DOES LAW 'EXIST'? ELIMINATIVISM IN LEGAL PHILOSOPHY

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ABSTRACT

What is law? This foundational question in legal philosophy has been understood in a variety of ways. Most recently, it has begun to be interpreted as a question about the nature of law, answerable via conceptual analysis. I will argue here that that approach is a mistake. It leads to an impasse in our debates. We cannot resolve this question because the method adopted is unresponsive to experience. Intuitions are made primary, and participants in the debate are unable to sway one another via counterexamples, because any putative counterexample can simply be reclassified, such that it does not present an objection to the view. In light of these methodological problems, I argue in favour of what has come to be known as 'eliminativism' about law. We should abandon any talk of the nature of law and instead adopt conceptual pluralism in the pursuit of a range of different questions. I respond to a number of objections to the eliminativist approach, arguing that it is a viable position.

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I. INTRODUCTION

> *Hitherto there has been no real joinder of issue between the opposing camps. On the one side, we encounter a series of definitional fiats. A rule of law is—that is to say, it really and simply and always is—the command of a sovereign, a rule laid down by a judge, a prediction of the future incidence of state force, a pattern of official behavior, etc. When we ask what purpose these definitions serve, we receive the answer, "Why, no purpose, except to describe accurately the social reality that corresponds to the word 'law.'" When we reply, "But it doesn't look like that to me," the answer comes back, "Well, it does to me." There the matter has to rest*.[1]

What is law? This foundational question in legal philosophy has been understood in a variety of ways. Most recently, it has been interpreted as a question about the nature of law, answerable via conceptual analysis. I will argue here that this approach is a mistake. It leads to an impasse. We cannot resolve this question because the method adopted is unresponsive to experience. Intuitions are made primary, and participants in the debate are unable to sway one another via counterexamples, because any putative counterexample will simply be classified differently on the different views. In light of these methodological problems, I will argue in favor of what has come to be known as 'eliminativism' about law. We should abandon any talk of the nature of law and instead adopt conceptual pluralism in the pursuit of a range of different questions.

II. LEGAL PHILOSOPHY: AN OVERVIEW

A. The Aim of Legal Philosophy

To the extent that legal philosophers reflect on their aims, they tend to give one (or more) of three accounts of their projects. First, it is suggested that we want to know about the nature of law just because truth and knowledge are important for their own sakes. We want to deepen our

1. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631 (1957).

understanding of an important social institution.[2] Second, it is argued that we require a clear understanding of what law is in order to assess the moral value of particular laws and decide whether they merit our obedience.[3] Third, we need to know what *law* in an abstract sense is to answer pressing practical questions about what *the law* is.[4]

I will argue against the possibility of finding true, general answers about the nature of law, at least through the methods examined here. If the aim is to understand law for the sake of contributing to knowledge, then we should not hesitate to abandon a debate incapable of producing such knowledge. However, what about the second and third reasons for pursuing the debate? These seem to give us pressing reasons to continue with the project. Since they rely on an answer that would satisfy the first aim, I will focus on the search for knowledge about the law's nature for its own sake. But I will return to these arguments below and argue that they do not prevent us from giving up on searching for the nature of law.

B. Positivism and Nonpositivism[5]

The central divide in legal philosophy is between positivism and nonpositivism. As the debate is typically understood, positivists argue that law is ultimately grounded in social fact, while nonpositivists argue that moral facts are part of what grounds law.[6] This is, of course, an

2. *See, e.g.*, JULIE DICKSON, EVALUATION AND LEGAL THEORY 144 (John Gardner ed., 2001); Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119, 1221 (2002) (reviewing JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001)); Brian Bix, *Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate*, 12 CAN. J. L. & JURIS. 17, 24–25 (1999); Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 OXFORD J. LEGAL STUD. 683, 692 (2006); Andrei Marmor & Alexander Sarch, *The Nature of Law*, STAN. ENCYC. PHIL., https://plato.stanford.edu/archives/fall2015/entries/lawphil-nature/ (Aug. 7, 2015); *see also* Danny Priel, *The Boundaries of Law and the Purpose of Legal Philosophy*, 27 L. & PHIL. 643, 683 (2008) [hereinafter Priel, *Boundaries*] (mounting an excellent argument against the view that jurisprudence is justified purely for the sake of knowledge).

3. DICKSON, *supra* note 2, at 144; H. L. A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 597–98; H. L. A. HART, THE CONCEPT OF LAW 240 (2d ed. 1994); John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 226–27 (2001); Michelle Madden Dempsey, *Why We Are All Jurisprudes (or, at Least, Should Be)*, 66 J. LEGAL EDUC. 29, 32–33 (2016).

4. LIAM MURPHY, WHAT MAKES LAW 76–77 (2014); SCOTT J. SHAPIRO, LEGALITY 25, 29 (2011).

5. I follow Murphy in using the term 'nonpositivism' rather than 'natural law,' which he argues is misleading, or 'law as integrity,' which captures only the Dworkinian subset of nonpositivist views. *See* MURPHY, *supra* note 4, at 21–22.

6. SHAPIRO, *supra* note 4, at 31.

oversimplification, but it will serve my purposes. My core concern is with the mode in which these assertions are made: as claims about law's nature.

This dispute is sometimes glossed as one about the 'grounds of law.' The 'grounds of law' problem, as Ronald Dworkin christened it,[7] refers to the question of what materials are appropriately appealed to in determining the content of law. Propositions of law are statements about what is permitted or prohibited according to law.[8] The grounds of law are other kinds of propositions in virtue of which propositions of law are true.[9] The grounds of law are what make it the case that, for example, murder is illegal.[10]

III. ANALYTIC METHODOLOGY IN LEGAL PHILOSOPHY[11]

So, legal philosophers want to know what law is, or what grounds law. One of the core puzzles is whether and how law is connected to morality. Many people understand this as a question about the nature of law. This section examines how theorists proceed to answer such a question.

Theorists usually say or imply that the truths about law they seek are not social-scientific observations about judicial practices or other observable phenomena. Their aim is something deeper—the *nature* of law. Further, many theorists claim that concepts can help us understand the nature of law. We use the method of conceptual analysis to provide insight not into our concept, but into the nature of the thing the concept represents.

Briefly, analytic legal philosophers suggest that we develop competing theories about the concept of law. The concept provides insight into the nature of law. And the nature of law is understood as consisting in statements about what is necessarily true about law. In developing such theories, we rely on intuitions. Each of these dimensions—concepts, nature, necessity, intuitions—is fraught. I will start by laying out some statements of methodology to support the simple view of it just presented. I will then delve into the problems with some of these methodological presuppositions.

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7. RONALD DWORKIN, LAW'S EMPIRE 4, 110 (1986).

8. *Id.*

9. *Id.*

10. There are also questions about systems of law; we can ask what the existence conditions of a legal system are, or about the values a system of law aims to instantiate, or traits it typically has. *See* LON L. FULLER, THE MORALITY OF LAW (2d ed. 1969); MURPHY, *supra* note 4, at 145–82. But much of the attention of legal philosophers has been focused on the grounds of law question.

11. In this section, I focus on conceptual arguments, leaving to the side what Murphy terms 'The Instrumental Approach.' This is an approach to resolving the grounds of law problem that entails defending an account of the grounds of law on the basis that that position would have better instrumental effects. Murphy himself, once an advocate of it, see Liam Murphy, *The Political Question of the Concept of Law*, *in* HART'S POSTSCRIPT (Jules Coleman ed., 2001), later argued convincingly against it, see Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088, 1097 (2008); MURPHY, *supra* note 4, at 73–76.

For Joseph Raz, a theory of law aims to articulate the nature of law.[12] He states that "legal philosophy is an inquiry into the nature of law, and the fundamental features of legal institutions and practices."[13] On his view, "a theory of law is successful if it meets two criteria: first, it consists of propositions about the law which are *necessarily* true, and, second, they *explain* what the law is."[14] It uses concepts to get at the nature of law: "Concepts are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other."[15] The nature and the concept of law are not identical, but an understanding of the concept of law can be useful in understanding its nature.[16] In short, Raz says, "the explanation of a concept is the explanation of that which it is a concept of."[17]

Julie Dickson follows Raz in her statement of methodology: "A successful theory of law of this type is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law."[18] Much of her book is devoted to defending the Razian method as she understands it: as a project that does not require us to morally evaluate the law to properly describe it.

Scott Shapiro also maintains that analyzing a concept can provide insight into the thing itself. Conceptual analysis "denotes a process that uses a concept to analyze the nature of the entities that fall under it."[19] He says:

> [W]hen one inquires into the nature of an object, one might be asking either of two possible questions. One might be asking about the identity of the object—what makes it the thing that it is? Or one might be asking about the necessary implications of its identity—what necessarily follows (or does not follow) from the fact that it is what it is and not something else?[20]

Jules Coleman says:

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12. Joseph Raz, *Can There Be a Theory of Law?*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 324 (M. P. Golding & W. A. Edmundson eds., 2005) (explaining that "as here understood a theory of law provides an account of the nature of law").

13. Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 LEGAL THEORY 249, 251 (1998).

14. Raz, *supra* note 12, at 324.

15. *Id.* at 325.

16. Raz, *supra* note 13, at 254–55.

17. *Id.* at 255. I have criticized this approach. *See* Hillary Nye, *A Critique of the Concept-Nature Nexus in Joseph Raz's Methodology*, 37 OXFORD J. LEGAL STUD. 48 (2017).

18. DICKSON, *supra* note 2, at 17.

19. SHAPIRO, *supra* note 4, at 405 n.9.

20. *Id.* at 10.

> 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 discernable a priori. These truths enable us to identify necessary or essential features of instances of the concept; these features in turn orient the analysis of the concept.[21]

Coleman continues: "The aim of conceptual analysis is to retrieve, determine, or capture the content of a concept in the hopes that by doing so, we will learn something interesting, important, or essential about the nature of the thing the concept denotes."[22] This is, in my understanding, a metaphysical project.[23]

Kenneth Himma argues that philosophers of law are engaged in conceptual analysis, and that conceptual analysis can lead us to true conclusions about the nature of a thing. Such claims are "metaphysical and expressed in terms of claims that are either necessarily or possibly true."[24] He relies on Frank Jackson for a distinction between modest and immodest conceptual analysis, and favors, as does Jackson, the modest form.[25] The modest approach, rather than telling us about the nature of the universe, tells us about "what the world is like *as we structure it* through the conceptual framework we impose on it through our linguistic practices. . . ."[26]

I cannot spell out the methodology of every legal philosopher here. However, this provides a sampling of the current widespread approach that sees legal philosophy as an investigation into the nature of the thing and holds that the nature of the thing is understood in terms of its necessary features, which we can understand via our intuitions, and usually through

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21. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLES: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY, 179 (2001); Himma, in discussing Coleman's book, says "The work represents the state of the art in conceptual jurisprudence and exemplifies the virtues of analytic philosophy at its best." Himma, *supra* note 2, at 1227.

22. COLEMAN, *supra* note 21, at 179.

23. Coleman says that the most fundamental question in legal philosophy is metaphysical; that is, he interprets the grounds of law debate as a metaphysical question. Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 61–62 (2011). Scott Hershovitz describes the three core positions in legal philosophy (exclusive legal positivists, inclusive legal positivists, and anti-positivists) as taking a position in a debate about metaphysics. *See* Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1166–67 (2015). David Plunkett and Scott Shapiro argue that the metaphysical question is not the only question on the table. *See* David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, 128 ETHICS 37 (2017). Nevertheless, I focus here on those who take themselves to be engaged in a metaphysical question, as it is this type of inquiry that I am objecting to. I will say more about Plunkett and Shapiro's view below. *See infra* Section VIII.E.

24. KENNETH EINAR HIMMA, MORALITY AND THE NATURE OF LAW 31 (2019).

25. *Id.* at 31–32; *see also* FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENSE OF CONCEPTUAL ANALYSIS (1998).

26. HIMMA, *supra* note 24, at 32.

conceptual analysis.[27] Many others write along the same lines, though they don't always talk explicitly about methodology.

One may notice that the list did not include two of the biggest names in 20th century jurisprudence: Hart and Dworkin. In my view, it is controversial whether they are engaged in the same 'nature of law via conceptual analysis' project as Raz, although both have been interpreted as engaged in that project. I have argued elsewhere that Dworkin is not properly interpreted in this way.[28] I argue that Hart is better understood as engaged in a different project in an unpublished draft.[29] I do not have the space to defend my interpretation of Hart and Dworkin here, but the standard view in the field is that they are engaged in the metaphysical project.[30] Thus, the dominance of this methodology seems clear, even if, as I argue, it is not the right interpretation of some of these figures. The idea that what we care about is the nature of law, and conceptual analysis is the way to get at it, is pervasive in modern legal philosophy.

A. Conceptual Analysis

27. It is worth noting that Andrei Marmor denies that conceptual analysis is the relevant methodology. *See Farewell to Conceptual Analysis (in Jurisprudence)*, *in* PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW (Wil Waluchow & Stefan Sciaraffa eds., 2013). I have argued elsewhere that he relies on intuitions in the same way as those who embrace conceptual analysis, and his quest to illuminate the nature of law puts him in the same category as these theorists. *See* Nye, *supra* note 17, at 71–73. I also want to acknowledge that there are other ways of understanding concepts, such as Wittgenstein's idea of family resemblance. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (2001). Thanks to Ronaldo Macedo for suggesting that we might move to this sort of understanding, and thereby avoid some of the problems with jurisprudential methodology. My core aim here is simply to critique a method that I see as widespread in legal philosophy, and that is the method outlined in the text. Some of the conclusions I reach below are sympathetic to a Wittgensteinian approach, but I do not think one needs to accept Wittgenstein's views in order to find the argument here compelling. For a suggestion that we might see law as a family resemblance concept, along Wittgensteinian lines, see Frederick Schauer, *On the Nature of the Nature of Law*, 98 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 457, 464–67 (2012).

28. Hillary Nye, *The One-System View and Dworkin's Anti-Archimedean Eliminativism*, 40 L. & PHIL. 247 (2021).

29. Hillary Nye, *On Law for Crabs and Angels* (October 14, 2021) (unpublished manuscript) (on file with author).

30. *See, e.g.*, Shapiro, who says that Hart "seemed to have assumed that the nature of law could be determined exclusively by conceptual analysis." SHAPIRO, *supra* note 4, at 406 n.16. Dworkin's methodology has been the source of much debate, but at least for many years, he was understood as engaged in a disagreement with positivists, and thus, he was often interpreted as engaged in the same project of uncovering the nature of law.

