The Grounds of Law

HARVARD UNIVERSITY
Graduate School of Arts and Sciences

DISSERTATION ACCEPTANCE CERTIFICATE

The undersigned, appointed by the

Department of Philosophy

have examined a dissertation entitled

The Grounds of Law

presented by Ahson T. Azmat

candidate for the degree of Doctor of Philosophy and hereby certify that it is worthy of acceptance.

Signature Mark E Richard

Typed name: Prof. Mark Richard

Signature Thos Scanlon

Typed name: Prof. Thomas Scanlon

Signature John C. P. Goldberg

Typed name: Prof. John Goldberg

Date: July 29th, 2022

The Grounds of Law

A dissertation presented by

Ahson T. Azmat

to

the Department of Philosophy

in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

in the subject of

Philosophy

Harvard University

Cambridge, Massachusetts

July 2022

Dissertation Advisor: T.M. Scanlon By: Ahson T. Azmat

THE GROUNDS OF LAW

Abstract

When H.L.A. Hart jumpstarted jurisprudence with *The Concept of Law*, he did so with a methodology particular to his own time and place: Oxford, circa 1961. Ordinary-language philosophy was in the air; Hart's focus and approach were deliberately, determinedly conceptual. More than fifty years on, the pendulum has swung in the other direction. Metaphysical grounding is all the rage; philosophers as early as Ronald Dworkin and as recently as Gideon Rosen argue that what we care about when we engage legal philosophy is not what words mean or what concepts refer to, but rather the nature of their referents, quite apart from how we might think or talk about them.

This dichotomy rests on a false choice. To make progress on the central questions of first-order jurisprudence, we need to distill insights from both approaches. Within a framework I call conceptual grounding (CG), the body of information within a historically bounded representational tradition acts as a constraint on our subject matter; once identified, we use metaphysical tools to understand this subject matter. The process is complex, and there are no promises—in particular, if we don't have the historical resources to fix intensions within the representational tradition, we probably won't have a principled manner with which to answer first-order jurisprudential questions.

Still, we can make progress. Chapter 1 describes the metasemantic starting points, applying lessons from the causal theory of reference to 'law' and its cognates. These terms are rigid property designators whose meaning is a constant function and whose designata comprise stable cross-world abstract objects. Identifying designata is a matter of deference to experts within a division of linguistic labor. At the same time, unlike natural-kind terms, semantic values for 'law' (and cognates like 'tort') must be justifiable to the community of language users who give up freedoms and liberties in exchange for a particular form of governance. Step 1 in CG balances these considerations of reference, deference, and justification. Step 2

then provides the real definition of the identified referents fine-grained enough to provide the right sort of explanatory power.

Chapters 2 and 3 address objections to CG. Challenging Step 1, various forms of deflationism ask why jurisprudential questions implicate robust metaphysics rather than a broader, more nuanced conceptual analysis, or perhaps a neo-Carnapian metaontology. I argue that these deflationary alternatives don't have the resources to vindicate answers to our questions. From the opposite direction, challenging Step 2, various forms of methodological antipositivism object that it's impossible to separate our inquiry into two discrete stages, one of which is non-normative. According to this challenge, jurisprudential inquiry is necessarily shot through with moral considerations. In response, I show not only how a multi-staged inquiry is possible, but also why it's a virtue rather than a vice, better accounting for the roles of history and philosophy so that we can finally position ourselves to answer the question, *what is law?*

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

"When are you going to be done with that paper?" A question friends and family have asked with increasing frequency over the years. This "paper" has indeed been a long time coming. I could not have finished it without steadfast support, far and wide: from family, first and foremost; from faculty at Harvard, Michigan, and Princeton; from friends all over the world; finally, from an informal network—lawyers, judges, doctors, bankers, teachers, consultants, and yes, even start-up bros—bound together by genuine intellectual curiosity, whatever their day jobs or titles. At the risk of forgetting some, it is my privilege to thank a few in particular.

First, my dissertation committee: Tim Scanlon, Mark Richard, and John Goldberg. Tim's remarkable range and wisdom have been a guiding light since my earliest days as a PhD student, when I entered the program enamored with law-and-economics and Dworkinian interpretivism alike. Mark has been an anchor and a foundation, his expertise an invaluable resource through thickets both philosophical and practical. I've counted on John's mentorship to help balance considerations within but also well beyond the confines of academic philosophy and law—I may not be a civil recourse theorist, but at least I'm no longer so enamored with law-and-economics!

Second, a motley crew of friends and colleagues has indulged my meandering disquisitions for literally a decade now (as I said—this paper's been a long time coming). In no particular order: Leo Kim, PJ Miller, Emad Atiq, Sam Fox Krause, Rachel Achs, Sandy Diehl, David Thorstad, Ronni Sadovsky, Will Tadros, Andrei Malikov, Cecilia Vogel, Ben Cogan, Jon Gould, Daniel Munoz, Will Ferraro, Kisho Watanabe, Max Straus, Mike Zuckerman, Ben Gifford, Steve Schaus, Adam Katz, Colin Herd, Rinda Ko, Sarah Paige, and—of course—Shoyeb Siddique, Demetri Karagas, Adam Levy, Dima Yakubov, Ron Zheng, Steve Gutentag, and the rest of the 30Mad crew.

Scholarship is rarely a solitary endeavor, and I've been unabashed in seeking help. Some forms are direct (Selim Berker literally taught me what grounding is; Gideon Rosen showed me its power). Others are indirect, but just as meaningful (Ned Hall encouraged my intellectual pursuits; Jack Goldsmith tempered them). In no particular order: Gideon Rosen, Des Hogan, Alexander Nehamas, Selim Berker, Ned Hall, Chris Korsgaard, Bernhard Nickel, Matt Boyle, Derek Parfit, Gabe Mendlow, Richard Fallon, Jack Goldsmith, Will Thomas, James Krier, Scott Hershovitz, Henry Smith, Ben Zipursky, Andrew Michaelson, Chris Belelieu, Andrew Villacastin, and Judge Amalya Kearse—teachers and exemplars, each in their own way.

I completed the final stages of the dissertation in the midst of unexpected health challenges. I'm grateful to the many people (some named above, many not) who helped me face these challenges. They may not yet be overcome, but what's important, I think, is how they are confronted. The most important people in my life are the reasons why this is so: Tariq, Sufia, and Aysha Azmat. Thank you.

ABBREVIATIONS

AT	Artifact Thesis
CG	Conceptual Grounding
DT	Discontinuity Thesis
DT*	Discontinuity Thesis*
EA	$((f_1 \wedge f_2 \wedge f_3 \wedge \ldots f_n) \leftrightarrow L)$
MVLT	Moral View of Legal Theorizing
(R)	$t(x) \leftrightarrow \approx(x, \text{“this}(\Gamma)\text{”})$
$R_A(t)$	Deferential Operator
SP	Social Position Theory

INTRODUCTION

1. To a first approximation, analytic (or general) jurisprudence is concerned with questions about the nature of legality: what are its central features? Its existence conditions? Its normativity? These are questions not about the law of a specific jurisdiction at some time or place but rather about "the nature of law, wherever and whenever law is found."[1] While they may seem straightforward, the questions are more difficult to answer, or even properly frame, than they first appear. We need a firm grasp on the kinds of inquiries they represent, the kinds of answers that count as satisfactory, and how we make these determinations.

Unfortunately, there are serious gaps in the literature even at this stage-setting phase of the endeavor. Some argue that the task of jurisprudence is conceptual analysis; others insist it is metaphysical grounding, or real definition. Many take law's artifactual nature as a starting point, not worthy of scrutiny in its own right; others note that this move begs the question against natural law theory. As one philosopher recently put it, "just clearly formulating questions about the nature of law can be difficult philosophical work."[2]

No surprise, then, how many complain jurisprudence has reached an impasse.[3] In this dissertation, I contend that collective depression sets in not because we have run out of interesting things to say, but because we have not framed our arguments in a productive way—in a way that primes genuine disagreement rather than merely verbal dispute. To prime productive theorizing, we need to build a better, more comprehensive set of metasemantic and methodological principles with which to frame our substantive inquiries into law's nature. Before jumping into the details, however, it may be helpful to more closely examine why such a framework is needed.

A note on presentation: In trying to keep track of shifting explananda, I follow philosophical convention by using small-caps to indicate CONCEPTS, square brackets to enclose [facts], single-quotes to mention rather than use, and italics for emphasis.

[1] Watson (2022:180).

[2] *Id.* at 189.

[3] *See, e.g.,* Hershovitz (2015); Patterson (2016); Enoch (2019).

2. Analytic jurisprudence can be roughly described as a series of disagreements among two groups, positivists and antipositivists. The disagreements between these groups runs deep, even as the basic contours of their positions have remained the same for over six decades now (roughly, since Hart's 1961 publication of *The Concept of Law*).[4] While prominent figures on both sides accuse the other of misconstruing claims, these criticisms are critically incomplete. The real reason for the impasse, I contend, is that neither position accommodates the other's starting point as a serious possibility, and so otherwise good arguments become ships passing in the night.

On the one hand, positivists like Brian Leiter pejoratively dismiss antipositivist positions as befit for psychological rather than philosophical scrutiny.[5] Likewise, Khalidi and Murphy endorse a starting point that "takes for granted that legal norms are not moral norms,"[6] while Andrei Marmor thinks it is "fairly obvious" that law is an artifact.[7] On the other hand, antipositivists assume law is a form of robust normativity with an intelligible, articulable nature, waiting to be found. For example, Dworkin's celebrated chain-novel theory of adjudication presupposes that "the brute facts of legal history" in accordance with which judges must articulate legal principles is not "an unprincipled chaos",[8] and Mark Greenberg, following Dworkin, believes law is a subset of our moral obligations distinguishable from but firmly located within moral or political systems.[9]

Both families of approaches take crucial premises for granted in a way that prevents downstream disagreements from making contact with rivals. And without a clear foundation, the predicament cascades through later chains of third-party commentary. For example, as Kenneth Himma understands the two projects, because positivists like Hart are engaged in modest conceptual

---

[4] There have been jurisprudential disagreements well before Hart came along, of course. For the purposes of this dissertation, I take as a rough and reasonably defensible position that contemporary general jurisprudence begins with *The Concept of Law*.

[5] Leiter (2018:8); Leiter (2011:666).

[6] Khalidi and Murphy (2021:4, 11-12).

[7] Marmor (2018b:57).

[8] Dworkin (1982:169). The assumption traces back to Dworkin's views about interpretation. The reason why a chain novel imposes interpretive constraints on authors further down the chain, he thinks, is that if "too much of the book is seen as accidental, and too little as integrated in plot, style, and trope," then "it becomes a shambles and so a failure rather than a success." *Id.* The premise here—that novels must not be disorganized, incoherent shambles—requires its own justification, and it's not clear that a simple "it's interpretation all the way down" rejoinder can accomplish what's needed. In other words, Dworkin's analogy, in which judges are given "directions" to interpret existing law it its best light when they adjudicate, *id.* at 166-167, requires a theory of how the directions themselves are interpreted, not just (as many of Dworkin's critics focus on) what "best" means.

[9] *See* Moore (1985); Greenberg (2014).

analysis while antipositivists are engaged in immodest metaphysics, they are not engaged in the same enterprise. Himma concludes that Dworkin is best construed as presenting an error theory, and his views are for that reason less plausible than rivals because a theory of law can't be an error theory.[10] How is this conclusion warranted, however, without confirming whether or not the target should be susceptible to an error theory? It's not just the two main rivals that become ships passing in the night—Himma stacks the deck so that a (second-order) framework in which a (first-order) position like Dworkin's may be right doesn't even come into view.

In a way, this failure to engage is due to an elementary mistake. As Quine taught us, we sometimes must ascend to a semantic plane to find common ground on which to argue.[11] Broadly construed, semantic ascent involves at least two aspects: clarification of the topic or subject matter about which we make claims that aren't reducible to verbal dispute, and the manner in which we try to resolve these claims. We can take these aspects one by one.

3. The most basic, generally applicable metasemantic question in jurisprudence is, *in virtue of what do legal terms have the content that they do?* The question sounds like it is tailor-made for philosophers of law. In fact, however, legal philosophers have been insufficiently attentive to the principles of reference underlying it. In the 60-odd years since Hart jumpstarted jurisprudence, there have been only three real, sustained inquiries into how and why legal terms refer to what they do.[12]

In his 1996 book, *Objectivity in Law*, Nicos Stavropoulos argues that legal interpretation—the process by which we determine what legal statements mean—can be objective.[13] Rejecting the Hartian claim that legal concepts are "criterial" or conventional, Stavropoulos aims to deepen and further develop an alternative that bridges Dworkin's "interpretivism" with Kripke and Putnam's metasemantic referentialism. The book is sophisticated, insightful, and insufficiently appreciated in jurisprudence today. While Stavropoulos's goal is to show that there's a certain kind of metaphysical

[10] *See* Himma (2003), (2016).
[11] Quine (1953:16).
[12] The literature can be usefully divided into two groups. The core, agenda-setting discussion comprises Hart (1961); Dworkin (1986) and (2008); and Raz (2009). The second group can then be seen as a sharpening of the relevant themes from the first: Stavropoulos (1996); Coleman & Simchen (2003); Schroeter et al (2020).
[13] *See* Stavropoulos (1996).

determinacy to questions of legal interpretation, the lessons we ought to learn from Kripke and Putnam are much wider and deeper. (One source of this lack of appreciation, I think, is that Stavropoulos's book can be misunderstood as just another salvo in the long-running Hart-Dworkin debate.)

Stavropoulos's work was largely neglected until a 2003 article entitled *'LAW'* by Jules Coleman and Ori Simchen.[14] Coleman and Simchen argue that terms like 'law,' unlike terms like 'water' or 'gold,' do not require deference to expert views within a division of linguistic labor even if we accept referentialism for generally. I'll dive deeper into Coleman and Simchen's work later in Chapter 1, arguing that they correctly grasp the second-order questions that need to be ask but arrive at the wrong answers (in part due to their puzzling—and self-undermining—assertion that "whatever 'law' is, it is obviously not a natural-kind term."[15]).

Finally, in just the past few years, Schroeter et al. take up the question how to determine whether legal disagreements are disagreements about the same subject matter (so that the speakers on conflicting sides are samesaying), or instead fail to substantively engage one another.[16] Schroeter at al. focus almost exclusively on Dworkinian interpretivism, seeking to provide operational details on how samesaying can be assessed. As I discuss in Chapter 1, much of what Schroeter et al. argue can and should be generalized.

All three of these works offer lessons that must incorporated into how we theorize about law today. I'll try to do that in this dissertation. For now, suffice to say that it hasn't occurred. In this light, I agree with Schroeter et al. that jurisprudence "has far too long proceeded and developed in relative isolation, without the benefits of contributions and disciplining provided by the rest of philosophy and neighboring empirical disciplines."[17] Schroeter et al. are particularly interested in evaluating the antipositivist family of views, but positivism too has "gained traction and favor among many legal philosophers and legal theorists more generally without getting the kind of vetting, disciplining, and developments that philosophical positions often get."[18] This failure intersects directly with another.

---

[14] *See* Coleman & Simchen (2003).
[15] *Id.* at 21.
[16] *See* Schroeter et al. (2020).
[17] Schroeter et al. (2020:95).
[18] *Id.*

4. The most basic, generally applicable methodological question in jurisprudence is, *what type of inquiry is appropriate when we ask about the nature of law?* Here we find plenty of answers in the literature, but too often they rest on false dichotomies. Hart and most of his positivist followers advocate for an old-fashioned conceptual analysis;[19] Dworkinian anti-positivists insist the right approach involves heavyweight metaphysics, in the form of grounding or real definition.[20] Still others talk in even more sweeping terms, writing that legal philosophy is merely applied moral philosophy, or a set of data points for philosophers of language.[21] Finally, eliminativists argue that theories of law should tell us only what our legal concepts should be, normatively speaking, and that descriptive theorizing is impossible.[22]

In fairness, some philosophers (Raz in particular) have a more nuanced take, according to which we can consider how LAW relates to the nature of the underlying entity within a community. Raz believes that while conceptual analysis of law aims to elucidate its essential properties, it is part of "our common understanding of the law that its nature changes over time."[23] Commentators have long criticized the apparent tension in this view, but any such tension can be allayed. Conceptual analysis explicates a concept of law situated within a specific context—as I'll describe in Chapter 1, within a specific "representational tradition"—and identifies properties that law necessarily has according to the framework in which *that* concept operates (and in which it may be, as such, contingent). General jurisprudence can thus be at the same time "a parochial study of an aspect of our culture"[24] and an inquiry into the nature of certain constituents of that culture as applied to, or used as a set of existence conditions in, the study of other cultures that have their own parochial concepts.

