defer to state power. Without changing these underlying beliefs, it is not clear how legal theorists can hope to change the meaning or application of the term "law." Theorists, for their part, offer no mechanism for achieving that result, which makes their arguments seem like fantasies from the Ivory Tower.⁶¹

Moreover, even if the word could be changed, it would not produce the results that moralists desire. Suppose, for example, that citizens were compelled to adopt the positivist view that "law" referred simply to the existence of a government rule, without any connotation of bindingness or obligation. Citizens would continue to believe that the government deserves obedience.⁶² They would just have to find different ways of expressing that sentiment. That, of course, would not be difficult to do. Citizens could still refer to government rules as obligatory, either by using a different term (say, by referring to government rules as "precepts"), or by adding adjectives to the word "law" (say, by referring to government rules as "binding law").⁶³ In other words, without changing underlying beliefs, a conceptual change makes little difference.⁶⁴ A similar result

61. For a similar point, see Murphy, *supra* note 50, at 1100–01 ("The instrumental argument has no purpose if there is no serious prospect of convergence on the preferred usage. Where the motivation for an explication is that convergence on the new meaning will have good effects, it would be pointless to offer an explication outside a constrained and perhaps professionalized context of communication. . . . The thought that the urging of theorists might change the usage of "law" . . . seems absurd.")

62. Soper, *supra* note 51, at 48 (A "[m]oral conscience, if it is inclined to yield to officialdom, will do so regardless of the prevailing legal theory because both positivist and natural law regimes will claim that their directives are just.")

63. In these cases, the status quo would be retained, with the word "precept" or "binding law" replacing the word "law." Cf. Schauer, *Positivism as Pariah*, *supra* note 50, at 41–42 (assessing the appeal of replacing the word "law" with an alternative term, such as "social directive").

64. I say "little" difference, because one cannot discount entirely the possibility that the way concepts are used might influence an individual's belief system to some limited degree. Cognitive scientists have found that in some situations, changes to conceptual practice can have a small, but nonnegligible, effect on human perception. Thus, for example, research by Lena Boroditsky has found that differences in the way Russian and English speakers conceptualize color affects those speakers' color perception. For example, English speakers have a single word for the color blue. Russians do not; instead, they have words light blue (goluboy) and dark blue (siniy). Boroditsky's research found that these differences affected Russian speakers' color perception by ensuring that the Russians had greater awareness of subtle shades of the color blue. Lera Boroditsky, *How Does Our Language Shape the Way We Think?*, in *WHAT'S NEXT: DISPATCHES ON THE FUTURE OF SCIENCE* 116 (Max Brockman ed., 2009). Whether these findings can be extended to complex, abstract concepts such as law is doubtful, but even if some minimal effect existed, it would likely be dwarfed by the deeper cultural values about government power that permeate society.

would occur if citizens were compelled to adopt the natural law interpretation.⁶⁵

The overarching point is that changing the way “law” is defined is not easily achieved, and even if it were, it would not change the way citizens think about government power. Where beliefs on government authority are strongly held, a change in conceptualization—even if possible—would have little effect. Concepts do not drive beliefs, beliefs drive conceptual practices.

3. *The Cynicism of Normative Theorists*

Laid plain, the moralists’ arguments seem like fanciful academic speculations. But these musings also have a cynical quality that deserves comment. The moralists are concerned about a perceived danger, a worry that citizens are passive and unthinking in the face of government power. However, they seek to counter quietism in a way that itself treats citizens as unthinking pawns. Rather than trying to educate citizens about the need for greater vigilance against government overreaching, the moralists attempt to alter human conduct by manipulating the concepts associated with the word “law.” This prescription calls to mind infamous attempts by real and fictional regimes to control the public by manipulating language.⁶⁶

There is a way to respond to concerns about quietism while also respecting an individual’s capacity to make reasoned decisions about what to believe. That approach requires an effort, not to manipulate concepts, but to address the deeper substantive questions that citizens have about

65. If citizens are already predisposed to believing that government rules are morally justified, adopting a natural law interpretation will not alter their view that government rules are obligatory. They will continue to apply the term “law” to government directives, since they will assume that those rules are morally justified.