What, then, is the method of conceptual analysis? It "depend[s] on intuitions about the proper application of the concept in particular cases."[31] We start by gathering our pre-theoretical data, our 'folk' intuitions about what law is. We then develop a theory that makes sense of most of these intuitions. According to Jackson, a prominent defender of conceptual analysis, we start with our 'ordinary conception', or 'folk theory' of the thing in question, which we identify according to "what seems to us most obvious and central" about it.[32] We then think through hypothetical examples that may lead us to reject or rethink the suggested account. For Jackson, conceptual analysis is the project of "addressing when and whether a story told in one vocabulary is made true by one told in some allegedly more fundamental vocabulary."[33] This story is then supposed to be tested against (and hopefully survive) the method of possible cases, whereby we try to see whether the cases our account captures fit with our intuitions about what should be captured.[34] In other words, we use our intuitions to determine whether aspects of the folk theory should be discarded or reformed, depending on whether we think the examples properly fit in the category.[35]

To put this in terms of law, following Shapiro, it involves gathering a set of "truisms" about law—these are propositions that are "*self-evidently*" true.[36] The idea of truisms, I take it, is supposed to map onto the role of intuitions in conceptual analysis. The next step is to develop a theory of law that, while it need not account for every truism about law, makes sense of as many as possible.[37] A theory of law, then, would require us to describe law in some allegedly more fundamental language, such as talk of rules or authority. This picture is then tested against intuitions.

IV. DISAGREEMENT ABOUT LAW

Legal philosophers disagree about what the nature of law is. The process of conceptual analysis produces different accounts of the nature of law because it depends on intuitions about the correct application of the concept. But our intuitions conflict. This clash of intuitions has led to an impasse. Murphy argues that the intuitions driving people's views about law are so

31. MURPHY, *supra* note 4, at 78.
32. JACKSON, *supra* note 25, at 31.
33. *Id.* at 28.
34. *Id.*
35. *Id.* at 31–42.
36. SHAPIRO, *supra* note 4, at 13. Shapiro has been more explicit about the role of conceptual analysis in his theory than many legal philosophers, and so I rely on his model in my discussion here.
37. *Id.* at 14.

deeply held that we should not be optimistic about the future of the debate.[38] For the question of the grounds of law, "there will be no convergence at the level of criteria, because there will be no convergence at the level of example."[39] Disagreement between positivists and nonpositivists is intractable. All our accounts of concepts ultimately depend on intuitions about correct usage or considered judgments about law's nature.[40] These are bound to conflict.[41]

I think Murphy is right to be skeptical about the prospects for progress. Theorists tend to gloss over the problem of disagreement, assuming that, if done honestly for a long enough period, conceptual analysis will resolve disagreement or uncertainty. But it is mysterious how we are supposed to decide which intuition to discard, or whose intuitions to trust. The next section examines an example of how this disagreement manifests, and why it seems intractable.

A. The Priority of Theory

When theorists make claims about the nature of law, these claims lead them to draw certain conclusions about dimensions of our practice. For example, when Raz claims that law necessarily has certain features, this has implications for what counts as law. Raz defends what he calls the 'Sources

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38. *See* MURPHY, *supra* note 4, at 102–03 ("I am in the end inclined to think that our two camps are unlikely ever to be moved by argument – no other considerations are going to strike them as more compelling than their initial pictures of the nature of law.") Hershovitz also notes that the debate is stale, and "we should move on." Hershovitz, *supra* note 23, at 1162. Ultimately, his aim is "to reject the question at the center of the Hart-Dworkin debate." *Id.* at 1162–63. But though Hershovitz refers to the impasse in legal philosophy, problems with the debate are not his main source of argument for the conclusion that we should abandon the grounds of law question. Rather, it is a more directly metaphysical claim of his own: that there is no distinctively legal domain of normativity. Hershovitz says: "[T]he picture I am proposing is ontologically spare. Indeed, we might think of it as a kind of eliminativism, since it denies the existence of an entity—a distinctively legal domain of normativity, or quasi-normativity—that more traditional pictures presuppose." *Id.* at 1193. His argument relies on observations drawn from other spheres of experience, such as the rules of rental houses, our practices of promising, and games such as chess, to demonstrate that we do not think that such practices generate their own domains of normativity. The conclusion Hershovitz draws is that we should think similarly about law. Despite some ambiguity about whether Hershovitz is making metaphysical claims, I am sympathetic to the overall picture. But it relies on different argumentative foundations than my own view presented here.

39. MURPHY, *supra* note 4, at 82.

40. *Id.* at 85.

41. Murphy states as follows:

> Each side thinks that the other is fundamentally and hopelessly mistaken about what law is. For the reasons given, I am skeptical about the availability of substantive argument that might have the power to move either side closer to the other. All the arguments I have seen inevitably include some premise or methodological commitment that is sure to seem less compelling to one of the sides than their initial fundamental convictions about the kind of things law is.

Id. at 88.

Thesis': "A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument."[42] This leads to the conclusion that any judicial appeal to moral principles has to be characterised as an exercise of discretion.[43] The Sources Thesis, Raz argues, does not settle the question of what the proper rules of interpretation are.[44] He makes it clear that he considers the question of proper adjudication to be a separate one from that of the nature of law:

> First, none of the above bears on what judges should do, how they should decide cases. The issue addressed is that of the nature and limits of law. If the argument here advanced is sound then it follows that the function of courts to apply and enforce the law coexists with others. One is authoritatively to settle disputes, whether or not their solution is determined by law. Another additional function the courts have is to supervise the working of the law and revise it interstitially when the need arises.[45]

Raz argues that "legal gaps are not only possible but, according to the sources thesis, inescapable."[46] Wherever a 'gap' of this sort is encountered, a judge has discretion.

Shapiro also acknowledges that social facts cannot resolve all possible scenarios that will arise and that, therefore, there will be a certain area left undetermined, in which judges can and should engage in morality. In his view, too, they must be understood as exercising discretion.[47] In hard cases "judges are simply *under a legal obligation to apply extra-legal standards.*"[48] Of course, almost everyone would agree that judges sometimes exercise discretion. But on Raz's and Shapiro's views, we must go further than this. We have to categorize all instances of judicial appeal to morality as exercises of discretion. In other words, the proffered account of the nature of law is determinative of what we should say about other phenomena. Because the account of the nature of law says that law cannot be a matter of moral deliberation, but only of social fact, this claim drives what we have to say about what judges are doing.

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42. Joseph Raz, *Authority, Law and Morality*, 68 THE MONIST 295, 296 (1985).
43. "The sources thesis leads to the conclusion that courts often exercise discretion and participate in the law-making process." *Id.* at 319.
44. *Id.* at 317–18.
45. *Id.* at 318.
46. JOSEPH RAZ, *Legal Reasons, Sources, and Gaps, in* THE AUTHORITY OF LAW 53, 77 (2d ed. 2009).
47. SHAPIRO, *supra* note 4, at 251.
48. *Id.* at 272.

This conflicts with how many judges and other officials conceive of what they are doing. But my point is methodological, not substantive. I am not arguing that Raz is wrong because we can look at what judges do and see that, in fact, they *are* applying law. I am making the point that the very structure of this disagreement doesn't allow for that sort of appeal to experience. If I point out that judges do seem to think they are applying law, Raz can simply say that they are (and I am) mistaken: judges are actually exercising discretion.

A nonpositivist on the other side of this debate can do the same: their account of law's nature, similarly derived from their intuitions and reflections on law's nature, implies that there is always a right answer to legal problems and that, therefore, the judge is actually finding the right answer, not exercising discretion. But if the Razian tries to point out that this moralized decision-making looks like legislating from the bench, the response is always available that the Razian misunderstands the nature of law. According to the nonpositivist, law includes moral principles, and therefore, the moral inquiry the judge is engaged in is part of the law.

No example can make a difference here. The question cannot be resolved by looking at our experience. The theoretical standpoint takes priority and determines how we should categorize particulars. What the theory says is primary; it sets the parameters of what counts as law, and if people disagree about those boundaries, nothing in our experience seems capable of resolving this disagreement.[49]

It is a disagreement about who has the correct description of the true nature of law, not the correct description of any observable facts. It is hard to see why this should matter. Interestingly, Shapiro seems to recognize this: "No doubt, those whose fortunes lie in the balance will find little comfort in this more accurate description of their predicament. It does not matter to them whether their anxieties are about the present state of the law or its looming future. For them, the issue is purely semantic."[50] But Shapiro

49. Dan Priel also argues against the kind of boundary-drawing project that philosophers engage in. He says that an "explication of a concept must be grounded in attitudes that are part of the practice" Priel, *Boundaries*, *supra* note 2, at 656. The method that philosophers use, Priel says, is to "test a suggested explication of a concept . . . by trying to refute it against agreed-upon instantiations of the concept." *Id.* at 655. Priel argues against certain forms of theorizing about law on the basis that the law—the thing being theorized—fails to give us an answer. There is no answer within the practice of law, either because the practice has vague boundaries, the participants have no views on it, or the participants' views conflict. *Id.* at 658–59. In all of these cases, the practice fails to give us a determinate answer, and so there is no basis for the theorist to give an answer. Many disputes about the boundary between law and other things are, therefore, indeterminate. I am sympathetic to this argument, and I think it leads us in a similar direction to the eliminativist claims I will make below, but it comes at the problem from a different angle than the arguments I make here.

50. SHAPIRO, *supra* note 4, at 256.

continues to insist that it matters, if not to the legal subject faced with the command, to the theorist who wants to settle on this "more accurate description." He insists, in other words, that there is a truth of the matter about the question of the nature of law, even if it makes no difference in practice.

B. Theory of Law and Theory of Adjudication

As the previous section noted, the question of the nature of law is independent of the question of what makes for good *adjudication.* This is an important point to emphasize. The theory of adjudication does not flow from the account of the nature of law;[51] indeed, on the adjudicative question there might be substantial agreement between those who disagree about the grounds of law. Both positivists and nonpositivists agree that moral factors are appropriately considered when judging. The difference centers on what we should think is going on when judges appeal to morality.

In other words, the grounds of law problem reduces to the problem of *how to describe* what judges are doing when they appeal to morality: both camps agree that judges appeal to morality, but in doing so, one side says they are finding law and the other says they are making law.[52] Murphy puts it this way:

> When a conscientious judge appropriately appeals to moral considerations to reach a decision, has he in so doing gone beyond the mere application of existing law and in part also made new law? One side says yes, its opponents no. The dispute about the grounds of law is not about what judges should do, but you could say it is about the correct description of what they do.[53]

51. As Murphy says, "[a] judge's theory of adjudication may be sketchy and perhaps only implicitly believed, but she must have one . . . it is not essential, by contrast, that judges have a theory of the grounds of law." MURPHY, *supra* note 4, at 8; *see also* Liam Murphy, *Concepts of Law*, 30 AUSTL. J. LEGAL PHIL. 1, 4 (2005) [hereinafter Murphy, *Concepts of Law*) (stating that "a positivist could agree entirely with Dworkin on the question of how judges should decide cases").

52. Priel also notes that "it is agreed that judges often rely on moral reasons, and it is also agreed that judges *should* rely on moral reasons when deciding cases. The question that remains disputed is whether when the judge relies on moral reasons she is within or outside the boundaries of the law." Priel, *Boundaries*, *supra* note 2, at 657.

53. MURPHY, *supra* note 4, at 13. It is unclear who belongs on the side of the nonpositivists in this dispute. Though Dworkin invented the 'grounds of law' terminology, it seems that he did not understand the problem in the way that Raz does and was not concerned with answering the question of whether judges 'really' find or make law. As he says of his own position, "law as integrity rejects as unhelpful the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither." DWORKIN, *supra* note 7, at 225. Dworkin's project, I argue, has always been a normative one. See Nye, *supra* note 28.

The question, as it seems to be understood by those engaged in it, is not a matter that can be resolved empirically. The issue is the correct account of the boundaries of the phenomenon.

C. Clashing Intuitions

Our intuitions clash. I have suggested that they clash so intractably because of the priority of theory over experience. The methodology adopted permits intuitions to define the boundaries of our categories, and this means that when people disagree, as in the example about what judges do, there is no way to settle who is right. We cannot point to examples, because examples can be categorized differently according to the theories we each hold.

This disagreement is not just taken to be a matter of different people holding different concepts that serve different purposes. Rather, we are supposed to be disagreeing about law's *true nature*. There is a fact of the matter about that nature, which may not track the views of most ordinary people. People are commonly confused about what law *really* is. As Julie Dickson argues, "[s]ome self-understandings of the participants will be confused, insufficiently focused, or vague. Moreover, some self-understandings will be more important and significant than others in explaining the concept of law."[54] In seeking to build a unified theory of the law's nature, it is justified to minimize, discard, or recategorize some aspect of our pre-theoretical intuitions. This is what the method of conceptual analysis requires—we clarify and refine our position, necessitating a rethinking of some of our folk intuitions.[55]

On Shapiro's similar model, where we begin by collecting 'truisms,' it is hard to square the idea of discarding one of these initially held truisms (which he is clear that we must be prepared to do),[56] with his view that the denial of a truism should result in bafflement.[57] Wouldn't we then be baffled by our own considered position? But let us give him the benefit of the doubt: perhaps sufficient reflection will allow us to see that it was not a truism after all, and thus, the puzzlement will disappear.[58] Then, conceptual analysis

54. Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 LEGAL THEORY 117, 138 (2004).

55. *See* JACKSON, *supra* note 25, 31–32 (discussing the role of intuitions).

56. SHAPIRO, *supra* note 4, at 17.

57. *Id.* at 405, n.11; *see also* Brian Leiter's critique of Shapiro's truisms, in Brian Leiter, *Critical Remarks on Shapiro's Legality and the "Grounding Turn" in Recent Jurisprudence* (Sept. 16, 2020), https://ssrn.com/abstract=3700513.

58. Indeed, this process of reflecting on one's views, and becoming convinced only reluctantly by positions that initially seemed implausible is nicely described by Robert Nozick in the preface of

might be capable of getting the legal philosopher to a coherent, settled view that they can endorse. Of course, at that point, we would have to wonder about our process for selecting 'truisms' in the first place—if some can be discarded, how can we have certainty about the truistic character of the others? There seems to be no satisfactory account of the basis for rejecting one of our intuitions.