---

[19] *See* Hart (1961); Raz (2009); Bix (2006); Shapiro (2011); Kramer (2018).
[20] Dworkin (1986), (2008); Greenberg (2008a); Rosen (2015).
[21] *Compare, e.g.*, Green (2003:1898) ("Philosophy of language generally has no jurisprudential consequences") *with* Neale (in Greenberg, 2013:218) ("A great deal of time and ink have been wasted in legal theory … [T]he good news is that the confusions and conflations that have given rise to spurious debates or produced the illusion of intelligible arguments are readily dispelled by doing some patient philosophy of language"). *See also* Dworkin (2011); Greenberg (2011); Hershovitz (2015).
[22] *See, e.g.,* Hershovitz (2015); Perry (1995).
[23] Raz (2009:25-27).
[24] *Id.* at 31-21.

To some legal philosophers such a view is incoherent;[25] others think it relegates jurisprudence to "banal descriptive sociology of the Gallup-poll variety."[26] As I'll discuss below, once we have a more precise sense of what we should be doing when we ask questions about the nature of law, these conceptions rest on a false choice, born of an oversimplistic sense of the available options.

5. To preview, Chapter 1 focuses on clearing the ground and setting out a basis for how to think about first-order jurisprudential issues. Its two goals are (1) to argue that the right methodology in jurisprudence fuses conceptual and metaphysical analysis, rather than picking or choosing between them; and (2) to argue that the metasemantic framework with which to deploy this methodology is rooted in the causal theory of reference. I am not directly interested in first-order disputes between internal and external legal positivism, or even the *ur*-debate between positivism and antipositivism. Instead, I am interested in the upstream question how terms like 'law' are endowed with content, so that when first-order disputes arise, we can engage with them productively.

As an initial example, consider the most familiar of legal concepts, CRIME. To be guilty of most crimes, the government must prove that a defendant performed the relevant action (*actus reus*) and possessed the relevant mental state (*mens rea*). However, in some jurisdictions there are crimes that do not require *mens rea*, at least as it is typically understood. These crimes fall into a strict liability punishment regime (think of statutes against drunk driving, for example, or statutory rape). The existence of strict liability crime is seemingly an empirical fact: if ever doubted, we can cite the fact that the prohibitions are right there in the statutes, available for anyone to see for themselves. But is this empirical fact of the right *sort*—is it responsive to people who doubt the existence of strict liability crimes? The concern is that the empirical fact's jurisprudential status is a consequence of a higher-order theory of legal content determination. That's where the real disagreement lies. We must be able to accommodate this concern.

To see why, suppose Bill lives in a jurisdiction with a strict liability punishment regime, *J*. Bill believes it is immoral for the state to punish a defendant who does not possess *mens rea*. Positivists

[25] *See, e.g.*, Hutchinson (2015); Priel (2015).
[26] Leiter (2007:177).

think Bill has only one option with respect to some strict liability law *L* in *J*: he must hold that *L* exists despite the fact that it is unjustified. Antipositivists can allow for a greater variety of options. On their view, it's open for Bill to hold that *L* is not a law at all—that what the statutes say (their communicative content) does not translate into *law*, even within *J*. If they opt for the latter approach, we've got not only a first-order disagreement about whether *L* is a law, but also a second-order disagreement about what sorts of facts count as indicative of law's existence—a disagreement about not the right application of some specific criteria but about the right selection of any specific criteria.

The latter sort of disagreement implicates questions about law's modal profile. To entertain it, the space of possibilities must allow for certain sorts of objections. In particular, it must include the resources to be able to evaluate claims about what law can possibly be, given some suitably specified set of parameters.[27] For example, Bill may want to argue that given the nature of law, strict liability crime is not a genuine possibility any more than, say, [[2] ∧ [not-2]] is a possibility in bivalent logic, or traveling faster than the speed of light is a possibility given the known laws of our universe, or free will a possibility given determinism, and so on. In each case, there is a move to be made such that the modal profile of the explanandum doesn't allow for certain positions to be taken—there are limits to variation. In the legal case, we need to accommodate the possibility that empirical facts about what statutes say may not be the full or even the most salient part of the story about what *grounds* law. (I'll say more about what it is to ground law in Chapter 2.)

To adjudicate the disagreement between antipositivists and positivists, Bill will want to assess not just their respective views about the existence conditions for laws in *J* but also the manner and propriety with which they arrive at their respective accounts of these existence conditions. This amounts to asking foundational questions about the metaphysics of modality within the legal domain. This is not due to some personal interest Bill might have in the subject. It is *required*, because the first-

[27] That is, we're interested in the modal profile of a specific explanandum, not explananda of the same general kind. Philosophers sometimes refer to the object of such inquiry as *de re* modal claims: claims about what specific things could have been like, not what general sorts of things there could have been. The idea is that for any explanandum, there is some degree of tolerance in how its constitutive properties may differ from what they in fact are before it becomes something else. *See* Dorr (2021). In the example above, the goal is to determine what *J*'s criteria could have been, not what just any jurisdiction's criteria could have been. An additional layer of complexity comes in because, setting the example aside, our interest in general jurisprudence is in legal content determination more widely. (Just how widely? I address that question in Chapter 1.)

order disagreement about *L* in *J* presupposes a higher-order premise: that the semantic value of the term 'law' is the same on both positivist and antipositivist views, so that the disagreement about the existence conditions for an instance like *L* is a genuine disagreement (what Dworkin sometimes calls a "theoretical" disagreement[28]). If, say, antipositivists believe what we are talking about when we ask whether *L* exists is whether a morally justified subset of our political institutions' output exists (as Greenberg thinks), and if positivists believe what we are talking about is whether a tiered rule accepted in a systematic way by legal officials exists (as Hartians thinks), we may be talking at cross-purposes. And if we are, we will need to determine which of these approaches is of the right kind.

In making this second-order determination, we will need to decide what factors to take into account, and how much weight to give them. It may be that Bill's pre-theoretical views about *L* carry a lot of weight, some weight, or none whatsoever. It may be that historically, the law always required a *mens rea* component, and only began to recognize a category of strict liability crime starting in the 19th century. Alternatively, it may be that there has been a category of strict liability crime as far back as we can go. We'll need to decide how much this history matters, or what difference it makes, and why. We'll need to make these determinations in a way that does not pre-judge what law is, and thereby illicitly favor positivism or anti-positivism in the setup to first-order inquiries. To manage all of these considerations, we need to a framework through which we can begin theorizing about law in a way that is principled, and more specifically, answerable to just the right kinds of desiderata for a debate in which we may disagree, substantively, about just about everything. This, in short, is what the second-order theory of conceptual grounding (CG) attempts to provide.

After the basic contours of the framework are set out in Chapter 1, the next two Chapters entertain and answer objections from two opposite sides. CG is metaphysically demanding, and so Chapter 2 discusses appealing deflationary objections. Deflationists question the need for CG by proposing that we can avoid (supposedly) mysterious metaphysical explanans and rely instead on (seemingly) straightforward historical or empirical tools; alternatively, they propose that the truth

[28] *See* Dworkin (1986). I tend to avoid this term because Dworkin's critics argue that it presents a misleading contrast with the manner in which positivists determine law's existence conditions, and how closely it relates to his "semantic sting" argument. *See* Shapiro (2012). To avoid taking sides on first-order disputes, I won't be doing much Dworkin-exegesis in this dissertation.

conditions for natural language sentences need not turn on our metaphysics, but can instead simply be guided or informed by it.

Chapter 3 examines objections from the other direction, by theorists who believe it is impossible to approach jurisprudential questions without bringing substantive, first-order moral values to bear. (This is a kind of "methodological positivism," not to be confused with substantive legal positivism.) Focusing on some of the better arguments for this idea, CG helps sharpen subtle distinctions in contexts of common law but also constitutional law, in which there is an increasing reliance on history as an arbiter of meaning . In answering these skeptical objections, I don't pretend to establish CG as a definitive, fully satisfactory methodology whose implementation will solve all of our jurisprudential problems—or even answer its most basic ones. But it is, I think, a promising start.

CHAPTER 1

Chapter Abstract: There are two structural problems with the way we think about jurisprudential disagreements today, one methodological, the other metasemantic. Chapter 1 shows how these problems are related, offers a framework with which to overcome them, and then sketches an extended example illustrating the framework's payoffs. In the framework, called conceptual grounding, we undertake a two-step inquiry into how first-order jurisprudential questions should be asked. Beginning with lessons learned from the causal theory of reference, we must appreciate how the terms used in asking questions about the nature of law gain the semantic content that they have—through a package of intention, ostension, and convention. We must then identify constraints on the possible candidates for this content, both in order to render the causal metasemantics practicable and on pain of talking past one another. These constraints amount to a balancing between deference to experts within a division of linguistic labor and answerability to the community of language-users whose representational traditions we are deliberating about, and which help narrow down our target explanandum. Once these desiderata are balanced, we can make progress on substantive disagreements about law's existence, content, and normativity using the insights of both conceptual analysis and metaphysical grounding, deployable both in general jurisprudence and in specific departments of law.

Section 1.1

The central question of analytic jurisprudence is, *what is law?* A series of familiar subsidiary questions flow from this question. However, no adequate jurisprudential theory can begin directly with the central question because it is multiply ambiguous. To sharpen it, we need both a framework—a set of parameters within which the nature and role of each of the question's components can be rendered precise, or at least principled enough not to beg substantive questions—and a set of tools with which to sharpen it.

My proposal for this framework is called conceptual grounding (CG). The tools employed within the framework will be described more fully as the chapter proceeds, but to preview, CG involves a two-step procedure. For any given topic or subject matter at issue (our explanandum), CG asks:

Step 1: How do we determine the concept(s) at issue when we discuss this topic?
Step 2: What is the nature of the content(s) of these concepts?

Both steps assume a few substantive ideas. For one, concepts are discriminatory abilities rather than meanings, so concepts and contents don't collapse into one another.[29] For another, we can inquire about our explanandum from a perspective that doesn't presuppose any one proper use of the term(s) that are supposed to track it. This is, at least roughly, a form of semantic ascent. Because legal philosophers are not interested in the history of linguistic items as such, the first round of sharpening the question is in rephrasing it as, what is it *to be* law?[30] This is a distinction between an object-level question (what is *x*?) and a meta-level question (what is the semantic value of the term '*x*'?).[31] As I'll explain in §3, while common, declaiming interest in history and etymology are serious mistakes, for a proper account of our explanandum must be constrained in important ways by history. How this is so will become apparent as the chapter proceeds.

As with any explanandum, we need some preliminary sense of our explanandum, or else we won't have a tether anchoring us to the motivations of the inquiry. Having the right toolkit is thus important for the meta-methodological project we are undertaking. Fortunately, we can begin with some ideas that are relatively uncontroversial. In this chapter, I'll identify a rough but serviceable toolkit with which we can continue sharpening the central question. The legitimacy of some of these tools will be necessarily bracketed (to question them all would take us too far afield); others must be squarely evaluated. Given the dissertation's methodological focus, the emphasis will be on Step 1 (in part because Step 2 is relatively more straightforward). We'll build CG, and entertain objections, as we go along.

We can divide a term's meaning into two components, its extension and its intension. The extension of a term is the set of referents (items, objects, entities) it applies to; its intension is, loosely speaking, its cognitive significance. The relationship between extensions and intensions is best understood as a kind of mapping, or correspondence, so that intensions are traceable rules for

[29] As opposed to frameworks in which concepts are abstract objects, such as Fregean senses. On the approach adopted here, contents stand to concepts as semantic values stand to linguistic meanings: that which is contributed to the truth conditions of sentences picking out a subject matter. For discussion, *see* Schroeter et al. (2020:79).
[30] *See, e.g.*, Haslanger (2020:244) ("[W]hen we ask 'What is X?'—not about a particular but about a type or a kind—usually a better way to put the question is: 'What is it *to be* X?'") (emphasis in original).
[31] *See* Schroeter (2015:419).

determining or generating extensions at a world.[32] In thinking about what intensions do, we come naturally to concepts. Usually thought to be either abilities or mental representations, the easiest way to think about concepts is functionally. To possess a concept, on this approach, is to have the ability to carve logical space in a certain way, distinguishing possibilities as distinct contents. The contents of concepts, in turn, are partitions of logical space.[33] For example, to possess the concept RABBIT is to be able to sort out rabbits from non-rabbits, or more broadly, to carve up how things are in a world rabbit-wise from how things are non-rabbit-wise. Over much of its history, the goal of jurisprudence seemed to be to do just this with LAW—to carve up the world in terms of when or under what conditions LAW obtains. As I'll describe below, however, this is an oversimplistic if not altogether mistaken approach.

Conceived as abilities, concepts are gradable. We in 2022 A.D. share the concept WAR with Charlemagne, but whereas he in 814 A.D. could only conceive of war on land and war at sea, we can carve up the world more finely, recognizing distinctions between land, sea, cyber, and nuclear war. In being able to partition the logical space taken up by WAR in more ways than Charlemagne could, we can represent the world in more ways than he could.[34] However, our greater representational capacities don't necessarily translate into greater accuracy—the notion of accuracy is relative to a set of interests, or goals, and our tools are only better or worse accordingly.

Because we can think of the possession of concepts as the ability to discriminate in certain ways, we can distinguish the study of WAR from the study of its extensions. The former is (roughly enough) conceptual analysis, a form of inquiry into the world as we structure it through our concepts. The latter is metaphysical reduction, or grounding, a form of inquiry less concerned about concepts and more concerned with the reality (if any) underlying them.[35] Importantly, choosing to engage in

[32] To put it less loosely: the semantic value of an expression is an intension that assigns an extension to the expression at every possible world. For example, the extension of the term 'rabbit' will be the set of rabbits hopping about in the world; its intension will be a rule experts debate and laypersons apply in sorting and classifying objects in the world. We can specify extensions and intensions for names, predicates, sentences, and so on.

[33] For discussion, *see* Yalcin (2016); *see also* Rawls (1999).

[34] *See* Haslanger (2020). On this view, possessing a concept is not just a matter of "what you can articulate, but how you respond to and coordinate with others in your environment, that is, how your capacities for attention, categorization, interpretation, memory, language, inference, affect, and the like, are marshalled for the purpose to coordinating (and refusing to coordinate) with others in response to particular kinds of information." *Id.* at 240.

[35] As Kenneth Himma notes, the first approach "gives us insight into what the world is like as we view it through a lens defined by the language we adopt to describe and make sense of our experience," while the second focuses on "the nature

either conceptual analysis or metaphysical reduction seems to be path determinative, identifying one sort of explanandum rather than another.

For example, on the one hand, asking what is it to be water or gold is to ask about the nature of mind-independent phenomena. After an initial fixing of our topic (more on that in §1.2), there's only limited value in consulting linguistic practice or *a priori* intuition. Lay reflections give us a flavor for how we use, or are disposed to use, 'water' or 'gold', but they don't tell us what water and gold are. What we need, instead, is the real definition of the relevant objects, properties, kinds, or relations.[36] (How do we know real definition is called for? Because our inquiry must be revisable, —at the very least, it must to allow for possibilities like deflation or debunking, or a systematic error theory. Conceptual analysis does not have this capacity.[37])

On the other hand, sometimes there *is* value in consulting linguistic usage, dispositions, and judgment. In asking when to use terms like 'war' or 'quarterback,' we are asking about mind-dependent artifacts, practices, or conventions. The relevant non-linguistic features of reality are picked out by stipulation—there is nothing to the property *being a quarterback* above or beyond our conventions, so the correct use of the predicate will correspond to these conventions.[38] *A priori* methodology is not only warranted but in fact needed to fix the boundaries of the kinds our terms purport to track. But here, too, there's danger of path determinacy: in certain cases, our explanandum is neither constituted by what we say nor so mind-independent that it floats free of our linguistic practices. So while conceptual analysis effectively forecloses certain conclusions (we could not *all* be wrong about what it is to be a quarterback), that's a problem if we need to preserve the possibility for more complex

---

of a thing as it really is, independent of any conceptual framework that we impose on the world." Himma (2019:32-33). The distinction maps onto an older one Frank Jackson described as "modest" and "immodest" theoretical inquiry, respectively. Jackson (1998:30-31). For discussion, *see* Braddon-Mitchell (2015).