66. The Third Reich’s attempts to manipulate language are one historical example. *See, e.g.*, VICTOR KLEMPERER, *LANGUAGE OF THE THIRD REICH: LINGUA TERTII IMPERII* (3d ed. 2006). The most famous fictional attempt, of course, is Big Brother’s efforts to impose “Newspeak” on its citizens, as described in the novel *Nineteen Eighty-Four*. One loyal subject explains the strategy this way:

Don't you see that the whole aim of Newspeak is to narrow the range of thought? In the end we shall make thoughtcrime literally impossible, because there will be no words in which to express it. Every concept that can ever be needed will be expressed by exactly one word, with its meaning rigidly defined and all its subsidiary meanings rubbed out and forgotten. . . . The Revolution will be complete when the language is perfect. Newspeak is Ingsoc and Ingsoc is Newspeak Has it ever occurred to you, Winston, that by the year 2050, at the very latest, not a single human being will be alive who could understand such a conversation as we are having now?

GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 55 (Everyman’s Library 1992) (1949).

whether or when government rules deserve to be obeyed. This approach inevitably raises deep philosophical questions that have so far remained suppressed. Is there really an obligation to obey the law? If so, how much weight should be given to that obligation?

These are not simply conceptual questions. They involve substantive arguments about the relationship between government power and social obligation. Theorists who believe that greater skepticism of government is warranted would need to develop arguments to persuade citizens to adopt their preferred position. That project would, of course, have no guarantee of success. Even if a cogent philosophical argument could be developed, few citizens will have the patience for the kind of philosophical reflection the approach would require. Nonetheless, this is the only approach that treats citizens as thinking beings, showing respect for their ability to grapple with the thorny issues of law's normativity.

B. Contingent Conceptual Analysis

Moral principles are not the only basis for making a statement about how concepts "should" be interpreted. One can also offer "hypothetical" or "contingent" reasons for a specific concept. These are arguments that justify a given action based on the promotion of an accepted objective, even if that objective is not a moral one. Such an example would be the statement, "you should press down the accelerator if you want to go faster." This is a normative statement (a "should" statement), but it does not rely on moral arguments.

An analogous statement might be made about the concept of law. The argument would take the form: "Theorists should define the concept of law to be X, in order to promote goal Y." On the assumption that participants agree on goal Y, this normative argument would identify reasons for action. This method generates "hypothetical" or "contingent" obligations (rather than categorical ones), since any obligation is dependent on the acceptance of the relevant goal.⁶⁷ We will thus call this approach the "contingent" form of conceptual analysis.

67. See DICTIONARY OF PHILOSOPHY 218 (Dagobert D. Runes ed., 1942) ("Hypothetical obligation is expressed in such sentences as 'If you want so and so . . . then you must or should do such and such.' Here the necessity or obligatoriness is conditional, depending on whether or not one desires the end to which the action enjoined is conducive. Categorical obligation is expressed by simple sentences of the form, 'You ought to do such and such'. Here the necessity of doing such and such is unconditional."). See also Robert Johnson, *Kant's Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Summer 2014 ed.), available at <http://plato.stanford.edu/entries/kant-moral/> ("There are 'oughts' other than our moral duties, but these oughts are distinguished from the

Several notable legal theorists have adopted contingent conceptual analysis. They have argued for a specific concept of law based on the claim that the interpretation advances certain *theoretical* goals.⁶⁸ As Liam Murphy put it, this methodology means “we should let our theoretical practice develop the concept that suits it best: the ‘best’ concept of law will be the one that emerges in the process of developing the best social science of law.”⁶⁹

1. Leiter’s Contingent Conceptualism

Perhaps the most prominent advocate of this view today is Brian Leiter.⁷⁰ Leiter has argued that we should adopt a concept of law that “figures in the most fruitful a posteriori research programmes . . . that give us the best going account of how the world works.”⁷¹ What kind of program is that? It is one that involves the “*descriptive* study of the causal relations between input (facts and rules of law) and outputs (judicial decisions).”⁷² The goal is to “predict what courts will do.”⁷³ In that endeavor, researchers attempt to identify factors that influence judicial action, which requires the use of methods drawn from the social sciences.⁷⁴ The reliance on these empirical methods is part of Leiter’s “naturalist” view of legal theory, which approaches legal theory from a scientific, deterministic viewpoint.⁷⁵

moral ought in being based on a quite different kind of principle, one that is the source of *hypothetical imperatives*. A hypothetical imperative is a command that . . . requires us to exercise our wills in a certain way *given* we have antecedently willed an end.”).