If some participants in the debate misunderstand what law really is—or, if some of my intuitions are correct about what it is, but others are 'confused'—a serious epistemic problem arises: how do we decide between competing understandings of the practice? On what basis do we judge 'significance'? In constructing our theory of law, what gets in and what stays out? We will need some further authority to determine which of our intuitions to discard, or which of the participants in the debate is confused or mistaken. But no such authority exists. In the end, the only check on our theory is whether it *seems to us* to track the nature of law.[59] And we disagree about what the nature of law is, so we find ourselves deadlocked.

Danny Priel has discussed this problem in slightly different terms. He refers to it as "the problem of individuation," that is, "that in order to determine the features that laws have we needed to know what counted as law, i.e., what to "work" on. But there is no way of determining that in a non question-begging way."[60]

> [T]he theorist has no way of distinguishing between true examples of law (which as such could serve as counter-examples to an account of the nature of law) and false examples of law (that do not affect the theorist's account for they are not members of the same kind of thing the theorist is trying to explain). Since, unlike in natural science, the legal philosopher can always treat supposedly counterfactual cases as

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ANARCHY, STATE, AND UTOPIA. *See* ROBERT NOZICK, *Preface* of ANARCHY, STATE, AND UTOPIA (1974). Thanks to Annalise Acorn for pointing me to this citation. Raff Donelson also argues that "we should remain open to the idea that a hypothesis about law can be correct even if it does not conform to everything we antecedently thought about law." Raff Donelson, *Describing Law*, 33 CAN. J. L. & JURIS. 85 (2020). Nevertheless, even if one can find one's way to a settled view internally, it seems hard to give an account of how we can settle disagreement interpersonally, when we disagree about which 'truisms' to discard.

59. The 'us' here is the source of further problems. How do we determine who counts as part of the community whose concept we are articulating? If we disagree with one another, how do we know who is right and who is wrong? Or do we just belong to different communities articulating different concepts? *See* Danny Priel, *Is There One Right Answer to the Question of the Nature of Law?*, *in* PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 322, 322– 46 (Wil Waluchow & Stefan Sciaraffa eds., 2013) [hereinafter Priel, *Right Answer*]. One might also object that intuitions are not the only check on a theory: we also look for internal coherence, alignment with other commitments, etc. But the problem persists because, whatever other checks there are, we will eventually bottom out in intuitions, and then we are stuck with disagreement.

60. Danny Priel, *Jurisprudence and Necessity*, 20 CAN. J. L. & JURIS. 173, 191 (2007) [hereinafter Priel, *Necessity*].

> members of the second group, the account becomes immune to refutation by begging the most important question, namely, which cases belong to the set of things that are laws.[61]

As Priel points out, we can start with something we think counts as law. But as soon as we encounter a questionable case—one that lacks one of the features we had thought essential—we are faced with a dilemma. We can either revise our theory to remove that feature or stand by our theory and declare that the thing in question is not law.[62] There is no suitable way of drawing this line, and as I laid out above, there is nothing to constrain the recalcitrance of the participants in the debate if they wish to stick to their prior intuitions about what law is like.

Brian Tamanaha makes a similar argument.[63] Theories of law are unfalsifiable because theorists do not provide criteria that will distinguish correct from incorrect theories of law.[64] Additionally, Tamanaha says, theorists insulate their theories from being empirically disproved by "declar[ing] that an existing or historical legal system that does not meet the features of their theory of law, ipso facto, is not a legal system—leaving the theory unscathed."[65] As long as this is possible, there will be no way to settle the debate between competing pictures of law.

D. This Problem Distinguished from Empirical Inquiry

There is no authority that can tell us whose understanding of the practice is right, or which of our intuitions we should discard as false. There is a crucial difference here from the case of empirical disagreement: in cases where we really are engaged in description, the facts in the world represent the neutral data to which both myself and my interlocutor are bound. If our accounts fail to fit that information, they fail as descriptions.

If you and I disagree about what flavors of ice-cream are offered at our local ice-cream parlor, there is a way to resolve this disagreement: we can go there and see for ourselves. There is the prospect of resolution, and an agreed-upon method for it. But if we disagree about whether ice-cream can ever *really* be a meal or only a snack or a treat, there will be no way to resolve

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61. *Id.* at 187; *see also* Danny Priel, *Description and Evaluation in Jurisprudence*, 29 L. & PHIL. 633, 654 (2010) [hereinafter Priel, *Description*].

62. Priel, *Necessity*, *supra* note 60, at 188.

63. *See* BRIAN TAMANAHA, A REALISTIC THEORY OF LAW, 77–81 (2017).

64. *Id.* at 78.

65. *Id.* He also links this problem specifically to intuitions. "The 'What is law?' debate continues because different intuitions about law at the folk level and at the theoretical level cannot be resolved by reason or empirical evidence." *Id.* at 43.

this problem. I will say: "Listen, I ate it for lunch yesterday—it was a meal." And you can respond: "You might have eaten it at noon, but all that means is that you skipped lunch and had a treat instead. Ice-cream can never be a meal." There is nothing in the ice-cream shop, or anywhere else, to which we can point to resolve this dispute.[66]

As trivial as this example may be, my point is a serious one: the very structure of the methodology employed makes resolving disagreement impossible. It makes intuitions about the nature of things primary, which leaves nothing we could point our interlocutor towards as a counterexample. If your intuitions about the nature of the world determine how to categorize the world, then it makes no difference if I provide an example that seems to undermine your view. Your view takes precedence, and you can simply deny that the example is really an instance of the thing in question.

Murphy says that his argument about disagreement has not "proved that this standoff is permanent," and he isn't claiming that progress could not be made or that we could not ultimately converge on a view.[67] Think of physics, where there are numerous competing versions of string theory, and seemingly no prospect of convergence on a single, unified theory.[68] If we can say about physics that further experience may yield an answer, a grounds of law theorist should be able to say the same. In other words, what is the difference, if there is one, between the standoff in legal philosophy and the

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66. An important objection arises here. Even the question of how many flavors there are is not so simple to resolve without prior agreement about the categories. We need prior agreement on what counts as a separate flavor of ice-cream. They might, for instance, have classic vanilla and French vanilla—are these two flavors? They might have sorbets—do these count as flavors of ice-cream? And so on. Just as with the debate about meals, here we agree on all empirical facts, and yet still may disagree. I thank Jan Mihal for raising this objection. I agree in essence with the point, and if someone were to dig in their heels and insist that no matter how they are presented, the two vanillas simply are one flavor, I would also happily say that this is a verbal dispute. We need to create categories to get on with many of our projects, from the empirical sciences to the choosing of ice-cream. What we do not need to do is fight about which of those categorizations correctly tracks the nature of the universe. To move past a dispute such as this one, we need to make clear what the purposes of our categories are, what our aims are, and then choose a category that furthers those aims. If we want to report to our friend how many flavors there are *for the purpose of* assisting her in choosing, then we ought to include the various vanillas and the sorbets because that might be of interest to her. But no more needs to be said about whether that categorization is true or correct in some deeper way.

67. MURPHY, *supra* note 4, at 102.

68. There are, to my lay understanding, five string theories and a sixth theory that counts them all as parts of a single whole: M-theory. *See* BRIAN GREENE, THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY 284–87 (2003). *See also* Paul Sutter, *Putting String Theory to the Test*, SPACE (March 20, 2020), https://www.space.com/putting-string-theory-to-test.html [https://perma.cc/D4HN-QH65] (Sutter says: "String theory hopes to be a literal theory of everything, a single unifying framework that explains all the variety and richness that we see in the cosmos and in our particle colliders . . . . And while it's a potentially powerful idea, which if unlocked would completely revolutionize our understanding of the physical world, it has not ever been directly tested.").

standoff in string theory (or in physics more generally)?[69]

The answer is that there is a significant difference between conceptual analysis and the sciences:[70] when string theory is charged with being untestable and therefore unfalsifiable, proponents of it do not respond by saying that it is nevertheless true because it seems intuitively like the right account of the world.[71] Rather, their response is to seek ways to show that it *is* falsifiable. The way forward is to develop experiments that would provide indications that one view is right. They emphasize that even if there is so far no evidence, the right project is to seek to develop tests that could provide the relevant evidence. We should be striving to rule out theories, to find predictions and experiments that will allow us to figure out what is true.[72] That attitude is the appropriate one, not the attitude that tries to insulate a theory from falsification.

The worry with the methodology of legal philosophy, whereby we use intuitions about a concept to tell us about the nature of the thing, is that *whatever* experience or evidence is presented can—in principle—be recategorized according to each theory.[73] We simply cannot do that with

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69. I thank Liam Murphy for pressing me on this point.

70. Priel makes a similar point with respect to natural science. *See* Priel, *Necessity*, *supra* note 60, at 187–88.

71. There is an important distinction between the claim that scientists sometimes do make, that intuitive appeal, theoretical beauty, and coherence are important factors in theory choice, and the claim that that is all that is needed to determine what theory is true. For an illuminating discussion on this point, see RONALD DWORKIN, RELIGION WITHOUT GOD 53–65 (2013).

72. For example, see Brian Greene's claim that falsifiability is what we should be striving for: "Let me emphasize too that if we could rule out supersymmetry and rule out string theory I'd be thrilled . . . I'm not wedded to any one theory, I'm wedded to making progress toward the truth. And ruling out ideas is surely progress." Ria Misra, *Brian Greene Is Here to Answer Your Questions About String Theory!*, GIZMODO (Mar. 11, 2014, 12:00 PM), http://io9.com/brian-greene-is-here-to-answer-questions-about-superstr-1541336914/all [https://perma.cc/U7CQ-ELPB]. *See also* Sutter, *supra* note 68. While Sutter notes that it has been challenging to test string theory, he outlines the various approaches that have been undertaken to test it. There are, he says, "ways to explore some of the underpinnings and potential consequences of string theory. And while these tests wouldn't prove string theory directly one way or another, they would help bolster its case." Sutter says that "questions remain about whether it's worth it to build even-larger colliders to try pushing harder on supersymmetry, or if we should just give up and try something else." But the point is that that 'something else' is a search for some form of evidence, and not an appeal to intuition. This is the approach taken in the sciences, and this is importantly distinct from the method of conceptual analysis.

73. Of course, there might seem to be some constraints here on how we categorize things, but these are really only constraints in the sense that if we make a claim that is seen as obviously out-of-bounds by our interlocutors, they simply will not listen to us. There is no inherent restriction within the methodology on the kinds of recategorizations that are impermissible. And indeed, that is why the disagreement is not just at the edges but at the core: the appeal to morality by judges is a core case of law on one view and a core case of non-law on the other. Nothing in the methodology stops each side from making its intuitive account of law the final arbiter of what counts as law. We have a methodology according to which evidence can be redescribed and recategorized, no independent way to assess whether a given categorization counts as out of bounds, and no clear way to convince one side that the categorization made by the other was the right one.

physics.[74] We could have infinite experiential data that would not settle the grounds of law question, because both theories can 'bite the bullet' on certain elements of our experience. In science, we cannot bite the bullet—if a theory fails to explain the data, the theory is out, whereas in the case of conceptual analysis, if the theory fails to explain a piece of data, we can discard, or recategorize, that piece of data. There is no experiential evidence that a theory of law has to account for in any particular way. Our intuitions drive the answer, and so any possible convergence is dependent on intuitions. This means resolution does not rest on some reliable process of discovery or argument that we could follow, but on happenstance and luck.

Because this methodology depends on our views about the right way to describe agreed-upon facts, there is nothing we can imagine appealing to as the final arbiter of truth. There is nothing that can, in short, play the role of the external world in checking our theories. In light of this, I think we should wonder whether there is a stronger claim that could be made than Murphy's claim that we are at a temporary impasse. We should recognize that the problem is not that we are in a stalemate like the one in string theory, where we can await the development of a better particle collider, but a standoff where, no matter the evidence presented, there is no resolving the problem because of a methodology that allows us to discount experience that does not fit the theory.

E. Back to Law

Let's look now at an example drawn from law. Recall that the grounds of law question is that of what materials are appealed to in discerning the content of the law. Specifically, theorists debate whether moral principles are ever included. How should we answer this question? We might think we

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74. One might argue that disagreements about boundaries in science also fail to be sensitive to empirical evidence. Just as in jurisprudence, the participants may agree on all the evidence and yet disagree on the 'correct' categorization. James Penner provides an example of this in *Decent Burials for Dead Concepts*, 58 CURRENT LEGAL PROBS. 313, 330–32 (2005). He says that there exists a live dispute about whether wolves are properly classified as dogs; theories that focus on the ability to interbreed say that they are, whereas theories that focus on behavior say that they are not. Do we want to say that this too is a verbal dispute? We might worry that we are abandoning too many questions, and ones on which important things turn if we do so. I thank Jan Mihal for this objection and for drawing my attention to this citation. My response here would be, in short, to accept that this is a verbal dispute but to deny that that prevents us from engaging in any of the interesting questions. The question of how to 'correctly' classify wolves is a verbal dispute. Verbal disputes can be *about* things that matter. They just do not *themselves* matter. It does not matter to 'get it right' when it comes to the classification of wolves. But it may well matter which classification we choose, in light of the purpose we have in mind. We should think carefully about what category suits our purposes. But that does not mean that a genuine question remains about which classification is correct.

could look to the familiar sources, such as statutes, cases, and so on. Let us look at an example from statutory law that might be helpful. In the California Civil Code, in the Part dealing with Contracts (Division 3, Pt 2), Section 1667 states:

> That is not lawful which is:
>
> 1. Contrary to an express provision of law;
>
> 2. Contrary to the policy of express law, though not expressly prohibited; or,
>
> 3. Otherwise contrary to good morals.[75]

Subsection 3 is the crucial one for our purposes. The facts on the ground are clear: this statute states that immoral contracts cannot be law. Different theorists will all agree on its wording, agree that it is a valid statute, and agree that it directs a judge to use moral reasoning. And they agree that statutes are part of what is properly appealed to in discerning the law—part of the grounds of law. But in response to this factual scenario, we could have three different descriptions of what subsection 1667(3) 'really' does. For the nonpositivist, it demonstrates the intertwined nature of law and morality: law is full of principles, some of them explicit, like this one, and others implicit. This statute merely presents an example of this general truth. For the inclusive positivist, this shows that morality can be incorporated into law via a social fact like a statute. Lastly, for the exclusive positivist, this is an example of a gap in the law, directing a judge to exercise discretion.[76]

Theorists agree on the experiential evidence, but nevertheless disagree about the truth. What drives the different theories is not the observable world, but intuitions. This makes it clear that theorists are engaged in a metaphysical project, not a sociological or descriptive one that would take account of evidence.[77] They endorse a methodology according to which the truth about the nature of law is accessible via our intuitions. In adopting such a methodology, theorists make their accounts unresponsive to experience.