[36] Real (as opposed to nominal) definition is a term of art conveying metaphysical inquiry. *See* Rosen (2015). I return to this tool in Chapter 2.

[37] As Rosen writes, when we study the relevant phenomena, "we are happy to entertain analyses cast in terms that fully competent masters of the analysandum need not grasp. We have no conception of semantic or conceptual analysis on which this makes sense; and yet our analytical questions do make sense. And this suggests our questions are not semantic or conceptual questions after all, but rather metaphysical questions that call for definitions of properties and other aspects of mind-independent reality." *Id.* at 189. As I'll argue, theorists like Rosen are right to call for real definition, but go too far in rejecting conceptual analysis.

[38] Some such phenomena are mind-dependent in more subtle, less stipulative ways. For example, 'recession' tracks features of the world that can obtain without anyone realizing that they do.

terms, like 'witches' or 'morality' or (you guessed it) 'law.'[39] This potential tension can lead us astray. That is exactly what has happened in general jurisprudence over the last few decades.

Section 1.2

For over six decades, orthodoxy has been that we must employ conceptual analysis to better understand law. Some theorists subscribe to this orthodoxy implicitly, while others do so by explicitly adopting one method as defined by its rejection of the other, tracking the distinctions we just made in §1.1[40] Hart, for instance, emphasized that his target was the concept LAW,[41] and his most of his positivist successors followed suit.[42] For a long time, this was the prevailing methodology in legal philosophy. Brian Bix summarized the state of play when he noted that "most of the influential theories about the nature of law are conceptual theories."[43] Likewise, Liam Murphy observes that "the traditional view has been that we approach the problem of law by providing an account of the content of the concept of law."[44]

Recently, however, the pendulum has swung in the other direction. Some legal philosophers explicitly reject conceptual analysis, while others argue that it is inappropriate for most if not all philosophical inquiries. Andrei Marmor is emphatic that jurisprudence is "not an exercise in conceptual analysis" and instead is about "the nature of things."[45] Less emphatically, Gideon Rosen suggests that the only way to understand questions about justice and courage and the like is to

---

[39] Tom Nagel foresaw this when he commented, in passing: "The truth [in ethics] could not be radically inaccessible in the way that the truth about the physical world might be. It is more closely tied to the human perspective and the human motivational capacity because its point is the regulation of human conduct." Nagel (1986:186).

[40] *See* Bix (2007:2) ("Many prominent modern legal philosophers . . . have argued that theories of law do or should focus on the concept of law. Conceptual analysis has been central to analytical philosophy."); Leiter (2010:250) ("Modern legal philosophy has, like most of twentieth-century Anglo-American philosophy, employed the method of conceptual analysis."). Raz (2009) is perhaps an exception to the orthodoxy. But—tellingly—his views have been met with dismissal in some quarters and outright derision in others. *See, e.g.*, Hutchinson (2010); Tamanaha (2017); Nye (2017). I think Raz's views are more compelling than his critics realize, but this isn't the time or place to defend them. One additional recent departure from the orthodoxy is Plunkett & Shapiro (2017).

[41] Hart (2012:213). Most of Hart's commentators agree this signals "the analysis of concepts [that are] at the heart of his project." Plunkett & Shapiro (2017:53).

[42] *See, e.g.*, Kramer (2018:4-5).

[43] Bix (2007:5).

[44] Murphy (2014:78).

[45] Marmor (2013:209, 216); *see also* Marmor (2019).

understand them as questions about real definition that are not about words or concepts.[46] Philosophers interested in higher-order questions of metalinguistic negotiation converge on a similar point, proposing that the best way to understand the debate between positivists and antipositivists is not through a "descriptive" inquiry into "the current meanings of words, but rather a normative one about how we should formulate theses for the purposes of philosophical inquiry."[47]

But while the shift away from conceptual analysis is a step in the right direction, it goes too far. Analysis need not be of a reductive form, in which we break down complex targets into simpler elements, or formulate biconditionals that provide for necessary and sufficient conditions. Analysis can be of a looser, more "elucidatory" kind, in the vein P.F. Strawson recommends, relying on retraceable networks or non-vicious circles.[48] There's no need to throw the baby out with the bathwater—analysis can still have a place in our methodology.

That said, even a broader, more conciliatory approach cannot suffice to deliver the sorts of verdicts jurisprudential questions require. While the backlash against reductive analysis goes too far, its basic point is correct: at some point, we must set our sights on the *nature* of our explanandum. We must provide an adequate metaphysics of law—of what it is to be law, and not some other, loosely similar phenomenon, like morality or conventions. More sharply still, the goal is to assess *de re* modal claims about *our* law—not some law that could have existed in some other world or along an alternative timeline, but the law we in fact have. That is the object over which we debate, the forms it can take, the properties it can possess, and the extent of permissible variation along these axes possible without a change in the explanandum.[49]

The orthodox binary not only rests on a faulty premise; it also leads to impasse. This is evident in the literature. For instance, Hillary Nye argues that law is too contested a field in which to adopt a

---

[46] *See* Rosen (2015:189). It's worth reiterating that Rosen is not as explicit as Marmor, and I doubt he would draw the distinction this starkly, if posed this sharply.

[47] Plunkett and Wodak (2022:3-4).

[48] Network analysis is a case point. Connections are drawn through nodes passed over more than once, but in a fashion that is nonetheless elucidating. *See, e.g.,* Strawson (1992:19-20) ("the general charge of circularity would lose its sting, for we might move in a wide, revealing, and illuminating circle").

[49] *See* Dorr et al. (2021:11). As Dorr et al. put it, *de re* modal claims assert what specific things could have been like, not just what general sorts of thing there could have been. For example, the Great Pyramid located in Giza could have been somewhat smaller than it is. But that is a different claim than the claim that there could have been some pyramid that is somewhat smaller than the Great Pyramid actually is. A *de re* modal claim about the Great Pyramid implies that there is something that could have been somewhat different than it is.

metaphysics-first approach: "metaphysics must itself have a methodology," she writes, because any other alternative will be epistemically unwarranted.[50] In contrast, Kenneth Ehrenberg insists we first establish "what kind of thing law is, and then develop a methodology to investigate it" in order to develop "a deeper understanding of law's metaphysics and see how that leads to a methodology."[51] We seem to be left with a chicken-or-egg conundrum.

To be fair, some legal philosophers have been aware of this problem from the start. One of Dworkin's central claims is that for positivists LAW is "criterial," whereas on a better understanding the concept should be "interpretive."[52] But what follows (and what Dworkin was not sufficiently clear on) was that we then effectively have two concepts, LAW_1 and LAW_2, in play, and not a genuine disagreement. If we add the concern Nye and Ehrenberg raise, the impasse becomes paralyzing. What we need is a systematic, principled explanation of how we achieve samesaying—as Schroeter et al. put it, guaranteed rather than *de facto* sameness of subject matter—so that we identify one concept, LAW, and then discuss its various features or properties.

This endeavor is part of Step 1 in CG, whereby we identify the presuppositions that allow us to confirm that a community's members are samesaying when they disagree with one another when they talk about 'law.' Philosophers believe this can be done through one of two ways: through a matching model of conceptual competence, largely identified with a Fregean metasemantics, or a relational model of conceptual competence, identified with the causal metasemantics of Kripke and Putnam. I opt for the latter. The next sub-section explains what this choice amounts to.

Section 1.3

Consider a proper name like 'Michael Jordan' or a common noun like 'chair.' Suppose that a theoretical term like 'law' can be studied in the same way these terms can (we'll return to this assumption later). Let *t* be any such term. Some philosophers begin with the question "what does *t*

[50] Nye (2019:249).
[51] Ehrenberg (2016:120).
[52] *See* Dworkin (2011:6). While Dworkin has a lot to say about the difference between these types of concepts, and how the interpretive conception leads to his preferred antipositivism, he does not say much about how to evaluate between the two.

mean?" and immediately transition into their preferred theory of *t*.[53] This is not a good idea. Not only is there a use/mention ambiguity for *t*, given the nature of the question—we want to know where to even begin theorizing—the word 'meaning' itself is loaded.

This is where the toolkit discussed earlier is especially helpful. The distinction between extension and intension allows us to ask in virtue of what *t* is endowed with content and then look for a rule with which to move from the multiply ambiguous "what does *t* mean?" to "what is the reference of '*t*'?"[54] Of course, we're not interested in answers to this question for any given *t* (that would be to provide a first-order semantic value for *t*), but rather its nature and status—how we might answer it without making impasse-inducing commitments downstream.

The best way forward is through a conjunction of two metasemantic theses, one negative and one positive. The negative thesis is that semantic facts are not determined solely through facts about speakers' mental states. Rather, the meanings of terms and even the identities of concepts exist independently of what any one individual knows about them, external to their inner states. In this way, intensions and extensions don't supervene only on mental states.[55]

The positive thesis is a complement to the negative. Intensions and extensions are determined, in large part (intramural disputes will arise concerning what 'large part' amounts to, but set that aside for now) by environmental factors, such as facts about the speakers' linguistic community, patterns of use, and communicative conventions. Call the conjunction of these positions referentialism.[56] In practice, referentialism leads to a kind of externalism whereby an individual's discriminatory capacities (or, what comes to same thing, conceptual competence) can extend beyond the knowledge he has at hand. It is, in a sense I will describe in §1.4, *deferential*.

Within this metasemantics, the contents of common nouns and proper names track extensions based—again, in large part—on how the terms are first tagged or dubbed ("baptized," as

---

[53] *See, e.g.*, Marmor (2013).

[54] As noted in §1, this reformulation is important because some answers to the object-level question (contextualism, relativism, some forms of error theory) can't be expressed in object-level terms.

[55] Cappelen (2018:63).

[56] *See* Kripke (1980), Putnam (1973), Donnellan (1970). While some philosophers object to various features of referentialism, most try to accommodate its central ideas through a hybrid that emphasizes a descriptive component (*e.g.*, Jackson (2010)) or a different causal component (*e.g.*, Evans 1982, 1985). In short, the majority view is that some form of referentialism is the right way to go. *See, e.g.*, Recanati (2012); Dickie (2015).

Kripke might say). In contrast to definite descriptions, terms tag referents through a complex, causal process of ostension. An object x is first dubbed with a name, N. If successful, that dubbing is understood as such by fellow language users. Subsequent users then pick out x when they utter N because their uses of the name form links in a causal chain stretching back to the initial dubbing. Users down the chain inherit their reference from users earlier in the chain, and in this way, the reference relation is heavily influenced by the environment as well as social facts about the intentional dubbing, conventional deference, and causal linkage.

We can understand the relata in causal chains in different ways. Kripke emphasizes the act of dubbing itself; Evans insists that the causal connection is not between the dubbing and subsequent use but rather between the referent and the body of information associated with it (this helps resolve thorny questions of reference shift in peculiar cases), so long as the referent plays a dominant causal role down the chain of use. While I favor Kripke's original conception, either one can play the metasemantic role needed within CG (filled out in §3, below). What matters is that terms are endowed with content based in large part on the causal origin of their use, not atemporal, conceptual fit with a body of descriptions (though as we'll see in §3, there is a type of conceptual fit that does need to be considered—I'm not defending a purely or exclusively causal metasemantics).

While Kripke first sketched his picture as applying to proper names, referentialism can extend well beyond them. Putnam laid out basic principles for the causal tagging of predicates along the same lines using what Richard calls "the three Ps": paradigms of what predicates apply to, principles for projecting from the paradigms to extensions and intensions, and a pattern of deference among language users that helps establish the projective principles.[57] Building on Kripke's suggestion that these terms act as rigid designators, LePorte has provided a compelling account whereby terms for all kinds of properties (heat, color, *panthera tigris*) act as property designators—effectively, as singular terms.[58]

In contrast to the descriptivist model, the semantic contents of terms are heavily determined by extensions rather than the other way around (where speakers' views about content determine

[57] *See* Richard (2019:109).
[58] *See* LaPorte (2013). Properties themselves are conceived as functions from possible worlds to sets.

extension through the application of criteria in the form of definite descriptions, or associations). For example, what counts as 'gold' under descriptivism is whatever satisfies a set of severally necessary and jointly sufficient conditions supplied by a prior conception in the minds of the speakers. According to referentialism, in contrast, 'gold' picks out the worldly item tagged by its dubbing, or now stands in the same reference relation.

We can approximate this relation (discussed in more detail in Chapter 2) with something like (R). For a referent *x*, the term *t* applies to *x* just in case *x* bears a similarity relation, ≈, to a paradigmatic sample Γ ostensively designated with a token in a dubbing event, or baptism ("this").

(R) $t(x) \leftrightarrow \approx(x, \text{“this}(\Gamma)\text{”})$[59]

On this view, roughly speaking, the paradigmatic sample(s) Γ associated with *t* (which are part of the extension) and the ≈ relation determine an extension; the intension (that is, the rule that associates extensions with worlds) of the term is determined by that extension, insofar as the extension at a world *w* is always what at *w* bears the ≈ relation to the baptized extension. For terms like 'law,' the mechanism is most plausibly understood as a property designator, expressible through theoretical identity statements.[60] (R) is an idealization, but it nicely highlights several noteworthy features of how causal reference works.

First, *t* applies to all and only those items that bear the ≈ relation to whatever is indexically picked out in the dubbing. For example, where $\approx_{NK}$ specifies the natural kind relation, 'water'$(x) \leftrightarrow \approx_{NK}(x,$ "this(H_2O)") tells us that 'water' applies to an item *x* just in case *x* is of the same natural kind as the sample individuated by ostension to H_2O. Γ can be simple or complex, single or a package, concrete or abstract. We can substitute $\approx_{SK}$ for social kinds if what we're interested in are artifacts, $\approx_{F}$ for functional kinds, and so on. As I'll explain further in §3, the reference picked out can be a highly abstract kind or property attributed in judgments ('that room was hot'; 'that action is tortious') embedded within a complex; there is no reason to believe (R) is limited to the idealized environments of natural kinds typically used to introduce it once we clear away intuitive but misguided objections.

[59] (R) is a variation of Putnam's $same_L$-ness relations. *See* Putnam (1973); Simchen (2007).
[60] For discussion, *see* LaPorte (2013:7-9).