68. See, e.g., Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, TEX. L. REV. 267, n.161 (1997) [hereinafter *Rethinking Legal Realism*] (“As with any concept that has enjoyed wide and varied usage, the ultimate criterion for a definition of the concept must be its contribution to fruitful theory-construction”). See also HART, *supra* note 1, at 213–14 (“In the end we [rejected certain positions in the Nazi informer case not] because it conflicted with the weight of usage. Instead we criticized the attempt . . . on the ground that to do this did not advance or clarify either theoretical inquiries or moral deliberation.”). Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 410, 426–27 (Jules Coleman ed., 2001) (“[E]very community of scholars has a sense that the concepts and categories they use are theoretically useful; otherwise they would choose different concepts and categories.”).

69. Murphy, *Political Question*, *supra* note 50, at 383 (discussing H.L.A. Hart’s arguments along these lines).

70. H.L.A. Hart offers a different contingent argument in support of a positivist conception of law. His argument is that positivism helps clarify what issues are at stake in debates over whether to obey the law. I discuss this argument in a forthcoming article.

71. Leiter, *Legal Realism/Hard Positivism*, *supra* note 7, at 369.

72. Leiter, *Legal Realism*, *supra* note 2, at 252.

73. Leiter, *Rethinking Legal Realism*, *supra* note 68, at 286.

74. Leiter, *Legal Realism/Hard Positivism*, *supra* note 7, at 370.

75. See, e.g., *id.* (discussing attempt to “effect an explanatory unification of legal phenomena

Assuming for the moment that this really is the most fruitful research project, the next question is the critical one: what concept of law best promotes this endeavor? Leiter suggests that the answer can be found by looking at how empirical researchers themselves conceptualize the law. As he suggests, researchers should be expected to adopt the approach that best advances their research goals.⁷⁶ Thus, “[i]f social science really cuts the causal joints of the legal world in Hart’s positivist terms, is that not a far more compelling reason to work with that concept of law as against its competitors?”⁷⁷

So how do social scientists apply the term “law”? According to Leiter, they use the term to refer to “hard factors”—factors relating to legal sources, such as the statutory text or the legislature’s intent. These are distinguished from “soft factors”—factors that concern individual characteristics or background conditions, such as a judge’s socioeconomic background or gender. Social scientists thus express a conceptual choice. They favor a form of “hard positivism,” which holds that doctrinal law is defined in terms of legal sources.⁷⁸ As Leiter says, “hard positivism” is the theory of law that is presupposed by most naturalist studies of adjudication.⁷⁹ As a result, hard positivism should be adopted as *the* concept of law.⁸⁰

with the other phenomena constituting the natural world which science has already mastered.”). According to Leiter, this approach is long overdue and would bring legal theory in line with the broader movement towards naturalism in mainstream philosophy. Leiter, *Rethinking Legal Realism*, *supra* note 68, at 287 (“What really bears noticing here is that while every area of philosophy - metaethics, philosophy of language, epistemology, etc.—has undergone a naturalistic turn over the last quarter-century, Anglo-American legal philosophy has remained untouched by these intellectual developments.”); Brian Leiter, *The Naturalistic Turn in Legal Philosophy*, in *NEWSL. ON PHIL. & LAW* (The American Philosophical Association, Newark, DE), Spring: 142–46 (2001) (similar).

76. Brian Leiter, *Naturalism in Legal Philosophy*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Fall 2014 ed.), available at <http://plato.stanford.edu/entries/lawphil-naturalism/> (“The crucial question becomes whether our best empirical science requires drawing the conceptual lines one way rather than another.”).