When Raz says that social facts are the only source of law, he does not base this on observation. Raz is arguing about the nature of law, drawing on

75. CAL. CIV. CODE § 1667.

76. SHAPIRO, *supra* note 4, at 251; Raz, *supra* note 42, at 319.

77. They are also not doing a normative project. The question is not about what materials it is morally proper to appeal to—they might well agree on this, as I just pointed out—but only about what materials are properly categorized as legal: When are judges applying the law and when are they going outside of established law to create new norms?

claims about the concept of law. Something *cannot be* law if it does not meet his criteria. His concern is about how to correctly draw the boundaries of the phenomenon. Because of his views about authority and the role of law in mediating between people and the reasons that apply to them, Raz is committed to the view that *on the correct account of the nature of reality*, the judge is creating a legal norm, and not applying an existing legal norm.

On this methodology, theoretical disagreement cannot be resolved by appeal to experience: any ostensible evidence can be explained away. We might think we could appeal to things in the world, such as the above statute, but theories of this sort permit a methodological move according to which we can redescribe or recategorize parts of our experience, because intuitions take precedence over that experience.

Imagine that a judge applying subsection 3 says he is bound by law to invalidate a contract. Even that data point cannot settle the question of whether law really includes morality for theorists that adopt this methodology, because it is open to them to say that the judge is mistaken. Everyone will accept the fact that the judge appealed to moral reasons, and yet they will insist that the further question remains: "When judges exhibit this morally engaged behavior, are they *really* finding a right answer or are they *really* exercising discretion?" The word 'really' suggests that we need a perspective that goes beyond experience. This brings us to the impasse between positivism and nonpositivism discussed above. It is not a temporary impasse awaiting further data points. It is a permanent impasse because any potential data points can be explained differently by the theories in contention.

If I say that law cannot include moral principles and therefore judges are making law, and you say that it can and they are therefore applying law, we both put our theories about law's nature out of reach of any experiential evidence. We build our theory first and deal with the world second: experience can never overturn a theory, because it can simply be reclassified. On this sort of methodology, a position about the nature of law is insulated from any counterexample drawn from experience, because that counterexample can simply be described differently by different theorists.

As long as the methodology permits claims about reality to float free of any experiential evidence, we will never have the ability to assess these claims, and there can be no hope of transcending the disagreement.[78] We can have competing descriptions of agreed-upon facts and no way to identify which way of carving up those facts is 'really' true. Empirical evidence is

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78. *See* CHERYL MISAK, TRUTH, POLITICS, MORALITY: PRAGMATISM AND DELIBERATION 54–55 (2000).

unable to count in favor of one of the views, because the positions in contention are not about *what there is,* but about *how to describe* some already agreed-upon fact.

Modern legal philosophy seems, then, to face a serious problem. We have reached an impasse, which stems from the methodology that metaphysically-inclined theorists adopt, which goes beyond experience to make claims about the nature of things. I will argue that, in light of this, we should adopt what has been called 'eliminativism.' In short, this is the idea that we do not need an account of the grounds of law and can and should dispense with it in favor of a set of better-formed questions that will address all the important issues: normative questions about what judges and legal subjects should do, predictive questions about what may happen to us, and so on. We should move past the disputes that have plagued legal philosophy and pursue questions that are viable.

V. NO DIFFERENCE IN PRACTICE

Despite what has just been argued, whether judges are finding or making law *seems* to be an important question. In this section, I will reject that idea and argue that the resolution of the grounds of law dispute in either direction has no upshot in our experiences. I will argue that there is no difference in practice here, and so abandoning the 'what is law' question and adopting eliminativism is a viable way forward.

I argued above that the accounts we give of the grounds of law are not responsive to experience, but rather, to our intuitions about the nature of law. As a result, the theories generated by this method also have no experiential upshot. On either outcome—whether nonpositivists are right that morality is part of the grounds of law, or positivists are right that it can never be—there is no functional difference for the legal subject. The two descriptions differ, but the reality is the same. Thus, the claim that one is right is spurious.

Recall that Raz recognizes that the appeal to morality is a fundamental part of *judicial decision-making*. He has no problem with judges appealing to morality while resolving a case. Indeed, he thinks they have a *duty* to appeal to morality.[79] According to exclusive positivism, a judge could agree with, say, Dworkin's views about what sorts of principles ought to be

79. *See* Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1 (2004). Raz argues that the default position is that the judge decides morally, and so deciding according to moral principles is not outside the judicial duty, but outside the law, properly so-called. *Id.* It is the judge's moral duty to decide according to morality. Raz's claim is that when they do so it cannot be considered an appeal to pre-existing law. *Id.*

appealed to,[80] and could employ moral reasoning in the exact same way. The Razian judge could make the same decision, rely on the same moral principles, and take precisely the same actions. The only difference would be the point at which the exclusive positivist would draw the line and say that the judge has crossed over into the territory of making law.[81] Then we have a situation in which the facts on the ground about how the judge made their decision are the same, and the only difference would be the description of their actions as 'lawmaking' or 'law-applying.'

It seems clear that the chosen description could not matter to the legal subject. Whether we call the answers that judges give in hard cases 'finding law' or 'making law,' they involve appealing to the same moral ideas, and the upshot for the individual, the decision itself, is the same.[82] Nothing turns on it. It is a spurious question and should be rejected.

The question of what part of the judge's decision is properly classified as law is an empty one from the legal subject's point of view. The outcome for them is identical on either description. If they want to guide their behavior, they will need an account of how the judge makes decisions. On a nonpositivist view that account will all be under the umbrella of 'law,' and on the positivist view, that account will include a theory of law *and* a theory of how judges exercise discretion. But the content of those accounts will be identical. The only difference will be whether they are labeled 'law' or 'law and adjudication.' The legal subject wants to know what judges are going to do in those moments where they appeal to morality, whatever we call them.[83]

To be clear, the point is not that *adjudication* makes no difference to our experience. The way judges decide cases as a practical matter is clearly important. I am not saying that a question like "Should A or B win this

80. *See generally* DWORKIN, *supra* note 7, at 176–275.

81. Of course, the judge *may* not take the same view—they may be an originalist or take some other position on how to decide cases. But the point is that their theory of adjudication is not driven by their positivism. Theories of adjudication are entirely independent of the positivist and nonpositivist theories of the grounds of law. All that I am arguing, and all I need to show to make my point, is that both positivism and nonpositivism are compatible with the same theory of adjudication.

82. Others have recognized this. *See* SHAPIRO, *supra* note 4, at 256; David Enoch, *Is General Jurisprudence Interesting?, in* DIMENSIONS OF NORMATIVITY: NEW ESSAYS ON METAETHICS AND JURISPRUDENCE 65 (David Plunkett, Scott J. Shapiro & Kevin Toh eds., 2019). Enoch says, "Hart and Dworkin may differ with regard to the best account of what's going on when a judge exercises (some kind of) discretion, but it's not at all clear that what you should do as a judge in such cases depends on whether Hart or Dworkin are right." *Id.* at 82; *see also* Hershovitz, *supra* note 23, at 1201 ("So whether we follow Greenberg or Dworkin, the underlying considerations ultimately do all the explanatory work. Courts should enforce whatever obligations they should enforce, and whether we use the label "legal" to report the conclusion of that inquiry (as Dworkin suggests) or an intermediate step (as Greenberg prefers) in no way affects the substance of the decisions that courts have to make.").

83. One might object that, sometimes, we do not need to know what a judge will do, but rather *what the law is.* I address this objection below. *See infra* Section VIII.A.

case?" is a spurious one. That is a genuine normative question that we should be concerned with. But if we ask: "When the judge appeals to moral principles to find in favor of B, is he really finding law or really making law?" there is, *in principle,* no way to decide between these two views. There is no experiential upshot, as evidenced by the fact that various theorists describe it differently, though they agree on the experiential facts. The question of how, say, *Brown v. Board of Education of Topeka*[84] should be decided is one to which human experience, from statistical information about the harms of segregation, to moral experience that informs our views about what ought to be done, is obviously relevant. But when we step outside of those sociological or moral questions to ask what law *really is*, beyond our experience of it, we enter the realm of the spurious.

This suggests that the grounds of law question is spurious. It asks: does law, properly understood, include moral principles or not? This is different from the normative question: what materials are properly appealed to when making a judicial decision? I have argued that when the question is understood as the former one—which is precisely how Raz and others understand it—we simply *cannot* answer it.

VI. CHALMERS' SUBSCRIPT GAMBIT

In this section, I will try to approach the problem differently, by applying David Chalmers' "method of elimination."[85] This entails barring the contested term and seeing whether the dispute continues. A version of this involves disambiguating different versions of the term—$liberty_1$ and $liberty_2$, for example.[86] Chalmers suggests that this method is widely applicable to disputes of the form 'What is X?'[87]

Imagine that I say that morality is never part of the grounds of law, and you say that it is. We bar the term 'law' and introduce 'Law_1' and 'Law_2'. Law_1 says law is only source-based norms. Law_2 says law is source-based norms plus some set of moral principles. Now, it is clear that if we both accept Law_1 as our starting point, we will agree that morality is never part of the grounds of law, and that therefore, when judges appeal to it, as we also agree that they do, they are making new law. We will agree that the statute in question directs judges to make law to fill a gap. And conversely, if we

84. 347 U.S. 483 (1954).

85. David J. Chalmers, *Verbal Disputes*, 120 PHIL. REV. 515, 530 n.4 (2011).

86. *Id.* at 532. Chalmers calls this the 'subscript gambit.' *Id.* For a discussion of the approach of disambiguating different concepts, using liberty as an example where such an approach succeeds, see MURPHY, *supra* note 4, at 61– 63.

87. Chalmers, *supra* note 85, at 534. Indeed, he includes "What is law?" as one of his examples. *Id.* at 531.

start from Law_2, we will agree that those principles do incorporate morality into the grounds of law, so judges need not be understood as exercising discretion *every time* they appeal to morality (though they may still sometimes exercise it).

So, any disagreement disappears, and it seems that we are dealing with a verbal dispute. We have an agreed-upon description of the facts, but no answer to whether those facts support the claim that moral principles are among the grounds of law. These are just different ways to describe things, and there is no further question of what law *really is*, only a verbal dispute.

VII. ELIMINATIVISM

I have argued that the grounds of law question is spurious and should be rejected. I argue next that this leads to 'eliminativism.'[88] Eliminativism is the idea that we can do away with this disagreement about the grounds of law, and that we can therefore get by without answering the question of what law, or the law, is. There are a number of people who have recently put forward views that could be called eliminativist. Some explicitly use the term eliminativist to describe their own views, such as Lewis Kornhauser[89] and

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88. A note about terminology: 'eliminativism' is not the ideal word for the position I will defend here, but it is the word that has begun to gain currency in legal philosophy, and so I use it for that reason. In other areas of philosophy, eliminativism is a substantive metaphysical position, arguing in favor of eliminating certain *entities*. My argument here would push against eliminativism of that sort. But it can also be used to refer to eliminating *talk* of certain entities, and that is the sense in which I intend to use it. *See* Elizabeth Irvine & Mark Sprevak, *Eliminativism About Consciousness*, in THE OXFORD HANDBOOK OF THE PHILOSOPHY OF CONSCIOUSNESS 348 (Uriah Kriegel ed., 2020). For an examination of the various eliminativist views in legal philosophy, and the sense in which they map onto different kinds of eliminativist views in other areas of philosophy, *see* Hillary Nye, *Varieties of Eliminativism About Law*, (Jul. 24, 2021) (unpublished manuscript) (on file with author). I thank David Lefkowitz for pressing me on this point.

89. The beginnings of an eliminativist argument might be seen in Lewis A. Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law*, 79 CHI.-KENT L. REV. 355 (2004) [hereinafter Kornhauser, *Governance Structures*], published before Kornhauser's more explicit adoption of eliminativism in Lewis A. Kornhauser, *Doing Without the Concept of Law* (N.Y.U. Sch. of Law Pub. Law & Legal Theory Rsch. Paper Series, Working Paper No. 15-33, 2015), https://ssrn.com/abstract=2640605 [hereinafter Kornhauser, *Doing Without*]. In *Governance Structures*, Kornhauser argues that we should approach the investigation of governance structures as a social-scientific project combined with an evaluative one. Kornhauser, *Governance Structures*, *supra* at 374. But none of this requires settling the nature of law question. In *Doing Without*, Kornhauser expresses his eliminativist view more explicitly. Kornhauser also has a recent piece that elaborates on the view in *Governance Structures*. *See* Lewis A. Kornhauser, *Law as an Achievement of Governance*, 47 J. LEGAL PHIL. 1 n.1 (2022) [hereinafter Kornhauser, *Achievement*]. The view presented there does not speak in explicitly eliminativist terms but presents a view consistent with them. We do not need to settle the question of the nature of law; we talk instead in terms of governance systems, and much of the important work that legal philosophers should do involves evaluating governance systems on various metrics, such as the rule of law. *Id.* at 11. Kornhauser notes that on his view, "[a] governance structure . . . need not include decision procedures that require the construction of doctrine by each agent, or any agent, before

Scott Hershovitz.[90] Liam Murphy sets out the eliminativist position but does not ultimately endorse it.[91] Danny Priel does not use the term eliminativism to describe his view, but his general approach is sympathetic to the eliminativist position, at least as I articulate it here. He makes a number of arguments that are eliminativist in spirit.[92] Brian Tamanaha argues that there is no singular nature to law in a way that shares much with the eliminativist account defended here.[93] Raff Donelson argues in favor of viewing claims about the nature of law as practical claims, in part because interpreting them as descriptive claims would involve attributing epistemic error to those who make them.[94] Brian Leiter has made a number of arguments aimed at 'naturalizing jurisprudence'; some of this would have similar upshots to eliminativism.[95] Mark Greenberg might be considered an eliminativist, in the sense that his view skips any step where we identify the law and goes straight to the identification of our genuine moral obligations.[96] Dworkin might be interpreted as an eliminativist, as I have argued elsewhere.[97] A recent article

making her decision." *Id.* at 21. This sounds eliminativist, in looking directly to the decision protocols of each agent rather than constructing an answer to the question of 'what law is.'