Second, (R) illustrates how the content of a term like 'water' is the extension itself, individuated by virtue of the fact that it bears the $\approx_{NK}$ relation to Γ. Γ's being a *paradigmatic* sample is crucial: just as it would be wrong to think that the extension of 'water' is fixed by descriptive satisfaction conditions, it would be wrong to think that the extension of 'water' is fixed by our latest or most sophisticated scientific theory. Rather, its extension is fixed by the nature of the sample, whatever it might be.[61] So it's not that (R) tells us what the content of *t* is; it gives us its extension.[62]

Section 1.4

How might (R) work for terms like 'law'? The full answer unfolds through this chapter, but a rough sketch can hold us over. Anthropologists tell us the earliest norms we might now call 'law' date to around 2100 BCE, when the Mesopotamian leader Ur-Namma set down a system of 30-odd casuistic rules that, from directing punishment for crimes like murder to regulating social activities such as marriage and agricultural disputes, constitute "the beginning of the rule of law."[63] The hallmark of these rules—distinguishing them from what had come before—was that they established novel ways of regulating society that did not depend on claims of or to divinity: Ur-Namma's laws were published for all (not just kings or priests to see); they were accessible to, and usable by, common folk to hold everyone, including Ur-Namma's own officials, to account. Upon introduction of these casuistic rules, "anyone could quote a law," Pirie writes; "the legal form claimed an authority of its own."[64]

Using Pirie's claims as a launch pad (her reporting on Mesopotamian norms is the result of a 10-year collaboration of legal historians and anthropologists at Oxford), we can suppose 'law'(x) ⟷ ≈(x, "this(Γ)"). Γ is the set of essential properties (about which more in Chapter 2) distinctive enough of Ur-Namma's 30-odd rules that anthropologists identify them as the first recorded instances of law. Through a wide variety of extensional change over the millennia, it's not unreasonable to believe a

[61] Putnam spells out the importance of indexicality in (R): "The word ['water'] does not change its meaning every time we discover a better account of the nature of water. The meaning and reference of 'water' are not what has changed; it is our knowledge about water that has changed...To be water is to be the same liquid as *this*, where *this* can be (almost) any of the paradigm examples of water." Putnam (2013: 199) (emphasis in original).
[62] As John McDowell puts it, "what matters is not the object's fitting some specification in the content of thought but rather its standing in some suitable contextual relation to an episode of thinking." McDowell (1998a:162); *see also*, Simchen (2007: 222-23).
[63] Pirie (2021:17-21).
[64] *Id.* at 21-22.

single intension underwriting these instances, connecting U.S. law to English, Roman, canon, medieval, and Greek law, successively, all the way back to the "Ancient Constitution" that was thought to be "a unitary tradition that permitted one to speak, as Americans do today, of a singular constitution."[65]

This sketch leads to a natural worry, however. If the content of a term tracks facts about the external environment going back into "the mists of time" (as legal theorists refer to the origins of common law) rather than speakers' mental states, how do we manage to refer when we don't have a grasp on these external facts? Putnam provides the canonical answer, worth quoting more fully. The need to speak determinately despite a lack of knowledge about the nature of one's topic, he writes,

> engenders a division of linguistic labor. Everyone to whom gold is important for any reason has to acquire the word 'gold'; but he does not have to acquire the method of recognizing if something is or is not gold. He can rely on a special subclass of speakers. The features that are generally thought to be present in connection with a general name—necessary and sufficient conditions for membership in the extension, ways of recognizing if something is in the extension, etc.—are all present in the linguistic community considered as a collective body; but that collective body divides the labor of knowing and employing these various parts of the meaning of 'gold.'[66]

The division of linguistic labor signals a kind of deference implicit in our use of language as a communicative tool. Laypeople can speak determinately when we use general terms because while we have incomplete understandings of the items they pick out, when we refer in non-ostensive contexts, we defer in our usage to experts.

Deference comes in degrees, and can be understood along multiple dimensions. Insofar as possessing a concept is a matter of having the capacity to identify extensions, we can be deferential either in having to fully rely on others in some instances but not others, or in always having to rely on them. For example, I can tell that a watch presented to me by a street vendor on Broadway is not

---

[65] Goldberg (2005:536). Goldberg traces this "unitary tradition" to medieval times, but notes that English legal theorists from the 1600s "treated foundational documents such as Magna Carta as declaratory rather than constitutive" such that the "Ancient Constitution" was thought to "reach back into the mists of time." *Id.*. Historians like Thomas McSweeney concur, noting that the 13th century authors of *De Legibus et Consuetudinibus* (*On the Laws and Customs of England*), the foundational text of Western common law, drew on Roman and canon influences to identify a body of norms—and courts—for the regulation of society distinct from royal decree or divine prerogative. *See* McSweeney (2019:17-20). *See also* Iurlaro (2021) (writing that Latin and Greek legal texts help form the cultural identity of early European law).

[66] Putnam (2003:227-28).

actually gold because of its price. If presented with a sophisticated duplicate by my friend who claims he got a great deal, I may need to defer to an expert. The expert, in turn, may rely on still other experts (who know, for example, that gold doesn't rust, and can subject the watch to an appropriate test for that). In each case, we are committed to identity statements or ascriptions through a deferential operator, prepared to be corrected by the corresponding experts (regarding what prices to expect for what type of watch in a given market, how materials behave under certain conditions, and so on).

We can formulate the deferential operator as $R_a()$, binding terms in order to yield complex expressions like $R_A(t)$.[67] In general, $R_a(t)$ is a function from the context in which a speaker tacitly invokes another, A, to the content t has given the character that A attaches to t. Its content is the content that A attaches, or would attach, to t in a context of utterance. Seeing how $R_A(t)$ works helps highlight referentialism's virtues (and in particular, its social dimension) in contrast to descriptivism in scenarios that present more complex explananda than physical objects. For example, suppose Alice, a first-year law student, attends a course on defamation law in the morning and at lunch afterwards says "I think today's article in the *Times* was slander." Her use of 'slander' is deferential, intended to pick out the referent Alice's professor introduced that morning even if her grasp, were she to articulate it through a description such as 'false written statement that injures another's reputation,' better fits some other concept (in this case, LIBEL). In effect, $R_{PROFESSOR}$('slander') functions like quotation marks do, mentioning a reference to the terms used by Alice's professor.

Use thus involves two, nested intentions. Alice means to refer to libel because that is what her professor did. If informed about her mistake, Alice will confess error and thereby better conform to her own intended use: she had an incomplete understanding of defamation, and when challenged—when pressed for the properties that make the cognate concepts what they are, and not some other, perhaps related concepts—the use of terms in a given context falls back to a deferential base. Schematically, the externalist component of referentialism thus has it that concepts like slander and libel are given by reference to terms whose referents are determined by the features of the world external to speakers, picked out by experts.

[67] For discussion, *see* Recanati (1997) and (2000).

But deference conceived in this way doesn't require possession of DEFERENCE itself by speakers who think and talk in accordance with it. The idea behind the division of linguistic labor is that we defer more or less subconsciously. Rooted in what some philosophers call a "consumerist" picture of language, deferential use is passed down in links from user to user, tracing back to dubbings accomplish by "producers" of the terms in a given context.

The deferential character of this linkage is so robust that speakers can successfully refer without almost any grasp of the nature of their referents, operating with a kind of directly referential quasi-quotation. To use a shopworn example, suppose Alice goes to the doctor complaining of a pain that the doctor diagnoses as arthritis. Even if Alice has no idea what arthritis is—had never before heard the word—she can return from her visit and remark to her friend, "I have arthritis," using that sentence to express the proposition that she has arthritis. Alice uses 'arthritis' determinately—and thus has the concept ARTHRITIS—in virtue of her intentionally consumerist use of R_{DOCTOR}('*arthritis*').[68]

Section 2.1

The looming concern with (R) is that terms for abstract phenomena like law don't—*can't*—refer in the same way terms for natural kinds like water or gold do. (R) lends itself to a telescope-like model in which we peer through acts of ostension to objects in the environment the telescope is directed at, and we then decide what the nature of these objects is. But phenomena like law are not concrete items we can literally point to. If there's nowhere to point the telescope, what use is it to have one? One aspect of the concern is that there's too *little* information to work with, so we can't determine where to point the instrument; another is that there's too *much* information, so anywhere we point there are too many eligible candidates for reference.

There are a few ways to flesh out this concern. In one sense, it is a manifestation of the *qua* problem; in another, it's a version of a more global skepticism about reference associated with Quine's

[68] Kaplan gives an an even better illustration in a passing footnote on the implausibility of the descriptivist alternative. The entry under 'Ramses VIII' in the *Concise Biographical Dictionary* is: "One of a number of ancient pharaohs about whom nothing is known." Kaplan (2007:246). *See also* Kaplan (1989:602). Kaplan contrasts "consumerist" use of language with a "subjectivist" conception in which we assign meanings to words that are available to us as empty vessels—where "what the language community makes available to each of its members is an empty syntax to which each user can add his own semantics." *Id.* at 600-01.

inscrutability thesis.[69] In this section I address the *qua* problem, arguing that it is less debilitating than its proponents make it out to be. I bracket Quine's objection and relegate his concerns to a footnote, in part because it's not specific to referentialism (it's an objection of a much more global kind, applicable to all attempted attributions of cause in the face of causal overdetermination) and in part because what I say in connection with the *qua* problem can go at least some way towards alleviating concerns about inscrutability, at least by indicating that there are resources with which to soften its bite.

The *qua* problem asks, *how do we discover in virtue of what a term is grounded qua-one-kind and not qua-another?*[70] The worry is intuitive and immediate. A rabbit scurries by. Alice points to it, uttering "lo, a rabbit!" If the conventions we've described are in place, (R) tells us we are to apply 'rabbit'(x) ⟷ ≈(x, "this(Γ)") so that other instances of Γ can be referred to using 'rabbit' (as well as cognate terms depending on the level of sophistication with which the community specifies ≈). But, the *qua* problem notes, Alice's exclamation may well have been caused not by the rabbit *qua* rabbit (where Γ = rabbit-hood) but by its nose, or its ears, or by a time-slice of it. We can multiply possibilities as far as the imagination allows: perceptual contact with the rabbit could have been mediated by the fact that it occurred on a sunny day on which the peculiar shadow elicited Alice's utterance. We don't know how to pick out the true cause of the utterance, and thus what to place into the slots for Γ and ≈ within (R).

A first cut at solving the problem lies in introducing recognitional capacities, conceived as projections on behalf of the baptizing agent active when the baptismal action is performed. These projections are categorial constraints that help individuate x as a token of the type to which t is intended to belong. As Devitt and Sterelny propose, "the grounder [of the term t for x] must, at some level, 'think of' the cause of his experience under some general categorial term like 'animal' or 'material object.'"[71] Descriptive elements thereby enter the picture, but are subsumed within what is still largely a causal relation. Thomasson's reliance on "frame-level application conditions" is similar: to ground x

[69] I'm also not going to distinguish Quine's arguments "from below" and "from above"; the general thrust is enough for our purposes.
[70] *See* Devitt & Sterelny (1999:254).
[71] *Id.* at 30-93.

as *t* in virtue of being Γ, we draw on sortal or categorial concepts, frame-level because they are conceptually relevant to the respect in which *x*'s reference in virtue of its being Γ is established. For example, if I try to ground the term 'dolphin' for some *x* located near my boat, my attempt to ground the reference may fail if all that has perturbed the water near my boat is a clump of seaweed. Although causally relevant, *x* is not an animal, and thus doesn't fall under the frame in which (R) is supposed to be operating (in this case, using a categorial like ANIMAL).

Unfortunately, this move won't suffice. The *qua* problem is an epistemic challenge, not (or at least not only) a metasemantic one. Even if we suppose that reference is established through a baptismal act, we cannot know the referent of the term used in the act because it will almost always fall under many different kinds or categories.—as Richard puts it, "causal relations run in packs."[72] The speaker uttering 'rabbit' may well possess a sophisticated set of frame-level application conditions, but they will likely be overdetermined, and we won't know how to discriminate among them.

Philosophers have tried to avoid this result in a number of ways. Stanford and Kitcher posit that when a term is introduced, it tracks a cluster of properties that together form an inner structure giving rise (causally) to the referent the term picks out. The baptizer does not have exact knowledge of these properties, but through trial and error, we can make reasonable generalizations that rule out certain candidates and rule in others.[73] Azzouni, similarly, appeals to the depth and richness of the causal relations at work in our thought, talk, and action.[74] We don't look at any one act of ostension when we reverse-engineer the identity of a referent; instead, we situate dubbings within the broader history and interactions between the agents and the candidate targets, foregrounding the actual or dispositional aspects that best explain our behavior systematically and diachronically.

The basic move here is appealing. Within CG, (R) isn't supposed to deliver the content of a term in isolation, as though a single person goes out into the world and names the rabbits and dolphins she encounters, with everyone else following at some distance behind her, observing and taking notes along the way. Naming conventions are dynamic and multi-faceted; they involve interlocking practices that must fit together in order for reference to be stable and successful over time. More concretely,

[72] Richard (2003:12).
[73] *See* Stanford and Kitcher (2000).
[74] *See* Azzouni (2003:202-205).

we don't just see rabbits scurrying about and name them when they do. We capture them, cook them, keep them as pets; they figure in stories and artwork; they are semantic values in discursive structures of thought and talk. In order for all this to be possible, our terms must track the very same Γ across cases, unifying our discursive practices in intelligible patterns. This is a kind of transcendental argument rather than a deductive one: our behavioral and discursive practices fall into a network we can make sense of, or find patterns in. For that to be possible –and we know that it is—it must be the case that there is some degree of referential determinacy.

But even this enriched picture won't fully resolve the problem for subject matters like law. To one degree or another, the move philosophers like Devitt and Sterelny or Azzouni rely on involves descriptive elements. As the former explicitly note, the way to overcome the *qua* problem is to extract the relevant Γ that *x* possesses and that *t* is supposed to tag by appeal to the "mental activity" of the initial baptizers that "determines which underlying nature of the samples is the relevant one to a grounding," where that nature is "picked out by the descriptions associated with the term in the grounding."[75] In law, however, we fundamentally disagree about which descriptions *should* be associated with the corresponding terms. The resources brought in to solve the *qua* problem are elements of the contested claims we are trying to assess through a framework like CG.

To see this, consider a legal analogue to Quine's original case. A society seems to conform to a norm *N* whereby individuals are punished by the state if they enter private property without authorization. Theorists observe *N* in action for years, taking all sorts of historical and social facts into account, and then say of *N:* "that's a type of law, namely, trespass." Using (R), this comes to:

[75] Devitt & Sterelny (1999: 92). To the extent Azzouni's proposal is not hostage to appeals to description, it is exposed to the global inscrutability thesis associated with Quine. Briefly, Quine's challenge ratchets up the indeterminacy of reference by pointing out that any proposed candidate for Γ can be seamlessly replaced by another, equally consistent with the behavioral evidence of stimulus meaning—for example, 'undetached rabbit part' for 'rabbit.' While it seems that the inscrutability problem is also an epistemic challenge, Quine intends to go much further. for on his view there *is* no one reference relation. Given the totality of the data we must make sense of, reference is fundamentally indeterminate. Everything is part of theory, and there is no outer boundary to immune to revision. But Quine's claim is not that our terms *never* refer, only that they do relative to a purpose or interest. It may be that all we have is stimulus meaning relative to one language without successful (that is, determinate) translation into another, but it's also reasonable to provide for reference relative to that one language so long as we're modest about its reach. *See* Quine (1960:68); *see also* Quine (1981:20). There are of course other ways to resist Quine. His arguments rely on his own rather sparse view of what counts as a legitimate tool with which to determine reference, for example (such as verbal behavior), or that theories of meaning must be constructed from successful translation manuals. Any real discussion of Quine's views are well outside the scope of this dissertation, however.

'trespass'(*N*) ↔ ≈(*N*, "this(Γ)"). The Γ that constitutes the sample picked out as a paradigm of *N* must be individuated in part by the frame-level application conditions the theorists bring to bear. But the point behind CG is that we don't know whether these application conditions are the rights one to use (law-and-economics scholars will use a different frame than corrective justice theorists, for example). If, say, we hold that the dubbing for 'trespass' tracks a functional as opposed to a natural kind to slot into ≈ , we might be stacking the deck against antipositivists. What is salient in one frame will not be salient in another, so (R) will be susceptible to exactly the kind of question-begging it was brought in to avoid (albeit at a higher level of generality).

The upshot is that even if we can go some way towards reigning in the indeterminacy the *qua* problem exposes, causal relations can underwrite reference assignments only if there is something else that helps individuate the application conditions for reference. To the extent Step 1 in CG relies on referentialism, it is critically incomplete. The next section adds the needed element.

Section 3

As we saw in §2, applying (R) to a term *t* for a token *x* implies that that dubbing picks out Γ as a paradigm instance of (or perhaps part of) *x*. The *qua* problem presents a serious challenge to any such grounding. To overcome it, philosophers often introduce a minimal level of descriptive content, or frame-level application conditions, to isolate Γ among *x*'s other properties. The first cut at this type of solution founders because it's not robust enough to avoid collapse into a question-begging account of the frame-level application conditions. However, it does point us in the right direction. The purpose of supplying these conditions is to provide a series of guardrails for our grounding mechanism. What we need to do is flesh out how these guardrails work in a way that avoids begging questions when applied to first-order jurisprudential theories.