77. *Id.*

78. Leiter, *Legal Realism/Hard Positivism*, *supra* note 7, at 356–57 (distinguishing Hard and Soft Positivism).

79. See Leiter, *supra* note 76 (“Leading social scientific accounts of judicial decision-making . . . all aim to account for the relative causal contribution of law and non-law factors (e.g., political ideologies or ‘attitudes’) to judicial decisions; and second, they demarcate ‘law’ from non law factors in typical Hard Positivism terms; i.e., they generally treat as ‘law’ only pedigreed norms, like legislative enactments and prior holdings of courts.”); Leiter, *Legal Realism/Hard Positivism*, *supra* note 7, at 370 (these research programs “typically assume that law-based explanations of behaviour are confined to explanations in terms of pedigreed norms.”).

80. See Leiter, *supra* note 32, at 27 (“I am inclined to the view that Hard Positivism is correct . . .”).

2. *Critiquing Leiter*

Though superficially persuasive, Leiter's argument ultimately fails on several fronts.⁸¹ As a preliminary matter, the argument rests almost entirely on the contention that social scientists associate the term "law" with hard positivism. Oddly, for one committed to empiricism, Leiter offers no factual support for that view.⁸² To be sure, it is plausible that *some* or even *many* theoreticians find it convenient to divide factors into hard and soft. However, that certainly does not mean every researcher "should" follow the same approach. (Imagine the conversation: "Mr. Statistician, you must categorize the predictive factors you identify into the following categories because others have done so..."). Each situation is unique, and given the right circumstances, some researchers might find it more useful to keep matters simple, and to disregard Leiter's distinction between hard and soft factors.

Most importantly, even if one agreed that hard positivism best promotes the social scientist's predictive research project, it is not at all clear why that conceptual understanding should apply outside that scientist's research domain. Why should legal theorists, for example, be governed by the categorizations used by social scientists? The only response that Leiter can make—and it is the crux of his argument—is that no other theoretical endeavor, apart from the social scientist's, is worthy of consideration (at least none that have implications for interpreting the concept of law). That is why Leiter envisions legal theory as playing the handmaiden to the scientist's research agenda, relegated to the task of identifying the concept of law used in scientific studies.

Leiter's contingent form of conceptual analysis, in sum, does not offer a path forward for legal theorists. His argument implicitly (if not explicitly) rests on skepticism about the independent value of legal philosophy, a perspective that drains legal theory—and conceptual analysis of the law—of much of its significance. Were he successful, his argument would intensify, rather than diminish, existing doubts about the goals and methods of jurisprudence.

81. For additional criticism, see Brian Bix, *Conceptual Questions and Jurisprudence*, 1 *LEGAL THEORY* 465, 477–78 (1995).

82. One might be skeptical of the claim that social science researchers have adopted a uniform interpretation of the term "law." For example, it certainly seems plausible that researchers use the term "law" to refer, not simply to the factors driving judicial decisions, but to the actual rules produced by the judicial decisions themselves. If that is the case, then researchers might actually employ more than one concept of law in their projects, and none can be said to be "correct."

Leiter's failure does not mean that other contingent arguments in support of a concept of law are impossible to imagine. It is just difficult to conceive of any contingent argument that can serve as the primary objective of analysis.⁸³ Indeed, I am not aware of any example, since the publication of Hart's *The Concept of Law*, where contingent arguments represent the primary focus of analysis. Given that state of affairs, the burden surely lies on the defenders of conceptual analysis to explain how contingent arguments might play a more significant role in legal theory.

CONCLUSION

Conceptual analysis has long been seen as a dominant method of jurisprudence. Though it is typically characterized as a single approach, the term actually encompasses a range of different methods. This paper has identified four types—intuitive, empirical, categorical, and contingent analysis—and has offered a preliminary evaluation of each.