90. *See* Hershovitz, *supra* note 23.

91. *See* MURPHY, *supra* note 4, at 88–102.

92. *See* Priel, *Boundaries*, *supra* note 2; Priel, *Necessity*, *supra* note 60; Priel, *Right Answer*, *supra* note 59; Priel, *Description*, *supra* note 61. Priel says that we should give up on any search for necessary truths about law. Priel, *Necessity*, *supra* note 60, at 192. He argues that "there is no way of resolving disagreements about the nature of law," and that therefore we should move beyond questions of that sort. *Id.* at 194. For Priel, we should move instead to articulating and solving specific puzzles about law that arise, without trying to solve a general question about law's nature. *Id.* There is also room, on Priel's view, as on mine, for normative theorizing. *Id.* at 198.

93. As Tamanaha says, "To put it concisely, law involves multiple social-historical phenomena that have taken on different forms and functions in different times and places and therefore cannot be captured by a singular definition of law." TAMANAHA, *supra* note 63, at 38. Tamanaha still goes on to discuss what law is, but in an empirically-informed, non-essentialist manner that would be consistent with an eliminativist approach. *See id.* at 73–77 for Tamanaha's 'conventionalist' account of law.

94. *See* Donelson, *supra* note 58. This comes close to eliminativism in the sense that I use it because it involves a move towards pragmatic approaches to law rather than approaches that attempt to provide a metaphysical description.

95. *See* BRIAN LEITER, NATURALIZING JURISPRUDENCE (2007). He has also argued against trying to resolve what he calls the 'Demarcation Problem,' that is, the problem of attempting to draw a distinction between law and morality; this too sounds very eliminativist. *See* Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Scepticism*, 31 OXFORD. J. LEG. STUD. 663, 664 n.4 (2011). And his recent piece critiquing Shapiro argues against the metaphysical turn in jurisprudence in ways that are consonant with the arguments here. *See* Leiter, *supra* note 57.

96. However, he still labels the results of that inquiry as 'law,' and thus may not be an eliminativist. Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014). *See also* Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 106 (2017), where Greenberg seems to maintain the importance of "addressing the central jurisprudential question of how the content of the law is determined." This suggests that he is less eliminativist than some have interpreted him to be.

97. *See* Nye, *supra* note 28. Both Dworkin and Greenberg, if not interpreted as eliminativists, hold some version of the 'one-system' view, where legal rights are just a subset of moral rights. For an excellent critique of the one-system view, see Hasan Dindjer, *The New Legal Anti-Positivism*, 26 LEGAL

by David Enoch argues that the 'nature of law' question is not worth pursuing.[98]

The different eliminativist views that have arisen in legal philosophy have different commitments. They also have different bases, in the sense that there are different reasons given for why we should be eliminativists.[99] The arguments I have made so far lead to eliminativism on methodological grounds: I argued that the widely adopted methodology of seeking law's nature through conceptual analysis, which relies on intuitions, generates an impasse. The grounds of law question is therefore spurious: it invites us to go beyond experience, meaning we are left with no way to adjudicate between competing views. Thus, we should abandon the grounds of law question altogether.

When I say we should abandon the grounds of law question, I mean that we should abandon it, understood as a metaphysical question. It is this metaphysical gloss on the question that leads to the impasse discussed above.[100] It seems that there is no way to answer the question of what 'really' counts as law. So, we should give up on the question of the grounds of law as Shapiro and others have understood it—that is, as a metaphysical question. However, someone might object that they do not intend to interpret it as a metaphysical question. They just want to know what the law is.

THEORY 181 (2020). Dindjer does not consider the eliminativist position. *Id.* at 186. His critiques apply to those who do hold that we can demarcate legal from moral norms. But as he points out, this demarcation project runs into numerous problems. *Id.* at 200–09. These problems, on my view, give us good reason to give up the project of demarcating legal from moral norms, and to instead adopt eliminativism.

98. *See* Enoch, *supra* note 82. Enoch's argument starts by claiming that metaethics is paradigmatically interesting, and then argues that this is in part because it examines moral discourse, which is normative. *Id.* at 66, 69. Law, though, is not normative in the same full-blooded way as morality. *Id.* at 72–73. And if law is only formally normative, then there is nothing particularly interesting that can be learned through jurisprudential inquiry. *Id.* at 77–78. It is not clear whether we should understand Enoch as an eliminativist: he argues against eliminativism of the sort that Hershovitz defends. *Id.* at 70 n.14. But he does seem to want to eliminate the kinds of questions I too seek to dissolve, and he also argues that we should explore questions in moral and political theory instead. *Id.* at 84.

99. Kornhauser, for example, argues for eliminativism primarily on a pragmatic basis: we can do without the doctrinal concept of law, and so there is no reason to continue engaging in the debate. Kornhauser, *Doing Without*, *supra* note 89, at 14–15. Kornhauser focuses on laying out what legal philosophy would look like if we eliminate the doctrinal concept of law, and how we can do without it:

> In the standard model, every decision maker engages in a two-step process: first determine what the law requires; then consult other reasons for action that might weigh against doing what the law requires. In fact, however, each decision maker need only undertake a one-step decision procedure: weigh all reasons one has at that step. In this one-step procedure, the agent consults legal materials through which all agents coordinate their activity; these legal materials, however, are not legal norms in the conventional sense.

Id. at 15. Kornhauser's view and my own are similar in upshot, then, but get there via a different route.

100. The main reason I interpret it as a metaphysical question is that I am attempting to follow what many in the field take themselves to be doing. *See supra* Section III. But not everyone interprets the question that way. I will explore below the idea that there are alternative interpretations of the grounds of law question.

This 'what is the law' question is ambiguous. It might seem to be answerable, but it hides multiple possible meanings. We must replace that question with one that is answerable—one that is not hostage to the problem of competing intuitions described above. If someone wants to know simply what the content of the law is, we have to press them to explain further what they mean by that question. What do they want to know? Do they want to know what these institutional facts morally demand of us? Then it's a normative question. Do they want to know what the officials are likely to do? Then it's a predictive question.

This leaves us in the position of saying that there is no answer to the question of 'what the law is.' That question must always be rephrased. We should drop any talk of the nature of law and stop trying to answer the question of 'what the law is.' We pose new questions without any reference to 'law.' This may include a wide range of normative and descriptive questions.

In order to frame these answerable questions, we will often need to disambiguate concepts.[101] Conceptual pluralism makes sense with respect to law: we can feel the pull of a concept (or aspect of the concept) of law that highlights its connections with power, and we can see the importance of a concept (or aspect of the concept) of law that emphasizes what it is for our institutions to function well. There are important insights in positivism and nonpositivism. Sometimes we might want to emphasize the bruteness of our practices and institutions, other times, we want to discuss their aspirational qualities.[102] But the metaphysical approach critiqued here assumes that there is a single truth of the matter that hides behind our equivocal concepts; eliminativism rejects that claim.

Conceptual pluralism does not imply that anything goes, or that it is true for *me* that law is all power and true for *you* that it is a moral phenomenon, but rather that it is true for both of us that humans use these different ideas about law, and each plays a particular role in our thinking. We can develop these various ideas and set them out as our starting points for further conversation, as long as we do not make the mistake of thinking that they are competing to give an account of law's nature.[103]

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101. Dworkin drew a distinction between four different concepts of law: the doctrinal, sociological, taxonomic, and aspirational. *See* RONALD DWORKIN, JUSTICE IN ROBES 223 (2006). He was primarily focused on the doctrinal, however.

102. Kornhauser notes this dualism in our views of law, see Kornhauser, *Achievement*, *supra* note 89, at 22, as does Murphy, see Murphy, *Concepts of Law*, *supra* note 51, at 7. Hershovitz, too, suggests that we might characterize law differently in different circumstances. *See* Hershovitz, *supra* note 23, at 1202.

103. With verbal disputes, when we disambiguate, we may think neither version helpful, or we may decide to maintain both for different purposes. On this point, see William James's delightful story about

We can use the method of elimination and disambiguate our concepts. We can ask: 'What makes it the case that something is Law_1?' And we will be able to answer that question. We can ask: 'What makes it the case that something is Law_2?' And that too will be answerable. In each case, by specifying the relevant concept in advance, we make the question truth-apt. But if we want to ask the further question, 'What makes it the case that something is Law?' we will find ourselves at an impasse, because if that question is not interpreted as asking either about Law_1 or about Law_2, then it must be understood as asking which of Law_1 or Law_2 is the correct account of law. And that question takes us to the stalemate of intuitions described above.

These multiple useful concepts of law—Law_1 and Law_2—help draw our attention to various aspects of our experience. Indeed, setting out what we mean by law is an essential preliminary for further questions that we think are important. We can stipulate what we mean by law for the purposes of argument, and then go on to ask normative or sociological questions.[104] Given that philosophers are not typically trained in empirical work, most of the questions that remain answerable through distinctly *philosophical* methods will be the normative questions, and it is these that I think are the most important direction for legal philosophy.[105]

Some of the normative questions we can ask are about how we should structure our systems, what sorts of things should be subject to governmental determination and enforcement, and how better to organize ourselves in the areas we do decide to legislate. This is what is typically referred to in the literature as 'normative jurisprudence', as distinguished from 'general' or 'analytic' jurisprudence'.[106] Normative jurisprudence deals with questions like: "Should sex work be decriminalized?" or "Is the current tax system

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a squirrel and a man 'going round' a tree in William James, *What Pragmatism Means*, *in* PRAGMATISM 25 (Bruce Kuklick ed., 1981).

104. Priel also points out that "social scientists may have good reasons for carving the boundaries of social phenomena differently from the way described by the philosopher." Priel, *Boundaries*, *supra* note 2, at 689. Kornhauser, *Achievement*, *supra* note 89, argues that we may have many different useful concepts. "There is an achievement concept for every criterion of evaluation of functioning governance systems." *Id.* at 13. But the crucial point is that these concepts are not in competition. Each can operate to pick out the governance systems that achieve a certain value, and we can have use for a range of such concepts.

105. Others have emphasized the importance of normative questions. *See* Priel, *Right Answer*, *supra* note 59, at 346; Hershovitz, *supra* note 23, at 1203. Of course, empirical projects are important as well. Kornhauser says that "the questions that philosophers of law have typically asked are better understood either as questions about the theory of governance or as empirical questions about the relative efficacy of transparent modes of governance and opaque ones." Kornhauser, *Achievement*, *supra* note 89, at 16. Such empirical projects are important, but those of us untrained in empirical work might do better to focus on the normative.

106. *See* SHAPIRO, *supra* note 4, at 2.

fair?" These are important questions that can be pursued on the eliminativist account. We do not need an account of the nature of law. Rather, we can stipulate what we mean by law. We can establish, for example, that we mean something like 'positivistic law,' and then we can go on to discuss how that stipulated set of norms could be made more just, more coherent, or better along the particular dimension we are concerned with. Another normative question, as we have seen, is about how judges should decide cases. We must give an account of the right normative attitude for judges to take to the historical and institutional facts with which they are faced, and the sorts of arguments that are appropriate for them to employ.

The point is that, on my eliminativist view, we can answer all these questions.[107] We simply stipulate from the beginning what institutional features or elements we are going to be attentive to. We need not argue that these properly count as law. We stipulate the concept that we will be examining and use it to answer those further questions. The key thing that we *do not* do is argue about which of these multiple concepts is correct. They simply coexist; they do not compete.[108]

However, eliminativism means, as Murphy points out, giving up on making any claims about the content of the law in force.[109] Can we plausibly take such a view? I will argue in what follows that we can abandon the grounds of law debate without giving up anything that really matters. The

107. One might wonder whether the kind of questions I argue remain answerable are vulnerable to the same objections I have raised. In particular, this worry arises about moral questions, which attract at least as much disagreement as metaphysical ones. I thank Annalise Acorn, Thomas Bustamante, David Dyzenhaus and Malcolm Lavoie for pressing me on this point at various times. To fully answer this objection would take me too far afield; there is not space here to defend my views on moral truth. But in brief, the view is that intuitions are at least in principle the right kind of thing to appeal to in the moral domain, in a way that they are not in the metaphysical. Why would our intuitions tell us anything about the nature of the world? On the other hand, when it comes to moral dilemmas, it seems at least plausible that our intuitions are the right kind of raw material: they stem from our experiences with suffering and seeing the suffering of others, and that informs our views about moral questions. Further, moral questions are ones where there are genuine stakes. They are not mere verbal disputes where the problem dissolves once we clarify our terms, or boundary-drawing problems of the same sort as the 'nature of law' questions. Murphy notes this. Disagreement about morality, he says, is persistent, but also important: we cannot say it is a verbal dispute. *See* MURPHY, *supra* note 4, at 70. For further discussion of the methodology of moral questions, see *infra* note 125 and accompanying text.

108. One question that might arise at this stage is whether, among these multiple concepts, one or another should be thought of as primary, and the others as derivative or less important. We might think this, but we should be careful what we mean by primary. If we mean a certain concept is likely to be most useful for the kinds of projects we want to engage in, that is fine, but if we mean that the primacy we have identified indicates that one of these concepts somehow tracks the true nature of the phenomenon, then this kind of argument is precisely what my eliminativist view would reject. I worry that any attempt to show that one has priority in the sense of being 'true' would lead to the same standoff. Thanks to David Lefkowitz for raising this question.

109. MURPHY, *supra* note 4, at 88–90. As Murphy notes, mere frustration with the debate is insufficient to justify moving past it. We also need to show that we can get by without an answer to what the law is. *Id.* at 3–4. That is what I aim to do below.

next section defends the viability of eliminativism by responding to a number of objections. In the process, I hope to clarify what eliminativism commits us to.

VIII. OBJECTIONS

I have tried to show that the grounds of law problem, as it is approached by many of the core thinkers in modern legal philosophy, is a spurious question that is, by its very structure, unresponsive to experience. The rest of this article is devoted to answering some objections to the view that results. The arguments against the metaphysical project lead us to eliminativism. But eliminativism entails a broader commitment to giving up on any talk of law at all. So even those whose views are not captured by my earlier arguments might still object to adopting an eliminativist approach. Here I attempt to show that the eliminativist approach is plausible by responding to a number of objections.