This can be done by adverting to another important feature of CG: constraints on candidate semantic values whose use, as such, is based on the need to justify the semantic values to the community of language users whose practices we aim to account for in the first place. To see how justificatory constraints work as guardrails, recall that we began this chapter by noting the relationship between the object-level question *what is t?* with the metalevel question *what is the the semantic value of 't'?*

While this shift helps us refine the former inquiry, deliberations about the latter must respect the fact that changes in substantive (object-level) commitments about *x* in the course of inquiry must not shift the meaning of the target, '*t*,' while also guarding against the possibility that '*t*' may shift its reference in different contexts of use. As Laura and Francois write, methods for answering the question *what is t?* "must get one closer to the truth about *t* on the original meaning associated with the token representation 't' used in posing the question."[76]

Responsiveness to object-level language users amounts to a particular type of justifiability. The correct semantic assignment for a term must be justifiable from the perspective of the community using the term in their practices (given suitable empirical information and cognitive powers). The body of data from which to draw parameters for proposed semantic assignments—from which to construct, as best we can, a set of frame-level application conditions with which to determine Γ—thus is the body of term usage to which that community is committed through its own practices. 'Usage' here is broadly conceived. As the Schroeters note, the constituent "representational traditions" are historically extended representational clues converging onto our subject matter. They include token uses of terms; cross-references to similar types; perceptual gestalts; functional roles; causal powers; physical characteristics; and others besides.[77] The notion of 'tradition', too, must be broadly conceived to indicate a wide swath of narrative forms and cultural artifacts, the means by which societies (often by contrasting themselves against others, as in the novels of a Dickens or Austin) provide clues about their collective social identify and its constituent parts.[78]

To make sense of these data as inputs into a legitimate rather than question-begging application of (R), we construe them as rationalizing constituents of a community's discourse. They have a point, or purpose; they are directed towards intelligible aims or commitments; they form part of a stable, identifiable social structure within which our explananda figure. We draw on the full range of interpretive methods to paint as rich a portrayal of these traditions as possible, using not just legal theory and history but also literature, sociology, anthropology, genealogy, and economic theory.

---

[76] Schroeter & Schroeter (2015:420).
[77] *See* Schroeter & Schroeter (2015:426).
[78] Tradition thus conceived has a historical sense as well as a sharp, analytic, prism-like capacity to reveal, through both narrative and non-narrative form, the formations of belief, attitude, and commitment constitutive of cohesive communities, or societies. *See* Eliot (1975); Said (1993).

To interpret representational traditions, we must incorporate the (sometimes inconsistent) beliefs and practices of the entire linguistic community. As the Schroeters observe, "when you deliberate about the nature of [some *x*], you'll take your answer to apply not just to your own '*x*' thoughts but to the '*x*' thoughts of everyone in your representational tradition. Your aim is to figure out what all of us have been thinking and talking about all along."[79] The fact that it's traditions *as a whole* that form a cluster of inputs anchoring our explanandum helps explain why it's not question-begging or circular to identify them as guardrails for the frame-level application conditions we impose in applying (R). Theorists assigning content to legal terms must account for the uses to which the term has been put; the ramifications of that usage; how it was recorded in contemporary registers; how its users understood it and what significance they attached to it; how it related to similar concepts, and so on.[80]

For example, the legal historian Elizabeth Kamali examines a wide array of medieval English texts, from writs and news reports to poems and plays, to determine the features of felony crime in English common law.[81] These inputs form part of the same historically continuous representational tradition in which legal theorists participate in their thought, talk and use of concepts like FELONY. So a schema like 'felony'(*x*) $\leftrightarrow \approx$(*x*, "this(Γ)") will be constrained in its individuation of Γ, in part, by what these inputs represent as falling under 'felony' or its cognates within the relevant times, places, and practices.

Implementing (R) in this way is not as difficult as I imagine many will first suspect, whether the Γ in question is conceived as an extension or (as in the legal case) an intension or property designatum. Suppose that Alice is ticketed for jaywalking and must appear in court. To defend herself, she can argue to the judge that there are many features of her conduct available at the time and place she was ticketed, and that it's impossible to know which of them are salient in the determination whether she's done anything to warrant being hailed to court. But that's not going to be a very strong defense. Given the context, we can safely conclude that what the police officer was picking out when

[79] *Id.* at 429 (emphasis added).
[80] In this light it becomes apparent why it's a mistake to suggest—as philosophers too often do—that we don't care about the etymology of a word or the history of a term. These considerations constrain the possible semantic values our explananda can have if a given theory is to comprise a plausible set of *de re* modal claims.
[81] *See* Kamali (2019).

he ticketed her was a particular package of features—that Alice was walking in a particular place, rather than that she was blinking in a certain way, or swinging her arms alongside her body in a certain way. In using (R), Γ may be a subset of the situation in which we use *t* to ostend to *x*, but we do that *all the time* when we make judgments about what is salient and what is not, for what purpose, using which terms in our linguistic toolkit.

Of course, there's no generally applicable algorithm with which to this. But given how many data points we have, it is plausible to assign weight and accord deference to semantic assignments based on how well a practice, usage, or other input measures up to the whole. For example, we know that the authors of seminal English texts thought of the early common law as "part of the same body of knowledge as Roman and canon law."[82] English jurists took themselves to be working within a single tradition, extending from Roman and canon sources to English common law. A few hundred years later, American colonists "claimed for themselves the rights of Englishmen and justified their revolution on principles of English constitutionalism,"[83] with texts like Blackstone's *Commentaries* forming both the template and the substantive source of legal education and practice.[84] Accounts of law inconsistent with these passages face a substantial, if not fatal, justificatory burden.[85]

Facts about English common law form a weighty part of the representational tradition within which to assess competing semantic values for 'tort' or 'crime' as these terms are used in the U.S. legal system, while facts about, say, Islamic Sharia or Italian *omerta* will not. The key is that allocations of weight are not a function of *philosophical* arguments, but rather derive from historical data about the inputs that help isolate Γ. At this stage of the overall inquiry, the work is overwhelmingly historical rather than philosophical; Step 1 in CG is, in large measure, a matter of properly allocating and distributing explanatory burdens between theory and history.

More can be said about epistemological best practices used to identify (R)'s guardrails, but what concerns us, for now, is the identification of representational traditions as the units of

[82] McSweeney (2019:103).
[83] Goldberg (2005:559).
[84] *See id.* at 560.
[85] Downstream concepts must also be consistent. If Step 1 in CG yields an account of MARRIAGE that excludes same-sex couples, for example, it will be difficult to argue that our concept is the same one that, historically, was cemented in an exchange of some institutional benefits for others within a legitimated legal system (for example, tax benefits in exchange for certain constrictions on liberty).

interpretation that help make (R) practicable. When they are in place, we can apply the referentialist insight that the contents of terms are determined by extensions, individuated through a (largely) causal process. At the same time, the reference relation is not wholly unmoored from linguistic practices, as candidates for terms' semantic values are constrained in a real way by the best interpretations of the representational traditions in which they are used.

To take just one more example of the type of work that is essential to Step 1 (but is largely neglected in contemporary jurisprudence), consider the historical roots of the U.S. legal system as a whole. Historians tell us that the English law from which U.S. law derives incorporated customary and natural law, that is, law that depends in part on norms of morality. In early English law, magistrates "regularly invoked principles of fairness and equity which they deemed universally applicable 'natural laws'"; natural laws, in turn were characterized as 'rules prescribed by natural reason.'"[86] In early U.S. caselaw, "[t]he law of nature, taken up and used as a source of legal argument and decision, appeared within virtually every collection of decisions and consilia consulted. … References to the law of nature were… clear and repeated in the reports."[87]

These facts are highly relevant to debates that are too often framed as armchair conceptual analyses, or as matters fit only for metaphysical grounding. Indeed, if these facts are accurate, we ought to *reverse* the prevailing burden of proof in favor of positivism that is so often emphasized, in contemporary jurisprudence, by supposedly hard-headed legal philosophers who think it absurd that law could be anything but positivist.[88] If our representational tradition begins with a conception in which "law is called the art of what is fair and just,"[89] it is positivists, not antipositivists, who owe us an explanation of why their concept of law is of a piece with this tradition. If the community whose concepts we seek to explicate saw themselves as engaging in a certain kind of exercise, any attempt to

[86] Atiq (*forthcoming*: 5) (citing *Justinian Institutes*, 1.1.1., translated by T.C. Sandars (1883)).
[87] Helmholz (2015:42). For example, in *Calvin's case*, Coke refers "with exceptional directness to the '*lex aeterna*, the moral law, called also the law of nature.' His observations are worth highlighting: 'the law of nature is immutable, and cannot be changed… the law of nature is part of the laws of England'; 'the law of nature was before any judicial or municipal law in the world.' Coke cites Aristotle for the proposition that 'natural right is that which has the same force among all mankind.'" Atiq (forthcoming:11).
[88] *See, e.g.*, Leiter (2007).
[89] McSweeney (2019:32).

theorize about the nature of the content falling under those concepts must be consistent with those concepts.

Of course, vindicating antipositivist claims requires a much more extensive historical undertaking. What I hope to have shown is that one of the primary tools we need to sharpen jurisprudential questions, (R), can be both viable and principled in the face of objections like the *qua* problem.

Section 4.1

Coleman & Simchen accept referentialism's basic insights but argue that 'law' differs from terms like 'water' or 'gold' in crucial respects. They think views like (R) are inappropriate in jurisprudence, specifically, because a deferential operator like R_A('law') is a nullity: there's nothing to slot into the $_A$ position. Whether some x falls under 'law' is determined by laypeople in their ordinary discriminatory capacities, they say, and 'law' is thus more similar to general nouns (like 'pencil' or 'chair') for which there's no need for deference to expert opinion.[90] Because it is premised on a flawed conception of what deference involves, I don't think their position is tenable.

Coleman & Simchen believe linguistic deference is of recent vintage, tied to a distinctly modern conception of the contributions of science to our ability to "negotiate our way through the world."[91] They argue that historically, deference took root only as technology expanded and communities began to appreciate that we're better off—that we can reliably form accurate beliefs and so attain our goals—by relying on expert consensus. Keying deference to self-interest, Coleman & Simchen argue that linguistic communities treat terms deferentially just in case there is "widespread trust within the linguistic community that there is a received expert doctrine on the nature of the things to which the term refers that is thought to contribute to the speakers' capacity to negotiate the world."[92]

---

[90] *See* Coleman & Simchen (2003:28, 30).
[91] Coleman & Simchen (2003:22).
[92] *Id.* at 23-24 ("Individuals are linguistically deferential when they have reason to believe that expert doctrine will contribute to their capacity to negotiate the world.").

There are three elements in this picture. As Coleman and Simchen see it, deference is (1) a sufficiently salient received body of expert doctrine (2) concerning the nature of the phenomenon to which a term refers (3) that is commonly believed important to success in negotiating the world.[93] On their view, deference is driven by pragmatic concerns, operative only when we have reason to believe reliance on experts will assist us in, as they put it, "negotiating the world."

In this picture, 'law' doesn't exhibit deference because it doesn't satisfy element (1). Coleman and Simchen say we are "much less impressed by the capacity of philosophy to enable us to negotiate the social world than we are about the ability of scientific theories to help us chart a successful path in the natural one."[94] While terms like 'gold' and 'water' exhibit deference because we perceive of both the existence of a body of expert knowledge and its capacity to help us negotiate the world, there's no "parallel perception" among laypeople for jurisprudence.[95] As a term, 'law' falls into the same category as 'pencil' or 'chair', nouns for which uses there is no reliance on experts, because there simply *are* no experts.[96]

Notably, the picture presented here isn't supposed to track distinctions between terms for natural kinds on the one hand and terms for artifact kind on the other. Coleman and Simchen allow that artifact terms like 'electron microscope' may exhibit linguistic deference, while natural kind terms like 'pebble' do not. So their cross-cutting criterion boils down to whether successfully negotiating the world involves reliance on experts, which Coleman and Simchen believe to be a "specialized" feature of communication.[97] This is the crucial premise of the argument, and where, as I'll explain below, it ultimately breaks down.

Note first that the argument has a transparently instrumental structure. Because legal experts don't provide us with certain types of benefits, we decline to defer to them about the extensions of 'law,' and the corresponding body of doctrine (in this case, jurisprudence) is not authoritative in the

---

[93] *Id.* at 24.
[94] *Id.* at 25.
[95] Coleman & Simchen add that while we might recognize the existence and rely upon the advice of experts as to what "the law *around here* is, there is no relying on jurisprudential expertise for what law *as such* is." *Id.* at 27 (emphasis in original). I take this to mean that there *is* deference about the specific laws within various jurisdictions (what counts as third-degree homicide in New York, for instance).
[96] *See id.* at 19.
[97] *See id.* at 21-22.

way bodies of doctrine in the hard sciences are. Coleman & Simchen conclude that the extension of 'law' is not fixed by reliance on jurisprudential expertise. Instead, to fall within the extension of 'law' is to bear the ≈ relation the determination of which can be made by laypersons in their everyday discriminatory capacities.[98]

Now one temping objection to Coleman and Simchen is to exploit an intuitively appealing difference between two types of questions. The objection goes as follows. Recall that we began with questions like, *how does 'law' get its content?* This is a metasemantic question. Coleman & Simchen start by discussing referentialism as an answer to it, but then shift gears to a different question, something like, *how can laypeople speak determinately about law?*[99] Coleman & Simchen don't recognize this shift. They seem to believe their discussion of deference answers the first question, while in reality it's an answer to the second. Their conclusion about whether or not there is linguistic deference for general uses of 'law' thus involves a category mistake.

The division of linguistic labor, the objection adds, is a feature of how members of a community grasp and use the concepts that they do when communicating with one another. Deference explains how we employ terms and achieve samesaying without having the discriminatory capacity to individuate extensions (how, for example, I can refer to elms and not beeches when I use the term 'elm'). But it's not a thesis about meaning or content itself. So the question referentialism answers is about what it is for a thought to have certain content, while the question deference (Putnam's notion of a division of linguistic labor) answers is how we communicate. The latter is a wider and broader endeavor than the former, focusing not on semantics or metasemantics but on language use. It involves additional factors; in particular, the fact that a pattern of deference does not redound to one's benefit is only one factor in a wider set of considerations that must be taken into account when we theorize about how communication is possible.

While this objection has some appeal, it is probably not satisfactory. Coleman and Simchen can credibly respond that it's not plausible to posit referentialism and linguistic deference together in one breath and then insist on a cleavage between them in the next. After all, the latter is presented as

---

[98] *See id.* at 27-28.

[99] Coleman and Simchen thus elide questions about the semantic content of 'law' with questions about the capacity to speak determinately about law.

a part of the explanation for how we operationalize the former. Without adverting to facts about deference, the causal piece of the referentialist framework loses a key component, specifically, how it is that content is passed down from link to link within a causal chain. So without deference, referentialism can't be the explanans for our explanandum because we won't have a story to tell about how tokens of 'law' have the same referent after an initial baptism.[100]

Section 4.2

The objection mooted above is unsatisfactory, but it is on the right track. Facts about whether individuals believe that taking a deferential approach to expert views about 'law' would redound to their benefit—in a rather narrow, direct way, no less—are not the kinds of facts that determine how the content of 'law' is determined. Setting aside (independently quite serious) empirical reservations, Coleman and Simchen's argument misconceives the role played by deference not just within (R), but within rational communication more generally.

To see this, note first that the notion that there's no "parallel perception" in jurisprudence to the deference accorded to experts in scientific disciplines is ambiguous between the claim that there's no parallel perception regarding the *existence* of a body of expert knowledge in jurisprudence and the claim that there's no parallel perception regarding the *use* of such knowledge. The latter is a pragmatic claim that can't help Coleman & Simchen's argument. It turns on whether, relative to whatever interests we might have, it's of benefit for us to view law as situated within a body of expert knowledge to which we can defer (whether or not there is such a body). Just as a fictionalist about morality might argue that people ought to behave as though metaethical realism is true because that's the best way

[100] Interestingly, Soames has recently written that causal descriptivism's objection to referentialism can be rebutted along lines that appear similar to the mooted objection. He argues that descriptivists like Frank Jackson "mistake the semantic question *what does a term mean, and what do uses of it designate?* with the pre-semantic question *how did the term initially come to mean and refer to what it does, and how is that meaning and reference maintained?*" Soames (2020:88). Soames thinks that facts about how a name came to have its reference is "neither a convention nor something present speakers need to know," because they are already familiar with "how language is used to communicate." *Id.* In context, I don't think Soames's distinction is the same one I am mooting, however, because the question *how can laypeople speak determinately about law?* does not track either of the questions Soames differentiates. While it implicates facts about how language is used to communicate, it also implicates semantic facts, because it questions the meaning of the words used in the mouths of laypeople down a causal chain. (If that's not true, and Soames *is* arguing along similar lines as my initial objection to Coleman and Simchen, that's all the better for my position; §4.2 then just provides additional support for my position in a belt-and-suspenders sort of way.)

for society to function,[101] a fictionalist about law might argue that people ought to behave as though there is(/is not) a body of jurisprudential expertise. For example, given their purposes, it may well help an elite ruling class negotiate the world to defer to bureaucrats or administrative experts in maintaining the status quo. Or it may help negotiate the world for social-justice activists to insist that Ivy League professors (an overwhelmingly liberal group) are experts to whom deference is owed. Because the truth of the claim in either case will turn on the interests we happen to have, we can't conclude that 'law' does or does not require deference *simpliciter*.