The assessment has generated a sharply negative conclusion: none of the forms of conceptual analysis are capable of serving as the primary method of jurisprudence. For the most part, these methods either generate unpersuasive or uninteresting claims, or else serve a secondary, ground-clearing role in other, and more interesting, theoretical endeavors. The one area where conceptual analysis seems to offer promise is in the field of cognitive science. There, researchers have explored how individuals categorize—that is, conceptualize—common phenomena. Though fertile and insightful, this research agenda seems ill-suited for legal theorists, in part because it calls for technical and empirical skills that are beyond the expertise of most theorists. The bottom line is that legal philosophers should reject conceptual analysis as the central method of their endeavor.

The question is what might replace it? A first step in formulating an answer is to realize that many of the most interesting questions in legal philosophy are not primarily conceptual; they are normative and substantive. These are questions such as: How *should* a court decide a

83. Contingent arguments, of course, can serve secondary, supporting functions. To give a simple example, suppose a theorist is seeking to assess the moral force of government rules. In doing so, she decides to use the label "law" to refer to government rules because she believes (rightly or wrongly) that this definition is consistent with ordinary understandings of the term (and so would be least likely to confuse an audience). This is a contingent argument for the positivist concept of law, since the validity of the conceptual choice depends on whether the theorist's goal of avoiding confusion is found to be appealing under the circumstances. Even so, the conceptual question here is hardly at the center of the theoretical endeavor, which remains focused on assessing the moral status of the government rules.

specific case? Why *should* the defendant be punished? How *should* a political institution be structured? Those are questions that citizens, practitioners, and public officials alike struggle with and debate. Though conceptual clarity is certainly an important prerequisite in analyzing these questions, the ultimate issues transcend the conceptual and call on citizens to address perplexing disputes about how individuals and institutions should act.⁸⁴

Legal theory, if it is to be relevant and interesting, should play a role in helping citizens answer—or at least clarify—these normative issues. How can it do that? One tempting approach is for legal theorists to identify authoritative moral principles that can serve as the basis for determining how courts, citizens, and policymakers should proceed. In this regard, the task of legal theory would be to offer prescriptive arguments in favor of a specific course of action.

Though this path might sound appealing, it also faces serious criticism as the primary method of doing jurisprudence. A core problem with this approach “is that the content of the authoritative principles is disputed. It is not obvious how one would go about proving which principles are authoritative, or even what *kinds* of principles provide authoritative answers.”⁸⁵ But if legal theorists do not attempt to advance prescriptive claims of their own, how else might they help citizens engage the normative questions at the heart of legal disputes?

The answer is to reject the prescriptive impulse and to focus instead on clarifying the underlying premises of the normative claims generated by the legal system. To put the point baldly, every legal ruling can be seen as a normative claim by the court, a claim that *this* is the way the decision *should* be made. Legal theorists might ask: What is the underlying basis for such a claim? What moral, political, and institutional assumptions must be accepted to justify that claim? What, in short, are the fundamental premises of belief?

The effort to expose these underlying assumptions is sometimes called “rational reconstruction.” This method has modest ambitions. It does not aspire to determine the right or wrong ways of acting. Rather, it is “a tool for making more thoughtful judgments. It seeks to bring to light what has been suppressed, to make explicit what has been implicit, to encourage

84. This is true even for the question: “Should I obey the law?” Though that question requires a theorist to take a position, at least broadly, on the meaning of the term “law,” the truly challenging issue concerns whether that phenomena, however defined, generates obligations of obedience. I discuss this issue in more depth in a forthcoming article on H.L.A.’s method of legal theory.

85. See Rappaport, *supra* note 49, at 574–75.

self-awareness.”⁸⁶ The methodology, in other words, helps clarify the underlying bases for belief. In doing so, it allows us to have a more reflective understanding of our political and legal decisions.

Rational reconstruction offers a plausible method for doing legal theory, but it may not be the only candidate worthy of consideration. The point here is not to demonstrate that one methodology is the correct one. Rather, it is to challenge legal theorists to rethink their traditional commitment to conceptual analysis and to encourage further debate on the proper methodology of jurisprudence. If that debate occurs, legal theory can move beyond the sterile and unsatisfying questions that have distracted it in the past and hopefully emerge as a more vibrant and relevant theoretical pursuit.

86. *See id.* at 636.