A. What is the Law?[110]

Murphy's primary objection to eliminativism is the deceptively simple one that "we need a view about the grounds of law if we are to be able to figure out the content of the law in force."[111] He insists that we need to answer the grounds of law question so that we can answer concrete problems about what the law is.[112] My short answer to this objection is that it gets things backwards. It cannot be that we need an answer, because we do not have one, and we do get by: the fact that lawyers and legal subjects go through life without settling the grounds of law question should show us that having a settled answer is *not* essential.

For Murphy, this is because there is a substantial overlap between the different views.[113] Statutes that enact clear rules rather than vague standards—such as speed limits—are considered law on both the positivist and the nonpositivist account of law. People will use the term 'law' as a shorthand for that area of agreement.

But the eliminativist's argument is much stronger. The eliminativist

110. I thank Liam Murphy for extensive feedback on the issues in this section. I am sure my answers remain unsatisfactory, but they are, I hope, clearer, thanks to his insistence that we can talk about the content of the law, without framing that question as a metaphysical one.

111. MURPHY, *supra* note 4, at 77; *see also* Dempsey, *supra* note 3, at 31–32 (arguing that we need to know what the law is in part to further discussions of whether we ought to obey it).

112. MURPHY, *supra* note 4, at 14 ("[A]nyone who is attempting to answer a question about the content of law must as an initial matter have a view about the grounds of law."); *see also id.* at 16, 77.

113. *Id.* at 104–05.

view is that we could get along fine even if the two views gave different answers to every legal question, because nothing ever turns on the question of what the content of law is. That does sound radical, but I will argue in what follows that it is defensible.

Murphy uses a number of examples to make the point about the importance of knowing the content of the law in force. Here I will focus on one example—same-sex marriage.[114] "Whether the exclusion of same-sex couples from the institution of marriage in New York was in violation of the state constitution in, say, 1995 depends on the grounds of law."[115] Murphy argues that positivists will conclude that the sources did not determine this question and it was therefore open until it was settled by a court, in 2006, and then changed again by the legislature in 2011. Nonpositivists believe that the best moral reading of the legal materials is the true answer to what the law is. They will conclude that it was illegal to limit marriage to opposite-sex couples all along, regardless of the court's decision or the new enactment. "Different views of the grounds of law, different conclusions about what the law is. And it does seem to matter, to New York residents at any rate, what the law about marriage in New York is."[116] Murphy concludes that we need to have a view about the grounds of law if we are to answer legal questions. "Far from nothing turning on it, it looks as though, as far as the law is concerned, everything turns on it."[117]

But what does turn on it? In what sense will my experience be different if one view or another is right? One thing that matters is whether the officials will perform or uphold my marriage. But the answer to *that* question is the same on both accounts. Now, this might sound like legal realism, and the realists did remind us that sometimes the question of what the people in power will do does matter. That is often what we care about. The predictive question of Holmes's bad man is important to those who are subject to judicial decisions.[118] But that is not the only question. There are also important normative questions that can be discussed.

Thinking of experiential consequences we can actually point to, there seems to be nothing that turns on which view is right. The experiential evidence is the same, and all that is different is the description. The only thing that is different is that on one view we describe what takes place as

114. I discuss this same example briefly in Nye, *supra* note 28, at 271.

115. MURPHY, *supra* note 4, at 15.

116. *Id.* at 16.

117. *Id.*

118. *See* Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 HARV. L. REV. 457, 459 (1897); *see also* HART, THE CONCEPT OF LAW, *supra* note 3, at 147 (making the point that prediction is often important).

legal. But on both views, the same things happen. Thus, although Murphy says that it matters what the law is, it seems not to matter in any practical way to people. The only sense in which it seems to matter is if we care about giving the 'correct description' of what the law demands—and that is precisely the metaphysical question I have insisted is unanswerable.

Again, it matters whether officials will perform or uphold my marriage. We might say, more broadly, that in any situation, it matters what the people in power will do, and what they ought to do. Someone might say: 'But it also matters *what the law is*.' Putting aside any metaphysical interpretation, we just want to know what the content of the law is. That does sound initially plausible. But let us think about what that question could be asking. It seems to me that we will always need to drill down and figure out what the person wants to know. Are they seeking a lawyer's advice and want to know about the practical realities of the institutions that exercise power? Are they trying to understand whether those institutions give them real obligations? Whatever it is they want to know, it seems hindered rather than helped by framing it as a question about 'what the law is.'

Once we have converted to the eliminativist position, Murphy argues, there is much we can do with our various theories about law, but we cannot "discuss what the law now is: any such question must be paraphrased into a moral question about what a person ought to do or a descriptive question about the state's likely responses to people's decisions."[119]

What is missing here is a recognition that these kinds of paraphrases are *already* what we are dealing with. 'Law' is, in various instances, being used as a placeholder for a particular idea. 'Law' tends to be used in a wide range of ways, and we must always take care to clarify what someone means when they use it. Some people may use 'Law' as a shorthand for 'what the people in power do,' and others may use it as a shorthand for the idea that we have committed ourselves, morally speaking, to certain standards of behavior and interaction. Therefore, we should always be aware that there are at least two possible questions in the vicinity: "What are the people in power likely to do?" and "What are my moral obligations?"[120] It is not that eliminativism requires us to make convoluted paraphrases, but rather that it reminds us to inquire further about how a term is being used.

This is even truer in hard cases. When we ask: "What's the law on possession of marijuana in Colorado?" we might be asking one of several

119. MURPHY, *supra* note 4, at 90.

120. Note the similarity to Felix Cohen's view: "Fundamentally there are only two significant questions in the field of law. One is, "How do courts actually decide cases of a given kind?" The other is, 'How ought they to decide cases of a given kind?'" Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 824 (1935).

things: "Will I be thrown in jail if I smoke this?" or: "How is the Supreme Court going to come down on this issue, given the conflict between state and federal laws?" These are both forms of the predictive question. Or we might be asking: "What should the Supreme Court decide, in light of the institutional commitments and norms of our society?" This is a normative question.

These different questions that the eliminativist wants to substitute for the grounds of law question seem to me the right ones to ask. But one might insist that these substitutes miss something: for Murphy, they miss the fact that questions such as "Does the law allow this?" are real questions. We just want to know what the law is. It matters whether New York allows for same sex marriage *by law*, and whether it is *legal* to smoke marijuana.

These questions do have a sort of appeal. They seem like they should be answerable. But when we really get down to it, what are they asking? There are normative questions, descriptive questions, and metaphysical ones. There must be an assumption in the background that indicates whether the questioner means to ask a factual (predictive) or a normative question. (It seems implausible that a question like 'is it legal to smoke marijuana?' is operating as a shorthand for asking the metaphysical question of what law requires.) And I cannot think of an alternative interpretation beyond those three possibilities.

As I argued above, I think Raz and others are asking a metaphysical question. But others insist this is not what they are asking; Murphy says we just need to know what the law is.[121] If this is to be understood not as a metaphysical question, and to find a foothold in answerable territory, the options are the kinds of questions the eliminativist wants to pursue: predictive or normative questions, such as 'what is the likely outcome of this case?' or 'what am I owed, morally speaking?' We never need to know 'what the law is' to answer any of these questions.

B. Better Descriptions

One might insist that these different descriptions are not equally compelling. One view or the other might seem to better comport with the facts, to require less of a revision of our views and to match more of what we think is true about law.[122] So, for example, the nonpositivist view has the advantage of not requiring us to be revisionist about what judges themselves think they are doing: they claim to be finding a right answer, and if we are

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121. MURPHY, *supra* note 4, at 108.
122. I thank David Dyzenhaus for pressing me on this point.

nonpositivists, our description captures that in a way that the positivist one does not.

But the very question of which description is more compelling is exactly what is at stake, and it is this that I have argued is methodologically insulated from any evidence that might settle the disagreement. That is, those with different starting points will actually see what a 'revision' is and what is an 'accurate description' differently. For some positivists, showing that judges have the power to change the law is an important commitment of their view, and they will claim that their view is a better description, not a sacrifice.[123] But this will not convince those who start with the view that judges do not make law. The problem, then, is that both descriptions are on par, not because they are equally compelling as a descriptive matter (the point is that they may compel you or me differently), but because of the structure of this particular methodology, which gives intuitions priority over experience. This puts the different views *methodologically* on par. The kind of evidence we would need to appeal to in order to establish which is a more accurate description is methodologically ruled out, and our intuitions about which is the right description take its place.

C. Convergence[124]

What if we *do* come to agree on a description? If we could agree that one view is right, it seems there would not be a problem. In other words, perhaps we have not resolved this yet, but why not think that we could come to a view about the nature of law eventually? This might be an available move if the disputants were open to experience in the right way. But the very structure of the disagreement about the grounds of law is such that it is insulated from inquiry. It is not just that we do not yet know the answer, but that we could inquire forever and never resolve it, because it is not open to resolution through experience. The disagreement is about where to correctly draw the boundary around this phenomenon. Disagreement about this cannot be resolved by experience, because that experience is understood differently depending on whether you believe the boundary is drawn in one way or another.

Imagine our disagreement eventually dissolved: this would not be because experience had shown one view to be wrong, as experience is barred from influencing the result here. If we all happened to come to the same view

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123. This is, in fact, one of Murphy's key points: "It is an important aim of positivists to bring to the surface (what they regard as) the fact that judges have the authority to change the law." MURPHY, *supra* note 4, at 93.

124. I thank Jan Mihal for comments that enriched this section.

about the nature of law, this would not mean it was truth-apt. Instead, we would have to say that all the participants held shared beliefs about a nonetheless spurious question. The question is not about something we can look to, but about the boundaries of a phenomenon. A question about where to correctly draw those boundaries is unresponsive to experience, whether we happen to agree about it.

But people do change their minds. Is there something we can learn by noting that people are not always deadlocked in the way I have described? How is it that people come to accept different views? This is, in some sense, a psychological and not a philosophical question. It may be that idiosyncratic traits of human beings are what cause their minds to change.

But philosophers persist in trying to change people's minds. In terms of methods for convincing people, philosophers are fond of counterexamples, but as we have already seen, the kinds of questions about categorisation dealt with in the debate about the nature of law are immune to counterexamples.[125] Other methods include appeal to general usage[126]—but this will fail if general usage is divided. We cannot convince someone that they are wrong to believe A on the basis that everyone thinks B, because that person themselves thinks A, meaning it is false that everyone thinks B.

A further option is to turn to 'expert' usage as a method to settle the debate. This works well in scientific cases dealing with natural kinds, but less so in cases such as law. Still, we might think that law has experts—judges, lawyers, and perhaps even legal theorists. Nevertheless,

125. It is my view that counterexamples are paradigmatically effective in moral theorizing. When we are struck by a counterexample, it is because it conflicts with something we believe, and in moral theory, things we believe have very real upshots. If something is morally wrong, we should not do it. The stakes are high, and thus counterexamples can prompt a rethinking of what we are committed to. By contrast, questions of boundary drawing have no stakes, and so it is unsurprising that counterexamples do not carry so much weight, and that people are able to simply draw categories differently and move on. It is much harder to simply move on if we are confronted with something that may have serious upshots for how we ought to live.

126. *See* HIMMA, *supra* note 24, at 33. On Himma's view, we appeal to our general practices and ways of speaking and thinking about law. Conflict with our ordinary ways of speaking is a basis for rejecting a theory. *Id.* at 34. This gives him a way to avoid the problem I have described, because it does not appear to make the theory primary: instead, it makes the *observable data* about people's ways of talking about law primary. If a theory does not fit that data, it must be rejected. That sounds like a promising way out. But there is a problem: Himma does not follow this method himself; he appeals to argument rather than observations of what people think. He says that there is sometimes indeterminacy in the use of a concept. In such cases, Himma says, we can use conceptual analysis to resolve disagreement by seeking "deeper commitments. *Id.* at 63. He says that such problems cannot "be resolved wholly on the strength of empirical observations having to do with convergent patterns of usage." *Id.* at 64. So, we are back to the problem of having to choose between competing interpretations without the empirical method to help us resolve it. This leaves Himma vulnerable to the points I make in the text.

disagreement persists among these experts, so a turn to expertise will not help either.[127]

Minds change, it is true. But I do not think philosophy can give a good account of why they do. What philosophy can do, however, is tell us what questions are answerable, and, especially, highlight when they are not. If a question is unanswerable because it is not properly responsive to experience, then we need not worry about when or why someone might change their mind about it, because they do not have any justification for holding one view or the other in the first place. This, I believe, is the situation with respect to the nature of law.

D. Intuitions and Law

This objection pushes back on the idea that intuitions are not capable of telling us about law. Law is not a phenomenon in the physical world. It is a social one, so why are intuitions not relevant? In other words, social reality is constituted by the beliefs and attitudes of individuals in the practice. So perhaps prompting our intuitions about the practice can help us identify facts about the social reality of law.

There are three responses here. The first is to return to the problem of disagreement. Even though social reality might be structured by the beliefs of individuals, individuals still disagree. So the problem is not so easily solved. The second issue is that, even if disagreement disappeared, we would need to appeal to empirical observation to uphold claims about what the attitudes of individuals engaged in the practice are. And no philosopher does this.[128] Finally, we must be clear on what is being claimed. Even if law is a social phenomenon, the objective of metaphysical theorists is to correctly describe the boundaries of it in a way that transcends our shared experience of it. I do not see why my intuitions about how to 'carve nature at its joints'[129] would have any claim to correctness. When theorists claim, as they do, to be accessing the 'true nature' of law, this is a matter of description of reality that intuitions cannot access. Our intuitions can tell us about what we should do and about what *we think* about law, but not about 'what it is.'

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127. *See, e.g.*, NW Barber, *The Significance of the Common Understanding in Legal Theory*, 35 OXFORD J. LEGAL STUD. 799, 815–16 (2015); MURPHY, *supra* note 4, at 81.

128. For a version of this critique, see TAMANAHA, *supra* note 63, at 74.

129. This is a phrase that metaphysicians often use to describe their work. *See, e.g.*, THEODORE SIDER, WRITING THE BOOK OF THE WORLD 1, 1 (2011) ("Metaphysics, at bottom, is about the fundamental structure of reality. . . . Discerning "structure" means discerning patterns. It means figuring out the right categories for describing the world. It means 'carving reality at its joints', to paraphrase Plato. It means inquiring into how the world fundamentally is, as opposed to how we ordinarily speak or think of it.").