The former alternative construes deference too narrowly by limiting its circumstances of tangible benefit. In fact, deference is much more wide-ranging. Linguistic deference is a conventional practice based on iterative reasons to attribute conformity to others.[102] To see how this works, we need to pay closer attention to the logic and structure underlying language as a tool employed by rational agents seeking to accomplish goals, not just narrow ones reducible to immediate self-interest.

We can only communicate successfully if there's common ground, that is, presuppositions that guide what we choose to say and how we intend what we say to be interpreted.[103] One of the most important features of this common ground is the iterative presupposition that fellow speakers share it. Another is that our discourse is layered with presuppositions that are usually implicit. Consider, for example, assertions as mundane as "Adam knows Demetri is from Greece" or "the straw appears bent" or "we should not eat animals." In so asserting, I presuppose that Demetri is from Greece (that knowledge is factive); that how things look contrasts with how things are (that LOOKS is parasitic on IS); that we're able to not eat animals (that ought implies can). Without these layers it wouldn't be possible to form judgments, or justify our beliefs or practices.

Even basic mental operations require diachronic stability of this kind. Suppose Alice comes up with some notation for a theorem she'd like to prove. We can rightly say that by '*t*' she means *p* when she sets up her notation. But once the notation is up and running, and she's performed operations using it, it's not right to say that she *means* whatever the theorem yields: what it yields

---

[101] *See, e.g.*, Joyce (2005).

[102] *See* Lewis (2002) (describing language as convention using to solve coordination problems), though I don't necessarily agree with aspects of Lewis's view that require iterated knowledge by every participant in the convention.

[103] For discussion, *see* Stalnaker (2002). Like Stalnaker, I'm interested in pragmatic rather than merely semantic presupposition.

follows from the initial set-up. Within her setup, to presuppose *p* is not necessarily to believe it: it is enough to be disposed to act as though she believes it.

None of this is to say that the logic of deference is ironclad, or unrevisable. But we so revise only in light of an overall network of discourse through which we can do things like point out repugnant consequences of our beliefs, or address tensions we had not previously appreciated. J.L. Austin's (justifiably) well-worn distinction between doing something by 'mistake' or by 'accident' is a good illustration.[104] Most of us haven't bothered to ponder what differences, if any, there are between the two terms. When confronted with Austin's discussion, however, we have to make a choice. We can either resist his pressure or we can use it as a springboard to propose the necessary distinctions. Either conclusion will need to be supported by commitments underlying the terms, and what roles they play in our discourse.

The upshot is that in determining whether terms require it, we look to not only whether being deferential helps us negotiate the world relative to our interests, but also, in a wider and deeper sense, whether being deferential preserves the point of our communicative practices.[105] It is not a "specialized" feature of communication, as Coleman and Simchen seem to think; it implicates more than just acceptance of expert opinion on matters of technical sophistication (such that modern society has more deference towards experts than pre-Scientific Revolution societies did).

Two worries with this line of thought are worth addressing straightaway. First, is there an unlicensed inference from presupposition to deference? Common ground may be necessary for communication, but Coleman & Simchen can agree with that. So it may be that there's an additional step needed in my treatment of 'law' as deferential, and merely pointing to the pervasiveness of deference won't get us there. There needs to be an argument about 'law' specifically, to rebut the conclusion Coleman and Simchen draw.

I don't believe this is accurate as a construal of the response, however. On the view I'm urging, the extra step is not an additional inference that's needed but rather a better picture of what deference is. The corrective is not one of breadth, so that it encompasses 'law' just as it does 'electron

[104] *See* Austin (1956:11).

[105] I think Burge has something similar in mind when he writes that individuals must "maintain a minimal internal and rational coherence and a broad similarity to others' use of language." Burge (1979:114).

microscope,' or some such, but rather of depth, so that it encompasses *any* term with which we communicate competently. Once this picture is in view, we can see that there isn't a large gap between presupposition and deference. (In the same vein, it's worth noting that Coleman and Simchen say nothing specific about 'law' in their argument about deference; why then suppose a response would need to say something specific about 'law'?)

What I'm urging is that we appreciate not only how prevalent deference is (along a horizontal axis, as it were), but that it is prevalent precisely *because* it is not as demanding as its manifestations in technical domains make it seem along a vertical axis. That we defer to scientists when using 'electron microscope' doesn't mean we don't defer when we use 'pencil.' The former may involve a narrow and easily circumscribed body of experts, but a narrow body of experts is not necessary for deference. For 'pencil', the relevant experts will be the large, complex, but nonetheless finite body of language-users any one of whom can be in a position to identify mistaken uses of the term (a parent for a child, a teacher for a student, a native speaker to a foreign speaker). In Kaplan's terminology, sometimes we are consumers and sometimes we are producers; our roles shift as our context does, but they never completely flatten or collapse into one another.

The possibility of mistake is in large part what this wider sense of deference amounts to. Terms like 'pencil' are picked up earlier in our language games then terms like 'electron,' but the underlying logic in the division of linguistic labor is similar. Using 'pencil' as a means of communication is a matter of projecting, roughly, the same sorts of commitments understood to be operative in one context to another.[106] Deference is not necessarily a form of subservience to a well-defined authority for a discrete purpose, or an all-or-nothing yielding of one language user to another's judgments. It's a recognition of the existence of a weighty *body* of facts or practices with which we need to conform in order to be competent language users. Whatever our purposes in using 'law,' we could not achieve them without a certain amount of deference.[107]

---

[106] *See* Cavell's (2015) picture of learning and teaching words as reducing to "sharing routes of interest and feeling." McDowell's gloss—"there is nothing but shared forms of life to keep us, as it were, on the rails"—is on my view compatible with everything said here about referentialism.

[107] At its limit, the same principle applies to practices like rule-following. *See* McDowell (1998a:62-64). Interestingly, McDowell refers to Dworkin in his discussion of "hard cases" of rule-following and concept application.

The second objection keys off of my response to the first. Deference now seems so expansive that it collapses into a generic stability within contexts of use. Of course we need *some* stability, the objection goes, for how else could we preserve the possibility of basic inferences? If by 'deference' I mean that we have to be able to conclude [q] from [p] and [$p \supset q$], then every term we use will require deference. This is just not plausible given how often terms change over time. Surely Coleman and Simchen (and even referentialists like Putnam) have something more distinctive in mind when they talk about the division of linguistic labor?

I think the right response is to bite the bullet. Properly situated, deference is a constituent of communicative competence—a prerequisite for samesaying. So it *is* true that all terms require deference; what we disagree about is the degree to which they require it. 'Pencil' requires less deference than 'electron microscope,' but that doesn't mean we can make it refer to whatever we like. The use of language is the joining of a community for shared purposes, motivated by the intent to participate in a conversation whose existence necessitates shared bases. That is, I intend to understand and to be understood, modulo deviant cases or attempts to change the subject.

Moreover, because meaning supervenes on environmental facts, we don't have much control over what our terms mean. I can intend to refer to chickens using the word 'dogs,' but my intention will not get me very far on its own. I will have to let others know I'm deviating from the accepting meaning of the term in a way that makes it clear that that's what I'm doing; my intention will conflict with a network of collateral usage (would I then need to change the meaning of 'feathery' to 'furry', or 'clucking' to 'barking'?); communication will be ineffective; my idiosyncratic usage probably won't gain traction. For the most part, intentions cannot influence meaning in more than a superficial manner, for more than a short period of time, or in a highly circumscribed context. [108]

This picture dovetails with a corollary of referentialism, the possibility of massive, systematic speaker error. As Herman Cappelen puts it, "most or even all speakers of a language can believe that a predicate F applies to an object o, but be wrong. They can all want o to be in the extension of F, but wanting o to be F doesn't make it so. They can all be disposed to apply F to o even though o isn't F."[109]

[108] There's an entire literature on "conceptual engineering" that I'm giving short shrift to, but the basic idea is hopefully clear enough. For discussion, *see, e.g.*, Cappelen (2018).
[109] Cappelen (2018:63) (emphasis in original).

We lack control over meaning: believing and wanting terms to mean one thing rather than antother doesn't make it so. While meanings change and references shift, they do so through messy, disparate, inconsistent mechanisms too complex to manage in orderly ways. For communication to be effective, and individuals to be competent with the terms they wield, they must defer in uses of common nouns like 'pencil' or 'lunch' as well as with more contested terms like 'law.' Deference has both a wider and a deeper base than Coleman & Simchen realize.

Stepping back, I think the foregoing is at least plausible enough to reallocate the burden of persuasion to Coleman and Simchen. We use general nouns in many of the same ways and for many of the same purposes for which we use other predicates, and even proper names: to facilitate communication and participate as competent users of concepts within a shared discursive structure. It's just a mistake to think that we can isolate certain terms and decide whether to defer to experts in our use of them, as though language works with discrete modules for which we make individual decisions based on subjective interests as we negotiate the world. Once we accept referentialism—as Coleman and Simchen do—we accept a sketch in which our conceptual and linguistic abilities are inextricably intertwined with others' within a dynamic division of linguistic labor.

Section 5

The next two chapters will deal with more general objections to CG, especially given the metaphysical commitments it takes on (the details of which are described at the start of Chapter 2). Before doing that, however, it may help to demonstrate the kind of value CG can offer. In this section I use tort theory as an example for this expository purpose.

As Goudkamp and Murphy observe, it is "currently fashionable to offer accounts of tort law that purport to explain it in its entirety."[110] These accounts, offered by deontic theorists like Weinrib or Goldberg and Zipursky, on the one hand, or instrumentalists like Posner or Kaplow and Shavell, on the other, purport to be "universal," accounting for all of tort law within a single jurisdiction as

[110] Goudkamp & Murphy (2015:48).

well as tort law across all common law jurisdictions.[111] One of the defining disputes between these two groups of "universalist" theories, as Goudkamp calls them, concerns what is essential to tort law itself, or what it is in its nature.

On Posner's view, "law is an instrument of social policy,"[112] and "the essence of tortiousness is conduct that wastes scarce resources."[113] Seen in this way, tort comprises a set of liability-imposing institutions that exist to deter actors from inefficient behavior in an effort to maximize a suitably defined common good such as aggregate welfare or wealth.[114] Deontic tort theorists emphatically reject this claim. Coleman and Zipursky argue that tort has a deontic structure that is essentially bilateral,[115] while Goldberg traces its roots back to Locke's notion of private wrongs.[116] Adding teeth to the contrast, Goldberg says tort "forms a basic component of our constitutional order *only insofar as it operates as a law for the redress of private wrongs*."[117] He concludes that law-and-economics scholars are mistaken in their claims that tort is a means for the "shifting of losses [and] the deterrence of antisocial conduct"[118] if these properties are isolated and prioritized over properties such as tort's bilateralism.

The key here is the "*only insofar as*…" qualifier. What is the role, and significance, of the claim that tort links back to a Lockean notion of private wrongs? The question is crucial because law-and-economics theorists can provide plausible justifications of doctrine, and, just as deontic tort theorists, they can find persuasive readings of seminal caselaw. For instance, Coleman writes that "[a]ny plausible theory of tort law should explain both [fault and strict liability], and the difference between them, and [an] explanation of why fault provides the appropriate standard of liability in some cases, while liability in other cases is strict."[119] But law-and-economics *can* provide such a theory, as even

---

[111] *Id.* at 50-51. This is Goudkamp and Murphy's view of the theorists just mentioned; they might disagree about what their project's scope or ambitions are. (I think Goudkamp and Murphy are roughly accurate, at least as to all common law jurisdictions in the Western world).
[112] Posner (2013:469).
[113] Goldberg (2003:553).
[114] *See* Posner (1972).
[115] *See, e.g.*, Coleman (2001), Zipursky (2011). In tort theory, bilateralism is the property whereby causes of action in tort must be brought by victims seeking redress from purported wrongdoers (rather than, say, drawing on a common pool of resources for compensation). Corrective justice and civil recourse theorists believe tort's bilateralism is essential to its identity, while law-and-economics theorists do not.
[116] Goldberg (2005:606).
[117] *Id.* at 610 (emphasis added).
[118] *Id.* at 582; *see also id.* at 610.
[119] Coleman (2001:15-16).

deontologists sympathetic to non-instrumental conceptions of tort acknowledge.[120] The two competing theories each have their strengths if we focus only on their descriptive adequacy—on how well their theory can account for doctrine, provide rationales, and predict outcomes in any given stretch of tort disputes in a way that minimizes the need for explanatory epicycles.

Coleman argues that deontic theory better accounts for tort's structure, and Goldberg and Zipursky spend hundreds of pages describing how it connects with the historical materials associated with the Western legal tradition linking back to Blackstone (and earlier). But what they need is an account of *why* the historical record is significant. If Posner and Calabresi can show how tort's rules can fulfill the functions they describe (deterring sub-optimal conduct) and thus conform to the principles they identify as constitutive of tort law (cheapest cost-avoider loss-spreading), what makes their account deficient? After all, as Posner contends, a discipline's history does not delimit its scope,[121] and it is uncanny how much legal doctrine implicitly tracks economic principles (efficiency, welfare maximization).[122]

CG can help fill this gap. Too often, tort theorists conceive of descriptive adequacy as a sufficient condition for a theory of tort. Deontic and instrumentalist theorists both operate like this, and even third-party critics likes Goudkamp and Murphy scrutinize universalist theories by presenting object-level facts about punitive damages, for example, or the breach element in negligence suits.[123] But answers to this type of explanatory demand are liable to take the form of Just-So stories, that is, internally consistent accounts that fail to connect with the explanandum we are interested in, or fail to distinguish that explanandum from superficially similar phenomenon.[124]

In contrast, CG requires that, at Step 1, tort theory engage with the meta-level question, *what is the x, such that 'tort' refers to x?* It must determine whether the referent of 'tort' is shared between interlocutors, or whether they are talking past one another. This, in turn, involves analysis of the

---

120 *See* Perry (2002:1765-66).
121 Posner (1993:369).
122 *See* Posner (1981:5).
123 *See* Goudkamp & Murphy (2015).
124 For example, an account of how leopards get their spots may persuasively explain how well leopards hunt for food through camouflage techniques, but that does not mean it is correct. Likewise, an account of how a price theory of liability may persuasively explain how well government can function by spreading risk, but that does not mean it is a correct account of *tort*.

representational traditions the interlocutors identify with, in order to rationalize the practices associated with (as being about, or directed at) that explanandum. Without doing justice to these traditions, certain posits cannot be correct because they fail to make contact with the *de re* target of inquiry.

A passage from tort theorists Abraham and White nicely hints at the same basic point. In a recent study, Abraham and White note that judicial decisions that change tort rules "are not treated as legitimate if they are perceived as being made by fiat…Courts are expected to provide justification for changes in the law, and those justifications need to be grounded, to some extent, in established legal rules and doctrines."[125] This is because judicial decisions must be rooted in judges' capacity to "discern and apply authoritative legal sources that are deemed separate from the particular views of judges on matters of social policy."[126] So judicial decisions cannot flow from social policy directly; they must be mediated by the existing legal framework.

Where does this requirement come from? Abraham and White are more interested in the practical effects of charting changes in tort law, so they don't pursue it. Greenberg thinks it is an essential property of law; he thinks the "very nature of law requires a particular kind of rational connection, or 'intelligibility'"[127] between the rules and doctrines lawyers seek to implement on the one hand and the sources legal theorists seek to understand on the other. To vindicate such an account, we need to be able to tell story about how we discern the properties that make law the type of thing that it is, and not some other thing, when we argue about modal claims *de re*.