E. Metanormative Inquiry

The metaphysical question is not the only one a theorist may be attempting to answer. Plunkett and Shapiro have argued that general jurisprudence is a branch of metanormative inquiry.[130] By this they mean that most legal philosophers can be understood as engaged in 'metalegal inquiry,' which is inquiry that aims "to explain how legal thought and talk—and what (if anything) such thought and talk are distinctively about—fit into reality overall."[131] In particular, the aim is to elucidate universal legal thought and talk—the part of legal thought and talk "that is universal across all social/historical contexts where there is such thought and talk."[132]

One of the aims of Plunkett and Shapiro's article is to point out that metaphysics is not the only thing that counts as general jurisprudence. "[P]hilosophers working on metalegal inquiry can focus on different aspects of the relevant overall explanatory project. For example, they can focus on issues of language, metaphysics, or epistemology, while forgoing those outside that focus."[133] This is, of course, true. I have not intended to suggest that metaphysics is the only way to do general jurisprudence. However, I did intend to highlight the dominance that metaphysics has begun to assume in the field.[134] It may well be that some of the other projects that Plunkett and Shapiro anticipate being ways forward in general jurisprudence will remain untouched by my arguments.

However, the eliminativist argument I have raised does present some problems for their account of general jurisprudence as a form of metanormative inquiry. Plunkett and Shapiro rely on an idea of "universal legal thought, talk, and reality"[135] that is subject to the kind of disagreement I have outlined above. People in general jurisprudence are fighting precisely about correctly drawing the boundaries around what counts as universal legal reality. Some will say that immoral statutes count as part of universal legal reality, and some will say that they do not.[136] Therefore, it seems that the path of metanormative inquiry that Plunkett and Shapiro recommend cannot solve the problems I have highlighted.

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130. Plunkett & Shapiro, *supra* note 23.
131. *Id.* at 39.
132. *Id.*
133. *Id.* at 46.
134. *See supra* Section III.
135. Plunkett & Shapiro, *supra* note 23, at 47.
136. Though positivists often speak as though the idea that evil statutes count as law is simply obvious and no one could deny it, (see, for example, Enoch, *supra* note 82, at 73), people do deny it. *See, e.g.*, T. R. S. Allan, *Law as a Branch of Morality: The Unity of Practice and Principle*, 65 AM. J. JURIS. 1, 4–5 (2020).

F. Moral Criticism and Moral Decision-Making

It is claimed that we need a general theory of law to ask important normative questions about the law and to mount criticisms of it.[137] If so, the eliminativist is in trouble. But do we really need to solve the grounds of law problem to pursue such questions? Murphy argues that in many areas of political theory, we have persistent disagreement. Still, it is of a superficial sort—answering the question of what democracy *is* does not matter.[138] Rather, we recognize that in discussions of values like democracy, we can move forward without getting to the bottom of questions about essential nature. Instead, we can move forward by talking about related values.[139] We engage in Chalmers' "method of elimination."[140] As discussed above, this entails disambiguating different versions of the term.[141]

Murphy argues that this strategy will not be successful with respect to law, but I disagree. The moral criticism aim can be fulfilled without first resolving the grounds of law question. We can say everything we want to say by starting from stipulated, shared positions from which we can engage in moral debate. We can talk about related values and stipulate that, for the present discussion, we mean law to include x, y, and z.[142] The interlocutor who thinks law *really* does not include y can still engage in the discussion by understanding herself to be talking about the moral value of *that social practice that includes x, y, and z*, even if she would not accept that that social practice is coextensive with law.

A related objection comes from Steven Schaus. He suggests that even if we are interested in the moral questions about what we ought to do, having a concept of law might still be helpful for that enterprise. "The thought is that it might be useful to talk about the law's content because doing so enables us to better track an entire dimension of our moral lives."[143] But I do not think that having a concept of law will help us with our ordinary moral

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137. *See* Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1717 (1996); Dempsey, *supra* note 3, at 33 (arguing that we need to know what law is to engage in law reform projects).

138. MURPHY, *supra* note 4, at 64.

139. *Id.* at 65.

140. Chalmers, *supra* note 85, at 530.

141. *Id.* at 532.

142. And the stipulation need not be arbitrary; there are many institutions and norms that we pre-theoretically identify as legal, and there is no reason why our stipulation cannot track these to make it more theoretically useful. *See* HART, THE CONCEPT OF LAW, *supra* note 3, at 3 (discussing what the ordinary educated person knows about law); *see also* DWORKIN, *supra* note 7, at 91 (discussing preinterpretive data).

143. Steven Schaus, *How to Think About Law as Morality: A Comment on Greenberg and Hershovitz*, 124 YALE L.J. 224, 243 (2015). Schaus' other argument against eliminativism is that the debate is still at too early of a stage to determine that we should abandon the boundary-drawing project. The jury is still out. *Id.* at 242–43. I hope to give the jury some more evidence here.

thought. For starters, it seems like it would not be helpful unless we had settled the nature of law question, which we have not. When deliberating, are we supposed to be helped by a positivist or a nonpositivist account of law? It is hard to see how it will advance our inquiry if the initial 'nature of law' inquiry must be resolved first. Secondly, even if we were to settle that question, it is not clear why that would be helpful in moral inquiry. Placing something in a category does not seem to advance our deliberations about what it means for our moral obligations, all things considered, in a given instance. We will always need to do the hard work of figuring out what is morally required of us, and prior categorization is, I think, of little help in doing so.

G. Expressive Significance

In the realm of criminal law, Murphy finds the eliminativist position particularly implausible, arguing that it is absurd to suggest that there are no crimes but only good or bad decisions and predictions about what will happen to people.[144] "There is, at the very least, an expressive significance to the criminal law that this redescription cannot capture."[145] He provides an example of a statute criminalizing sex between consenting adult males, which is on the books though it is explicitly stated that it will not be proactively enforced.[146] Murphy asks, "[d]oes that mean that gay men in Singapore have nothing to complain about until the government changes its mind and starts prosecuting gay men for having sex?"[147]

It seems obvious that they do have something to complain about, but it is much less apparent why we need an answer to the grounds of law question to see that. Why can we not think that a person has just as strong and valid a complaint against the government for expressing such things whether they count as 'law' or not?[148] The legal subject has a further complaint against the government in this situation on rule of law grounds because the government is acting inconsistently with expectations it has generated and has undermined predictability. But again, we do not need a theory of the grounds of law to object to this. We can simply say that the rule of law demands that

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144. MURPHY, *supra* note 4, at 90.
145. *Id.*
146. *Id.*
147. *Id.* at 90–91.
148. Kornhauser makes the same reply to Murphy. He says, "Eliminativism has no effect on the society's ability to make collective judgments. Legislatures still enact statutes that reflect the collective judgment of the community about the regulated conduct. The expressive force of the enactment remains; calling the enactment "law" has no effect on its communicative powers or force." Kornhauser, *Doing Without*, *supra* note 89, at 21.

government action be congruent with its declared intentions, which we understand by looking at statutes and prior decisions, without taking sides on whether what is being done is properly called law.

H. The Internal Point of View

A further objection is that law plays an important role in many people's lives. People treat the law as valid—they accept it, or in Hart's terms, they take the 'internal point of view.'[149] In that case, they adopt a standing policy to follow *the law*, not an attitude of case-by-case assessment of the costs and benefits of compliance.[150] But the eliminativist has to give up the idea of acceptance of the law. To say that a person can take the internal point of view and accept the law makes no sense; the eliminativist cannot say that this could be helpful to them since it is a charade.

But people do seem to take an attitude of acceptance towards 'the law.' What is it they are doing when they do this?[151] Again, we must make the claim sensible. The attitude of acceptance adopted must either be an attitude of commitment to doing what those in charge see as required, which will look something like the Holmesian view.[152] Or it must be an attitude of commitment to doing what is morally required by our institutions.

Remember that eliminativism does not entail denying that we have practices and institutions which people have sometimes called 'legal.' We can talk about the phenomena that occur: statutes are enacted, and judges make decisions. None of this disappears. The committed legal subject can be

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149. MURPHY, *supra* note 4, at 91. For the introduction of the idea of the internal point of view, see HART, THE CONCEPT OF LAW, *supra* note 3, at 89.

150. Dempsey argues that many people do take an attitude of acceptance towards the law and believe it to have real moral force. For this reason, the question of what counts as law matters. *See* Dempsey, *supra* note 3, at 34. They might be mistaken, she argues, but their attitudes make the question a pressing one.

151. It seems quite clear that ordinary people who take an attitude of acceptance toward law are not thinking about the metaphysical question. When they say, "I want to follow the law," it seems extremely unlikely that they mean: "I want to follow whichever of positivism or nonpositivism is, in fact, the right view of law on the fundamental level. Once I have figured out which account correctly delineates the boundaries of law, *that* is what I will take an attitude of acceptance towards." Further, there is no practical difference between the views. So, adopting either view will not help with the fundamental questions at stake. The problem with the grounds of law debate is that the insistence that one of these theories is right or true is entirely untethered from our practices. If our committed legal subject accepts positivism, they will *also* need a predictive theory about how judges exercise their 'discretion.' If they accept nonpositivism, they will *also* need a predictive theory about how judges will carry out the task of 'finding law.' That predictive theory will do most of the work in hard cases, and the grounds of law problem will not affect their view about what to do. They could have the 'wrong' view of the grounds of law and yet be guided in their aims just as successfully.

152. As Kornhauser notes, eliminativism is easy to reconcile with the point of view of the Holmesian "bad man." Kornhauser, *Doing Without*, *supra* note 89, at 22.

understood as doing their best to make sense of this set of institutional structures that we have. They do that by a complex interpretation of our practices, conformity to community standards, and prediction of official behavior.[153] It is still possible for individuals to take an attitude of acceptance, but acceptance of what is morally demanded by our practices.

Murphy deals separately with whether legal subjects take themselves to be bound, as discussed above, and whether they have a genuine obligation to obey the law. If there were a general obligation to obey the law, then we would need to know what the law is, and eliminativism would fail.[154] But asking whether there is a general duty to obey the law risks trapping us in the same verbal dispute. Some will say yes, with a moralized account of law in mind, and others will say no, thinking of positivistic law. Thus, eliminativism helps us skirt this problem by framing other questions, ones that are answerable. As Kornhauser puts it, we look to the "conditions under which the citizen has an obligation to support the institutions of the governance structure."[155] An individual's obligation on the eliminativist view "is determined by the legal materials and whatever other relevant moral concerns she faces."[156] I think this must be right: the eliminativist seeks only to drop an unproductive debate. Therefore, anything possible in the world where that futile debate persists should remain possible once we move past it. So again, we do not need to resolve the grounds of law problem.

I. Law and Adjudication Must be Distinguished

Continuing from the previous objection, the idea that we could replace 'accepting the law' with 'accepting the outputs of good judicial decisions' is problematic according to Murphy because there is a distinction between these two things, at least for those who do not have the 'adjudicatory view

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153. Kornhauser's reply to this objection is that those wishing to follow the rules should simply look to the 'legal materials'—we need not say that they must look to 'the law.' *See* Kornhauser, *Doing Without*, *supra* note 89, at 23.

154. MURPHY, *supra* note 4, at 110; *see generally id.* at 109–43 (discussing this problem in more depth).

155. Kornhauser, *Doing Without*, *supra* note 89, at 23.

156. *Id.* at 24. Though Murphy thinks that the case for individuals' obligations to obey the law is weak, he argues that there is often a strong obligation for states and state officials to obey the law. *See* MURPHY, *supra* note 4, at 136–43. This might seem to suggest that the debate about what the law is still matters. However, I do not see why we cannot take Kornhauser's line with respect to legal subjects in the case of officials as well. We can say, following Kornhauser, that officials' obligations are determined by the legal materials and the relevant moral concerns, and we can insist that they have an obligation to take those things seriously and weigh them appropriately.

of law.'[157] Moreover, this substitution would obscure something important: the ability "to say, for example, that while I accept the law as it is, I believe that the courts ought to overrule the relevant precedent or invalidate what has until now been valid legislation."[158] Positivists regard it as a virtue of their view that it highlights judicial lawmaking.[159]

Let us think about what positivists believe they are exposing. We are talking about—as established—a case where the facts on the ground are the same, but the positivist and nonpositivist describe them differently. Is it not just as important to expose the 'fact' that judges have the authoritative power to *declare what the law is* in a way that is often obscure in advance? Supposing this is an argument about a state of affairs that is morally objectionable, then we must recognize that the state of affairs has not changed because it is described as lawmaking rather than law-applying.

It makes no difference whether we say we are exposing judicial power to make law or judicial power to declare law in a context where it was previously uncertain what the law was. An individual acting as an advocate for a particular cause might point out that a judge has the power to change the law. But what they are saying can be rephrased as the claim that the judge has the power to *determine the outcome of the case*. The judge's view is backed by the state's power, regardless of whether the positivist is correct that the judge *really* made new law. This power that judges wield is important to recognize under either description.

When an eliminativist wants to make this claim, they can say: 'I think the judge should deviate from the standard practice of enforcing statutes and should not apply this one because of its moral failings.' But the question is always a moral one: the question of whether the statute is 'really law' does not tell us anything about the important moral question of whether and why judges should decide cases in line with statutes or prior decisions. If we think they should decide in a way that accords with the statute, we need a moral argument for that, just as we need a moral argument for deviating from what it demands.[160]

Of course, people will not stop using the word 'law'. Thus, even if someone chooses to use the term 'law' for rhetorical purposes or simply because they have learned to use language this way and have not thought about whether it tracks some deeper truth, we have to understand them as

157. The adjudicatory view of law is the view that "all normative considerations that judges are authorized to take into account when deciding a case are necessarily part of the existing law." MURPHY, *supra* note 4, at 9.

158. *Id.* at 93.

159. *Id.*

160. These moral reasons for keeping faith with the past will often be rule of law reasons.

using it with a particular meaning. We can interpret the claim as such: 'Judges have the power to determine outcomes. Non-officials lack the power to do this.' This is true whether they are 'really' legislating or 'really' applying law, properly understood.

J. Executive Branch

The next objection is about "how nonjudicial branches of government should approach the matter of determining the content of the law that applies to them."[161] On the eliminativist view, Murphy says, they would have to approach all their decisions about law as though they were adjudicating disputes, even on nonjusticiable matters. Here, and in the case of legislatures, "eliminativism would make it impossible to discuss what appear at first glance to be significant political/legal questions."[162]

But it's not clear what would be unable to be discussed. Again, it is important to remember that we currently do not have anything close to a settled view on whether positivism or nonpositivism is right about the nature of law, and yet, the executive branch carries on making assessments of what actions to take. So, what is it that they are doing? Executive officials can assess what is required of them without imagining themselves as judges. They can make thoughtful interpretations of what this whole system of rules, norms, and principles demands of them in their institutional role. To do this, they need not answer the question of whether the moral principles they appeal to are part of the law or just additional considerations. They only need to engage in moral assessments of what they ought to do.