Deontic tort theorists are on the right track when they say that claims about what tort is must be continuous with historical facts, but they miss the significance of the historical record. The upshot of the disconnect between, say, a Lockean conception of private wrongs and the law-and-economics view is that if the former is what the relevant society—through evidence such as cases, treatises, scholarship, oral traditions, surrounding literature, and so on—has taken tort to comprise, then the nature of tort lies in our best attempt at the real definition of *that* set of properties. What vindicates this linkage is neither a substantive match between, on the one hand, torts today and Lockean wrongs

[125] Abraham and White (2022:8).
[126] *Id.*
[127] Levenbrook (2021:745); *see also* Greenberg (2008a), (2008b).

nor, on the other, extensional accuracy. It is the *causal* connection between the two that matters in the first instance. (The referent of a term is grounded, after all, through a causal chain linking the term to its designatum, similar to a quasi-anaphoric model of content inheritance for concepts.)

Consider one of Posner's cases from the Seventh Circuit, *Shadday v. Omni Hotels*.[128] The plaintiff, a female guest at the defendant's upscale Washington D.C. hotel, was raped by another guest in an elevator on the premises. The plaintiff sued the hotel, arguing that it breached a duty to take care to protect her from the other guest's attack. In his decision, Posner focused on *ex ante* probabilities to hold that guest-on-guest violence is such a remote possibility that it is outside the scope of the risk hotels are legally obligated to cover.[129] While the hotel has some duty to protect guests from harm at the hands of intruders, guest-on-guest violence falls outside it. Holding otherwise would lead to unpredictable liability, Posner reasoned, and would be over-inclusive without sufficient offsetting deterrence to be justifiable.

Goldberg and Zipursky believe Posner's analysis—in particular, the idea that a hotel owes no duty to take steps to protect against guest-on-guest violence—is untenable, and that his error results from his "concern to avoid the normative dimensions of duty, and also his determination to treat tort law entirely in terms of deterrence."[130] To illustrate Posner's mistake, they propose a hypothetical in which hotel guests can access other guest rooms easily due to the hotel's low-grade security system (say, key cards needed for room entry all work for any room). If one guest enters another's room and attacks her due to this security system, they suggest, the hotel ought to be liable. This shows that Posner's analysis is flawed: hotels owe a duty to take ordinary care on their premises, and "parsing that risk into the risk of attack by intruders versus guests is arbitrary and unmotivated."[131]

While I'm sympathetic to this criticism, I don't think the argument is as effective as it can be. Through the lens of *Shadday*, the disagreement between Posner and Goldberg and Zipursky seems to turn on what are (/are not) reasonable judgments about liability in the light of existing precedent. But what is (/is not) reasonable is anchored to the theoretical approach, or theory, in which the judgment

[128] 477 F.3d 511 (7th Cir. 2007).
[129] *Id.* at 512.
[130] Goldberg and Zipursky (2013:588).
[131] *Id.* at 589.

is made. Goldberg and Zipursky argue that Posner's holding is untenable, but it seems reasonable *if* the relevant approach is prescriptive law-and-economics, in which judges determine optimal deterrence and balance aggregate social value against individual duties of care. In *that* framework, the manner in which Posner parses risk is neither arbitrary nor unmotivated. In fact, it is precisely the opposite, as Goldberg and Zipursky hint at themselves: it flows from Posner's "determination to treat tort law entirely in terms of deterrence."[132] In the hypothetical, Posner would likely determine the hotel's liability based on the costs in investment in a more expensive security system weighed against the benefits to guest safety and the consequences for liability rules going forward. We can't *begin*, as Goldberg and Zipursky do, by characterizing the hotel's low-grade security system as "inadequate"—whether it is inadequate for the purposes of liability must be the conclusion rather than the starting point of the analysis.

The real problem Goldberg and Zipursky (should) have is with Posner's starting points. They object to his avoidance of "the normative dimensions of duty" not because (or at least not only because) they think it will lead to unreasonable liability determinations. They object, I suspect, because such avoidance betrays a failure to link up with *tort law*. Insofar as Posner couches his reasoning in terms of deterrence and efficiency, the problem is not just that *Shadday* results in an unreasonable application of tort—that the decision is extensionally flawed in failing to recognize an instance of tort when confronted with one. Rather, the problem is that Posner's framework fails to connect with the referent of 'tort'. Only once this latter claim can be grounded can Goldberg and Zipursky reach the conclusion they are really after: that Posner fails to grasp "what tort law *is*, apart from the functions it might serve."[133]

CG helps them reach this conclusion in a systematic way. We refrain from judging whether a type of behavior is tortious until we have an account of what determines the extension of 'tort,' so that we prescind from first-order judgements until we determine whether an extensional assignment to 'tort' flows from (rather than merely being consistent with) the commitments of the community in

[132] *Id.* at 588.
[133] *Id.* at 592.

which it is used. This, in turn, requires an inquiry into the representational traditions of the community's concept, TORT.

If legal anthropologists like Pirie (whose 10-year investigation into law's roots we previewed in §1.3) is correct that the earliest known references to legal principles in Western civilization, dating to the third century BCE, distinguish intentional from unintentional injuries,[134] these distinctions help track the nature of the phenomenon picked out by terms like 'tort.' The manner in which the community thought, talked, and behaved figures into our attempts to find the referents of their terms and concepts. Insofar as semantic assignments or conceptual contents are untethered from this phenomenon, their proponents are not "conceptually competent," as Schroeter et al. might say, regardless of how well their theory explains the data or predicts future outcomes.

Once we've fixed the explanandum, we can investigate its nature at Step 2, focusing on the referent identified at Step 1. For example, if at Step 1 what we identified as the intension of 'tort' is an Aristotelian principle of corrective justice, we'd proceed at Step 2 in the way Coleman and Weinrib prescribe; if it is instead a principle of civil recourse, we'd proceed in the way Goldberg and Zipursky prescribe. CG's modular, two-step framework tells us when to stop one type of inquiry and begin another; similarly, it can tell us when no amount of additional information can help. It would do no good, for example, for Posner to go back to law-and-economics textbooks and incorporate a more sophisticated breakdown of how to incentivize social welfare if it turns out that the intension of 'tort' makes no (or at best incidental) reference to social welfare. The conceptual confusion at Step 1 can only be corrected in certain types of ways.

In sum, CG provides a method with which to meaningfully interrogate claims about law's nature and properties. With it, we can see how and why certain assumptions must be questioned, and what its explanatory criteria must be. If historians like Pirie are right, the liability rules Posner adopts are not arbitrary or unmotivated—they are motivated incorrectly. When CG is taken aboard, his theory can be exposed as conceptually confused because too insensitive to what tort means on the ground.[135]

---

[134] *See* Pirie (2021:30). Pirie writes that these are "fundamental" distinctions constituting the identity of the phenomenon ancient civilizations referred to as law. If a law-and-economics theory cannot respect these distinctions, or replaces them with others, that theory is arguably no longer talking about the same phenomenon.

[135] CG's first step is similar to the approach Clifford Geertz commends in his work on ethnography and the interpretation of cultures more generally. In a passage that captures the limits of the *kind* of argument I think first-order tort theorists

To the extent Posner is left unmoved, he is left with a justificatory deficit. If he is no longer doing tort law, his decisions (in his capacity as a judge) cease to have legitimacy in resolving tort disputes. It is in this framework (as opposed to one in which we disagree about the extensions of tort based on how to interpret past judicial decisions) that Goldberg and Zipursky can credibly conclude that "when writing theory, [Posner] is keen to remake tort law into something that it is not."[136]

Conclusion

Every inquiry begins *in medias res*. The way to sharpen the central questions of jurisprudence is to identify the metasemantic that help isolate its explananda. Addressing this need, CG makes evident how philosophy of language and philosophy of law are continuous with one another—part of the same seamless web. Drawing the two together, CG comprises two steps with which to assess jurisprudential theories. The first sets out boundaries within which to assess *de re* claims about law using a causal theory of content determination through reference; the second specifies how to perform this assessment. Together, the two steps form part of an interlocking framework in place of misleading or oversimplistic methodological dichotomies.

Much work remains to be done, of course. Some of this is by design: CG contemplates a division not just of linguistic but also theoretical labor; theorists need historians to help fix the intensional boundaries of their concepts so that we can debate about whether candidates fall into their extensions. But there's also work to be done along purely theoretical lines. CG involves some philosophical commitments we can bracket (I don't seriously entertain a Fregean metasemantics, for example); others we must be confront directly. Chapters 2 and 3 carry on that project.

---

should avoid, Geertz writes that "coherence cannot be the major test of validity for a cultural description…The force of our interpretations cannot rest, as they are now so often made to do, on the tightness with which they hold together." Because severed from a causal connection to the referents of the terms that constitute them, law-and-economics theories of tort amount to "the construction of impeccable depictions of formal order in whose actual existence nobody can quite believe." As Geertz adds, "a good interpretation of anything—a poem, a person, a history, a ritual, an institution, a society—takes us into the heart of that of which it is the interpretation. When it does not do that, but leads us instead somewhere else—into an admiration of its own elegance, of its author's cleverness, or of the beauties of Euclidean order—it may have its intrinsic charms, but it is something else than what the task at hand calls for." Geertz (1973:18).

[136] Goldberg and Zipursky (2013:583). As I noted at the start of §1.2, quotes like this are best construed to be making *de re* modal claims about a particular designatum of 'tort'.

CHAPTER 2

Chapter Abstract: Step 2 in CG involves metaphysical theorizing about the nature of the contents that fall under the concepts identified at Step 1. In particular, it involves grounding and real definition, tools that help us understand what makes legal content the content that it is. These tools raise objections from deflationary approaches that promise to provide the explanatory power we are looking for without incurring the demands metaphysical theorizing requires. According to one such approach, truth conditions for the language in which we discuss legal claims need not line up with the metaphysics of law; on another, we can discover truths about law without robust metaphysical theorizing. These deflationary alternatives are not compelling, however, because they are, in turn, either internally unstable or unable to meet the explanatory demands needed for a satisfactory theory of law. For these reasons, the methodological framework in which they are deployed is not a tenable rival to CG.

Introduction

Chapter 1 introduced CG, a two-step framework with which to assess first-order claims about the meaning of legal terms. The framework is rooted in a referentialist metasemantics that emphasizes the causal aspect of how terms come to have the content that they do. It also recognizes that the manner with which we ascertain this content involves a particular kind of empirical spadework—a careful but wide-ranging look into the historically extended traditions in which terms are introduced and subsequently used to communicate. Chapter 1 focused on the first step of this framework.

Chapter 2 focuses on the second step. The latter half of the story reads in a more metaphysically robust key. To appreciate why that might raise concern, it's worth clarifying what metaphysics is, at least traditionally. As a tool, metaphysics seeks "a comprehensive account of some subject matter in terms of a limited number of more or less basic notions," by employing a methodology that expressly "is *not* that of letting a thousand flowers bloom," but rather of "making do with as meager a diet as possible."[137] An inquiry is metaphysical when, inter alia, empirical methods of investigation cannot suffice. It attempts to discover "deep" facts about the world (such as its modal properties) by "limning the true and ultimate structure of reality."[138]

[137] Jackson (1994:25).
[138] Quine (1960:221); *see also* Thomasson (2017:101); Sider (2012); Rosen (2015).

Given these ambitions, metaphysics is subject to a number of objections from folks wary, impatient, or otherwise disenchanted with the notion of "deep or fundamental features of reality."[139] Part of the concern is how to reconcile robust metaphysics with modern science; another is with a general skepticism about the epistemology of claims that "make a demand on the world"[140] in a way (seemingly) more straightforward conceptual claims do not.

Against this backdrop, §1 describes the machinery of metaphysical grounding CG employs at Step 2. Sections 2 and 3 highlight two deflationary alternatives to this approach. The animating spirit behind both is that metaphysics need not play a meaningful role in constraining the possible content of a given term because deflationary alternatives promise explanatory power packaged in a non-relativistic framework that gives us all we could want without unnecessary baggage. Eliminate the elaborate metaphysics but keep the realist backbone, the offer goes; if the promise can be made good, CG will be otiose at best. Before exploring this idea squarely, it may be helpful to set out a toy case of the kind for which CG is supposed to be useful in a (relatively) concrete legal context.

Return to the toy example from Chapter 1 concerning 'tort.' On what legal scholars call the skeptical view—skeptical in that it declines to take at face value deontic terms (such as 'duty,' 'right,' and 'obligation') that courts invoke when deciding cases—tort law places prices conduct in order to achieve (some suitably defined measure of) aggregate welfare. There has been a lot of discussion about how to apply the skeptical view, whether caselaw can be reconciled with it, and whether it is a good or bad view to adopt. And there has been some evaluation of the truthmakers for the theory.[141] But there has been very little discussion about how to evaluate the methodology appropriate to assess these truthmakers—of how to assess whether, for example, an argument for or against the skeptical view is a legitimate *kind* of argument.[142] To evaluate truthmaker arguments, we need a framework in

---

[139] Thomasson (2017:101).

[140] For discussion, *see* Linnebo (2018).

[141] Truthmaking is a metaphysical relation between worldly objects and propositions. A truthmaker for *p* is something (an object, fact, proposition, entity) whose obtaining makes it true that *p*. Though we can't go into too much more detail here, I accept a truthmaker account of ontological commitment (as against, for instance, a Quinean account on which ontological commitment turns on how we regiment a given language). For discussion *see* Cameron (2008), (2020). Unlike Cameron, however, I think the scope of truthmaker theory is pretty narrow, and that many ontological debates (*is there a table here, or particles arranged table-wise?*) are merely verbal disputes.

[142] Here's a toy example. If someone were to argue that the skeptical view is the correct theory of tort *because it was introduced by well-respected scholars working in Chicago in the 1970s*, that would be an easy case of an illegitimate second-order truthmaker. More difficult examples include *because it increases social welfare*, or *because it best accounts for the language of the opinions written by*

which to ask and answer the question, *what is it to be a tort?* John Goldberg nicely describes the terrain we need to traverse:

> The important thing to note about [the skeptic's] challenge is that it has brought us deep into the terrain of theory. We have on our hands a dispute about what tort law is; one that can only be resolved by getting into the interpretive weeds. To determine whether, despite appearances, the word 'tort' refers to something completely different than it did before the late nineteenth or early twentieth century, one has to interpret a ton of cases, relevant legislation, and the larger social context in which tort law operates. That's a long-term scholarly project.[143]

Unfortunately, different tort theories have different criteria in mind when they disagree about the nature of tort, and even more problematically, of what it means to "get into the interpretive weeds." This disagreement leads not only to conflicting answers to the question *what is it to be a tort?* but to an impasse on how to resolve these conflicting answers. For example (oversimplifying slightly to avoid jurisdictional or choice-of-law wrinkles), for legal positivists the fact that the Supreme Court hands down a law *L* as a rule of decision in tort suffices to make *L* part of tort law in the United States. For antipositivists, however, it is possible that the entire jurisdiction is systematically mistaken about *L*'s status, believing it to be part of tort law when in fact it is not (because, say, it is deeply immoral, or incompatible with natural law). For positivists, systematic mistake is a *reductio* of antipositivism; for certain antipositivists, it is merely one possible outcome based on what law is.[144]

The example is not merely academic. Justice Holmes's widely influential prediction theory can be usefully cast in similar terms. As the origin of modern law-and-economics, one of Holmes's core claims is that once the moral veneer on legal language is stripped away, its content comprises a set of predictions about the "material consequences"[145] of conduct, reducing to "a purely positivist theory of law—deflated, de-moralized, and disenchanted."[146] The interpretive weeds into which Holmes wades are not far removed from the places Goldberg and Zipursky look to find their theory: both care very much about judicial decisions, how judges write their opinions, how legal rules relate to one

common law judges. The realistic options are, of course, sophisticated theories that combine a number of seemingly appealing desiderata, such as we find in contemporary law-and-economics, corrective justice, and civil recourse theory.

[143] Goldberg (2018:24).

[144] *Contrast, e.g.*, Marmor (2011) with Greenberg (2017).