Whereas individuals can sometimes adopt something more like a predictive approach, government officials are almost unavoidably engaged in moral assessment.[163] This might seem implausible if we think about a low-level official with minimal discretionary power: even when doing their job well, it does not seem like they engage in moral decision-making, but rather that they adopt an attitude of obedience. But we have to see that as one sort of moral choice: given their role, they weigh obedience to authority very heavily, such that it will never or rarely be outweighed by other moral factors. Maybe this is the wrong assessment. But it is a moral one, in the sense of being an answer to a question of what ought to be done.

The idea that officials should 'apply the law' is widespread. Thus, it might seem natural to say that the president should do what the law requires.

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161. MURPHY, *supra* note 4, at 95.

162. *Id.* at 98.

163. Sometimes even officials can take a predictive approach with respect to the actions of other officials that will affect them. But when they act, they must engage in a process of moral reasoning.

But this on its own tells us nothing: as I have been arguing, we do not have a settled view of what the law requires, so we must look behind the platitude that officials should apply the law and ask what it means. We will find that it is a normative demand, requiring normative engagement by officials. It often has something to do with predictability and the idea that officials are bound by the clear enactments of a democratic legislature. But even that is for a normative reason: because we think it matters that we respect the democratic will or because we believe complying with clear statutory demands makes life more clear and predictable for people. So, digging deeper than the 'apply the law' idea, the demands we place on our officials and our executive actors are thoroughly normative and do not require them to have an answer to 'what the law is.' They must instead have a view on what ought to be done in light of the existence of statutes, social norms, customs of executive action, and so on.[164]

K. Legislative Branch

According to Murphy, lawmakers also pose a problem: "Lawmakers do not think that they are creating legal materials that will have varying practical significance for people depending on their institutional role."[165] Instead, they believe they are making law. It seems that eliminativism should be able to explain this straightforward idea about what lawmakers are doing.

When lawmakers believe they are making law, what is the content of that belief? One lawmaker votes to enact a statute with a moral term in it and thinks, along Razian lines, that they have just enacted a statute with a gap that judges will have a legal obligation to fill using moral reasoning and that that moral reasoning will be dispositive of the issue as far as subjects are concerned. Another lawmaker votes to enact that same statute but believes that they have enacted a statute that *includes* a moral term and has thereby turned the moral demand into a legal demand. The lawmaker recognizes, however, that there is disagreement about what that term means and that judges will have the power to interpret the term—that judges' views will ultimately determine what happens.

There is no difference between these positions. The question of which captures the 'reality' of the situation is spurious because we cannot decide between them on the basis of consequences: their consequences are identical.

164. Even if a governmental official did have a view on the grounds of law, this would make no difference: they would *still* need a further account of why it matters in any way that a particular act would conform to law. There needs to be a moral argument for why they, as an official, ought to take acts if and only if those acts conform to the law, properly understood.

165. MURPHY, *supra* note 4, at 109.

The eliminativist view is that, given that these positions have identical upshots, there can be nothing at stake here, and we should therefore discard the question. We do not discard the question of what judges should do, however. And we do not discard the question of whether it is good to legislate in such a way that judicial interpretation will be necessary (whether that interpretation is called lawmaking or lawfinding).[166] These are normative questions that can be answered. But nothing turns on the question of what law is.[167]

L. Eliminativism is Artificial

Murphy argues that the extensive rephrasing required by eliminativism is "implausibly artificial."[168] We can see the point simply by noting that people have developed a concept of law, and that they tend to see it as important and useful. If we eliminate this, are we not adopting an artificial view? If we are to take practice seriously, we ought not to be eliminativists.[169] The first point to note here is that there are many different ideas of law that have purchase both within and across societies. The positivist idea has force when we wish to draw attention to power, and the nonpositivist idea feels compelling when we wish to hold governmental power to account and demand that lawmaking meet certain standards. Both concepts exist, so noting that usage of 'law' is in some sense widespread will not help us here, because that widespread usage is equivocal. What the eliminativist wants to do is eliminate the search for a single answer ostensibly underlying that varied usage. And eliminating *that* is not so artificial.

Others, such as Mark Greenberg, might be thought to implicitly make an argument of this sort, or perhaps a mix of this objection and the 'what is the

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166. As Kornhauser notes, lawmakers are doing something with practical effects. "Legislation is an instrumental activity; we enact statutes to influence behavior. The legislator must thus contemplate how various public officials and citizens will respond to the (text of the) enactment." Kornhauser, *Doing Without*, *supra* note 89, at 26. This remains true without any appeal to 'law.'

167. Kornhauser's reply to Murphy here is that "it is hard to see what resources eliminativism has stripped from the legislator. Identifying some obligations as "law" does not help the legislator to resolve the questions she faces. To decide whether the legislature has the power to legislate in a given area requires each legislator to elaborate a political theory that explains the roles of each governmental institution." *Id.* at 25. He adds that it might even provide a better explanation of the phenomenon of underenforcement. *Id.*

168. MURPHY, *supra* note 4, at 99.

169. Thanks to Thomas Bustamante and Jan Mihal for raising different versions of this objection.

law?' objection. Greenberg defends what he calls 'The Moral Impact Theory of Law,' which holds that "[t]he content of law is that part of the moral profile created by the actions of legal institutions in the legally proper way."[170] Law is a term for all those moral upshots that are the result of actions by legal institutions. In other words, legal obligations are a subset of genuine moral obligations—those that we can trace to the actions of legal institutions.[171] So, though it prioritizes the moral inquiry in a similar way to my eliminativist view, it is not in the end eliminativist, because it continues to maintain that there is something called *law* that we can both identify and delineate the boundaries of.[172]

Though he does not put the point in terms of artificiality, as Murphy does, we might say that his view presents a related objection: that the most natural way to understand things, once we adopt the moral impact theory, is that *there is law here*. Trying to do without it seems counterintuitive.

But it seems to me that virtually any view that wants to maintain 'law' in the picture will also require some degree of artificiality. In Greenberg's case, he has to deal with the problem that, if a government enacts a persecutory directive, the moral upshots of it will include obligations to help the persecuted, to disobey, and to reform the law, among other things.[173] These are not legal obligations. Greenberg addresses this by saying that we must "limit the relevant moral obligations to ones that come about in the appropriate way – what I call the *legally proper* way."[174] But his account of what this means leads to further questions. He begins by talking about our 'intuitive' idea of the legally proper way for a legal system to create obligations.[175] When governments change the moral landscape in a way that is paradoxical, these will not count as legal obligations. Paradoxical obligations are those that "run in the opposite direction from the standard case."[176]

Greenberg thinks this additional condition is not ad hoc because it tracks his idea of what a legal system is for, what its purpose is: it "is supposed to improve the moral situation."[177] But the problem here is that he presupposes an idea of law's purpose that is not necessarily shared by others. The idea of

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170. Greenberg, *The Moral Impact Theory of Law*, *supra* note 96, at 1323.

171. Moral obligations, for Greenberg, are "*genuine, all-things-considered, practical* obligations." *Id.* at 1306.

172. *See* Hershovitz, *supra* note 23, at 1162 (noting that Greenberg's view is similar to his own but keeps alive the question of what law is).

173. Mark Greenberg, *The Moral Impact Theory of Law*, *supra* note 96, at 1320–22.

174. *Id*. at 1321.

175. *Id*.

176. *Id.* at 1322.

177. *Id*.

the 'legally proper way' complicates Greenberg's theory.[178] It is better, and simpler, to take the eliminativist approach and not make any claims about which upshots of governmental decision-making are 'truly law' and which are not. This avoids the difficulty involved in attempting to spell out the 'legally proper way' for legal obligation to result. Greenberg's account, in other words, is just as artificial as the eliminativist's might be said to be. Once we are in the position of having to explain what is legally proper, we have to draw boundaries around which upshots count and which do not—boundaries that might appear artificial depending on our perspective.

We can say the same thing about other views: Raz's view requires us to say that whenever law incorporates moral terms, it is really just directing us outside the purview of law and leaving space for discretion.[179] We might think this is just as distorting and artificial.

I tried to show above that the idea that we are searching for the true nature of law, and that it is accessible via our intuitions, is problematic. Once we really think about what the various accounts of the nature of law are claiming, that sort of picture starts to seem rather artificial as well, especially given the fact that the 'true nature' of law might depart from our experience of it and may require revising things we thought we knew about law. In other words, all theories can be distorting and artificial in certain respects, and positivism and nonpositivism do not do so well in this respect either. Therefore, this should not impugn eliminativism specifically.

But the more direct response is this: I do not think that eliminativism is as strange as it might seem. The eliminativist is saying: set aside questions of the nature of law. What matters is that we can talk about how decisions are typically made in our community, and how we think they morally ought to be made. We can talk about traits of our governance systems, what officials are likely to do, or about normative ideals associated with our institutions—topics that are in principle answerable. This, it seems to me, is not artificial at all: it is a way of bringing our talk about our practices back down to a realm where it might actually be accessible and answerable. Suddenly it is not the eliminativist whose claims seem so outlandish, but the theorist making claims about the 'true nature' of law.

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178. Schaus also critiques Greenberg's view. He, like Greenberg, seeks to "explain the common-sense distinction we draw between legal facts and moral facts." Schaus, *supra* note 143, at 226. He sketches out some objections to Greenberg's way of doing so. *Id.* at 231–34. He then presents his own alternative, focused on which obligations legal institutions have the standing to enforce. *Id.* at 235. But in trying to do what Greenberg does and uphold some idea of what the law is, he saddles himself with all the same problems I have outlined here. I see no reason to go this direction rather than the eliminativist one. *See also* Dindjer, *supra* note 97, at 202–04 (critiquing Greenberg's idea of the 'legally proper way').

179. *See* Raz, *supra* note 42, at 319.

M. Is Eliminativism Plausible? Thinking about Non-Legal Examples

One objection is that the eliminativist argument does not only apply to law. Law cannot be in a special category without raising some questions about why this is the case. Just how much stuff will we have to eliminate if we adopt the proposed eliminativist methodology? Does my argument apply to all social kinds?

Law is an odd case because it seems to be used as both a descriptive term and a normative ideal—or at least, it points towards a normative ideal, that of legality. But there are similar terms. Democracy, for example, can be applied as a descriptive term to a country. It can also be used as a term of commendation. But should we be eliminativists about democracy? I think we should, as long as we are clear about what that means.

Eliminativism about democracy does not mean dropping talk about the important values associated with democracy. We only drop the question of what properly counts as democracy. Suppose A posits that, as a matter of necessity, 'Democracies must give everyone one vote and no more than one vote.' Now, B may reply that the United States violates this because in the Senate, states have equal votes, with the result that people from sparsely populated states have votes that are worth more than those from other states. B means this as a counterexample to the claim, because the US is supposed to be a clear example of a democracy. A might insist that their account nevertheless tells us what democracy is, and simply say "Well, then the US is not a democracy." But if, for B, the commitment that the US is a democracy is stronger than the commitment to equal voting, then they can similarly put their foot down and insist that their theory provides the true account of what democracy is. This generates the same problem we saw above, whereby the theory is primary and there is no way for experience to upset the theoretical intuitions.

If *this* is the sort of discussion we are having about democracy, I would be happy to say that it is spurious. It does not matter whether democracy *really is* about equal voting, whatever other evidence we might face.[180] We can be eliminativists about this dispute. What we do instead is disambiguate meanings for democracy and move on to normative discussions about the value of democracy, about what it means to give substance to the ideal of

180. Dworkin discusses Archimedean approaches to political values such as democracy. *See* DWORKIN, *supra* note 101, at 146–48. Dworkin argues against the idea of defining it neutrally first, as 'majority rule,' or whatever, in a way that leaves open the substantive questions about whether it is a desirable value. *Id.* He does not talk in terms of eliminativism, but this is the same idea: we need not talk about what it *is*. All the important discussion happens on the normative terrain.

giving every person one vote, and whether the Senate violates that ideal. But we cannot discuss what democracy 'really' is.[181]

Thus, we may end up being eliminativists about a number of things, not just law. This is not as radical as it might seem. As I have tried to show, we can often substitute a different, answerable question for the spurious one about what something—etiquette, for example, or money, or a hospital—really is.[182]

IX. CONCLUSION

I have argued that we should rethink a common methodology in legal philosophy—that which requires us to seek truths about the nature of law through the use of our intuitions. When we aim at metaphysical truths of this sort, we set ourselves up in an inevitable impasse, because the method in question provides no way for us to decide between differing intuitions. Any evidence we can appeal to can simply be recategorized. We can think about how we understand our system and our institutions, about what they demand of us morally, but not about their metaphysical nature. Thus, I argued that we should abandon the grounds of law problem and be eliminativists about law. This means giving up on answering 'legal' questions.

Instead, we must peer behind these questions to find answerable ones. Eliminativism tells us to disambiguate meanings and frame our questions properly. We stipulate a meaning for the purposes of a particular discussion or reframe the question so that the troubling term is avoided. We ask questions about what we ought to do in the face of governmental commands, how this statute should be reformed, and so on. Normative and empirical questions can be pursued, and these questions, if properly framed, will be truth-apt.

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181. Waldron's criticism of Felix Cohen's eliminativism about certain legal concepts has relevance here. *See* Jeremy Waldron, "*Transcendental Nonsense*" *and System in the Law*, 100 COLUM. L. REV. 16, 24-26 (2000) (critiquing Cohen, *supra* note 120). Waldron's concern is that eliminativism about various legal concepts, as proposed by Cohen, could be problematic if those ideas are operating as a nexus in a web of disputes. *Id.* at 24. If we 'eliminate' one of these concepts, we may lose the sense of its relationship with others. *Id.* In the case of law, or democracy, I think all the important connections within our web of concepts can remain: as I've argued, we can make normative arguments about what a judge should do, and how a case should be settled, and we reframe them in ways that are more accessible. We do not lose the ability to talk about the importance of voting, or the right to have a say, or any of the important moral values at stake.

182. We could pursue similar examples with other social kinds, and I think I am happy to take a similar line on virtually any concept of this sort.