[145] Holmes (1897:459)

[146] Gordon (1997:1014).

another, and so forth. But whereas critics like Hart, Goldberg, and Zipursky take legal language seriously at face value, Holmes advises us to ignore it. He thinks that whatever the language in which judicial opinions are written, legal content is wholly constituted by "the prophecies of what the courts will do in fact."[147] To take legal language at face value is to "drop into fallacy."[148]

What makes the conflicting views on these choice points correct?[149] Without a satisfactory methodological answer, the scholarly project Goldberg describes is at risk of becoming a series of ships passing in the night. Even when or if law-and-economics scholars forthrightly acknowledge that they are offering a prescriptive rather than a descriptive theory, the problem is acute for disagreements between broadly deontic-minded theorists. Doctrinalists emphasize judicial reasoning, for example, while Dworkinian theorists look to moral and political philosophy more broadly. Each groups offers its own explanans, without explaining why that and *only* that is the right set of tools to employ for the determination of tort's nature or instances.

Suppose a Holmesian skeptic contends that what matters in the determination whether Acme Company's injurious φing is tortious is whether Acme was in the best relative position to avoid the injury. It's not just that liability is, on the skeptic's view, to be assigned based on the cheapest cost avoider; he supposes—at the level of the truthmaker argument—that the factors concerning cost avoidance are the relevant ones to consider. The disagreement doesn't even join issue with civil recourse or corrective justice theory.

CG can help bridge this gap. At Step 1, we approximate the paradigmatic Γ that 'tort' was used to pick out. The kind to which the sample belongs helps determine an appropriate intension (using the procedure described in Chapter 1). Its intension is a mapping from extensions to possible worlds,

---

147 Holmes (1897/1997:994).

148 *Id.* at (997); *see also* ("I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.").

149 The question can't be easily answered by observing that the theorists have different end goals, that is, that because Holmes was interested in advising results-oriented lawyers while Goldberg and Zipursky have more theoretical interests in mind, they are engaged in different projects. While later law-and-economics scholars like Kaplow and Shavell do shift to a narrower, more prescriptive form of theorizing, earlier scholars like Posner did not, and Holmes in particular is interested in telling us what the law *is*. In core areas of private law such as contract, for example, efficient breach theory is taken to be *descriptively* accurate, not just prescriptively desirable. *See, e.g.*, *Patton v. Mid-Continent Sys.*, 841 F.2d 742 (7th Cir. 1988) (Posner, J.) (promisor has a right to breach a contract when doing so would be efficient); *see also* Kaplow & Shavell (2002).

allowing us to assign truth values to specific legal claims. If, for example, corrective justice theorists are correct, 'tort' will track roughly the same set of deontic obligations today that Aristotle discussed in 320 BCE (an equality between the parties to a bipolar transaction).[150] But if this is *all* there is to it, CG will lead us astray. After all, if no more need be done, we could engage in the historical work to settle the dispute between skeptics and their opponents and accomplish our goals in theorizing about the nature of tort. There would be no need for a Step 2.

Chapter 2 evaluates this deflationary possibility in a few different ways. On one approach, the truth conditions of our ordinary language sentences need not closely track the metaphysical truths of our best theories; instead, there is wide room for divergence, or even discontinuity. On another approach, philosophical theorizing need not involve metaphysics at all, for we can successfully refer to law using easy ontology, without any need for epistemically mysterious metaphysics.

Unfortunately, for reasons related to the diagnoses canvassed in the Introduction, there isn't much discussion of any of these arguments within general jurisprudence today. They are taken up in other areas of philosophy (in race and gender theory, and in metametaphysics), however, so we dip into these literatures to help determine whether it is plausible to give an account of law with a minimal role for metaphysics in the way they contemplate.

Section 1

Step 2 in CG involves theorizing about the metaphysical nature of the content that falls under the concepts identified at Step 1. When we use a term like 'tort', we are using a property designator to refer to a set. The members of the set have a common nature we hope to understand. Even if the intension ultimately maps onto different extensions at some other possible world (because, conceived as rigid designators, the terms pick out kinds rather than extensions), at Step 2 what we care about is the nature of the referents picked out. The 'hoping to understand' locution signals a descriptive project, a task for metaphysics in its traditional sense. There is a powerful and influential series of

[150] *See, e.g.*, Weinrib (2002), (2012) (describing tort as a form of corrective justice aiming to rectify injustices through transactional restoration of notional equality, traceable to Aristotle's *Nicomachean Ethics*).

deflationist objections to this project. Before entertaining the deflationist objection, however, we first need to set out the details of the metaphysical project Step 2 contemplates.

Begin with the plausible assumption that facts are structured entities built from objects, properties, and relations.[151] Because facts are structured, we incur a two-pronged commitment: reality is layered rather than flat, and the facts that comprise it stand in explanatory relations of relative priority, or fundamentality. The first prong is intuitive, and the second follows on its heels. Some facts are layered below and therefore prior in the order of explanation than others: microphysical facts about quantum charge are layered below, because more fundamental than, biological facts about genetic makeup; social facts about Hartian rules of recognition are layered below, because determinative of, institutional facts about the Supreme Court. On this picture, for an entity *e* to be fundamental is for it to be ineliminable in the correct account of the relevant subject matter such that not all facts about *e* are explained by facts about other entities; for *e* to be foundational is for it to depend on nothing else; for *e* to be autonomous is for the demand for this sort of explanation to be simply inapt.[152]

Anyone who accepts this picture confronts an overarching question: for a given domain of discourse, how do natural facts relate to normative facts? For example, how do facts about the natural world give rise to the legal facts about the jurisdictions we study? We don't need a full-blown theory of metanormativity, but we do need a working account of the natural and the normative. To this end, we can suppose that natural facts are built from the causal, spatiotemporal entities of the hard sciences. Normative facts are built from properties picked out by concepts (such as OBLIGATION)—that is, non-causal properties that figure in synthetic propositions not defeasible by empirical inquiry.[153] There are tricky cases (such as REASON) but for our purposes this stipulation suffices.

The layered structure of reality calls for an explanatory tool usefully provided by GROUNDING. To a first approximation, grounding is a form of non-causal dependence, leveraged through the layered

[151] Even this seemingly innocuous starting point assuming a rich metaphysical picture: facts are *built*. *See* Bennett (2017).
[152] Note that *e* can be fundamental without being foundational, and it can be foundational without being fundamental. For discussion, *see* Dasgupta (2016); Raven (2016).
[153] Of course, normativity itself is graded. Lower grades impact our actions in some minimal way (for instance, by triggering pre-existing reasons for action), while the strongest exhibit properties like objectivity and prescriptivity. Because these distinctions are familiar, I won't dwell on them at any length here.

model of explanation. Represented by locutions such as "because," "makes it the case that," and "in virtue of," the concept is continuous with our natural-normative divide, applicable through statements, questions, and conditionals for any subject apt for explanation (more on this last caveat in a moment).

A number of formal features fill out the grounding machinery. Some are quite technical and need not detain us; others are more salient despite their technicality. The relata on each side of a grounding relationship are facts; these relata can be expressed hyperintensionally; they provide a rough but serviceable conception of fundamentality; finally, the relation between them is factive, transitive, irreflexive, and asymmetric. These features help distinguish grounding from modal tools such as entailment and supervenience, and are worth examining in more detail because of how helpful they can be in fields like jurisprudence.

First, consider grounding's asymmetry. To say grounding is asymmetric is to say grounding explanations can't run in both directions in the way supervenience relations can: the conjunction [$p \wedge q$] is grounded in its conjuncts, p and q; the disjunction [$p \vee q$] is grounded in whichever of its disjuncts is true, p or q. Whereas [the triangle is equilateral] and [the triangle is equiangular] supervene on one another, [the ball is red] and [the ball is colored] stand in a one-directional priority relation: the ball is colored because it's red, but it's not red because it's colored. Grounding can make sense of this asymmetry, while modal notions like entailment and supervenience cannot.[154]

Second, consider grounding's relationship to fundamentality. Under GROUNDING, facts will either persist or merge into their grounds: they will merge if all facts about them are grounded in facts not about them; they will persist if the facts that ground them are ungrounded.[155] Earlier, we noted that for e to be fundamental is for it to be ineliminable in the correct account of the domain in which it figures. We can fit fundamentality into an interlocking explanatory framework. A fact may be apt for grounding, and may be one whose grounds we can determine (such as most layered facts); apt for grounding, but whose grounds we cannot determine (such as the behavior of quantum particles, or

[154] On Jaegwon Kim's canonical description, supervenience is a "surface" relation that "reports a pattern of property covariation" rather than a deep explanatory relation. Kim (1990:167).
[155] *See* Raven 2016.

the anatomy of humor); or finally, autonomous, and therefore not apt for grounding at all (such as a definition in a proof).[156]

Finally, consider grounding's hyperintensionality.[157] For a given explanandum, grounding is more fine-grained than modal relations are because it can discriminate among possible explanans in ways its counterparts cannot. For example, stipulate a toy principle of tort indexed to institutional protections for bodily integrity from others' interference. Now compare (1) with (2):

(1) □ (φ-ing is wrong iff it interferes with another's bodily integrity)
(2) □ (φ-ing is wrong iff, and because, it interferes with another's bodily integrity)

(1) is an intensional formulation that identifies the extensions of the relevant properties across all possible worlds, while (2) is a hyperintensional formulation that tracks distinctions between necessarily coextensive properties.[158] It does so by positing a grounding relation, thereby avoiding the coarse-grained structure that renders (1) susceptible to defective equivalences such as (3):

(3) □ (φ-ing is wrong iff it interferes with another's bodily integrity and is not the color green)

Actions can't be colors, so (3) has the same truth conditions (1) does. But (3) is obviously defective; its second conjunct renders it unfit as an explanatory principle. The virtue of hyperintensional expressions like (2) is that they get at the truth we want our principle to express: it's not that actions are tortious iff they interfere with another's bodily integrity, so that anytime φ-ing interferes with bodily integrity it *happens* to also be tortious; rather, actions are tortious *because* they so interfere. The virtue of grounding is that it allows us to protect against tests, standards, or principles that are too coarse-grained to grasp the relationship(s) we actually want to pick out.

---

[156] For discussion, *see* Dasgupta (2016).
[157] A hyperintensional context is one in which we can discriminate between necessarily coextensive contents. For example, in the expressions "Lois believes Clark Kent saved her" and "Lois believes Superman saved her," the referent in the predicates necessarily refer to the same individual, but if Lois doesn't know that Clark Kent is Superman, the truth-values of the expressions will vary.
[158] Thanks to Selim Berker for helpful conversations about these ideas, as well as this set-up. For discussion, *see* Berker (2018) and (2019).

For example, suppose Adam's φing is a tort if, for reasons of social policy, it causes Demetri to suffer a loss in a way best internalized by Adam rather than shifted to anyone else. All things being equal, φing will then supervene on the natural conditions under which the internalization is specified by the social facts about the relevant jurisdiction. Civil recourse (CR) and corrective justice (CJ) theorists reject this claim because they insist that there's something more to being a tort, something roughly mapping onto wrongdoing—to deontic facts about what we owe to one another. Some such facts are modally resilient, unamenable to variation based on jurisdiction, or even possible worlds (for example, it is plausibly a pure normative principle that causing gratuitous pain is wrong).[159] But if these facts are necessary—obtain across all possible worlds—then a particular fact about tort will supervene on the social facts in the jurisdiction iff it supervenes on those social facts plus the resilient deontic facts. Covariance based on social facts is what Holmesian instrumentalists want to insist on, and yet proponents of CR/CJ need not deny this, because as far as they're concerned social facts may *themselves* supervene on deontic facts. The upshot is that while we can understand the disagreement about tort law in terms of grounding, we cannot understand it in terms of supervenience.[160]

So far we have helped ourselves to concepts like REDUCTION and FUNDAMENTALITY but said little about what makes fundamental facts fundamental (or relatively fundamental). In domains like law, we are interested not only in relative fundamentality but also the constitutive makeup of our explananda. To return to one of the first distinctions made in Chapter 1, we are interested not just in what the word 'law' means or the definite descriptions officials call to mind when they hear it; we are interested in *what it is* for a norm to be a law, or for conduct to be legal, or for harms to be in violation of it. Because neither modal nor dependence tools can satisfy this need, we need something more attuned to the essence of our explananda.

We are interested, in other words, in the real definition of law—of the properties, kinds, and relations that figure in our inquiries.[161] To provide a real definition of law is to provide an account that draws on the essence of law. Essence, in turn, must be distinguished from modality; along the lines

---

[159] On the difference between pure and mixed principles, *see* Scanlon (2014:37).
[160] Some philosophers believe this holds for debates about legal positivism more generally. *See* Rosen (2010), (2015).
[161] Rosen (2015:189). Rosen, as noted in Chapter 1, goes a step further and says we are interested in real definition "*rather than* semantic or conceptual equivalents." *Id.* I think this is an overstatement that, if taken in the wrong way, can lead us astray.

now familiar from Fine, law's essential properties account for what it is in a way its necessary properties need not, making it the thing that it is, and not some other thing.[162] This approach usefully exposes otherwise-subtle mistakes in the literature, such as Alexy's conflation of essential and necessary legal properties,[163] or Schauer's claim that jurisprudence is an "essentialist understanding of the nature of law," which is, in turn, a search for its "necessary" properties.[164]

Section 2.0

So much for the machinery undergirding Step 2. While there is some controversy concerning details about how grounding works, of more concern in a project like this are objections questioning either (or both) its role in our thought and talk, or the value it contributes to our explanatory endeavors. To prime this linkage, note that a common—perhaps even the default—picture of the relation between mind and world that grounding encourages is representationalist. Thought and talk represent how things are in the world: if Alice tells Bob "your ball is in the yard," the thing for Bob to do when looking for his ball is look in the yard, because what Alice has said represents what is so (modulo other non-standard features of the context).

Representational theories of meaning seek to account for the tools that play explanatory roles within this picture, such as truth and reference. But representationalism faces certain challenges, such as the need to account for more complex utterances like "it is wrong to harm animals" or "Santa Claus is coming down the chimney." Representationalism incurs metaphysical commitments, in other words, to the existence of moral properties like wrongness, or to non-actual entities like Santa Claus. More complex sentences require more complex explanations, including, crucially, regarding how truth and reference work in complex contexts.

---

[162] *See* Fine (1994) (being a member of the singleton {Socrates} is a necessary but not essential property of Socrates).

[163] Alexy writes that "questions about the nature of law are questions about its necessary properties." Alexy (2021:13). Specifically, he thinks "the question 'what are the necessary properties of law?' leads, by means of the concept of necessity (and its relatives, analyticity and the a priori)…into the question of what is essential." Id. Once grounding and its cognate concepts are in view, we can clearly grasp the conflation using canonical examples like Fine's distinction between Socrates and {Socrates}.

[164] *See, e.g.*, Schauer (2015:35). Schauer also draws a distinction between essential properties and properties that "are, in addition to being essential, also important." *Id.* at 45. He's thus doubly mistaken, as the logical distinction between necessary and essential properties need not require any reliance on claims about its importance.

For brevity's sake, let's treat application or truth conditions for natural language sentences equivalently, abbreviating them with the phrase 'truth conditions.' And let's use 'metaphysics' to abbreviate the attempt to discover facts about the world through limning the ultimate structure of reality. Then, on a rough but standard view, representationalism accounts for truth conditions through word-world relations such as reference.

Antirepresentationalism rejects this straightforward correspondence. As a family of views, it says that the proper use of terms can turn on considerations such as use or function.[165] Deflationism is a particularly worrisome version of antirepresentationalism because it promises to retain the backbone of metaphysical realism while rendering truth conditions lax enough to accommodate wide-ranging concerns about what the world would be like if we talked in one way rather than another. In short, it offers to successfully explain linguistic communication without resort to "mysterious" metaphysical claims about truthmakers or reference relations.[166]

One deflationary challenge has it that metaphysics can help "inform" truth conditions but does not play a further role in determining them.[167] Another has it that while metaphysicians believe they are "making discoveries about what really exists, and about the persistence conditions or modal properties of things of various sorts," in reality, all we ever do is "descriptive" conceptual analysis, so that metaphysics helps determine "the contours of our conceptual scheme, the rules that govern our concepts, and the relations among these concepts,"[168] but nothing beyond that. If deflationary views like these are viable, they will pose a serious challenge to CG.[169]

---

[165] *See, e.g.*, Williams (2013:128).

[166] Note that I am talking about a deflationary approach to metaphysics, not deflationary theories of truth. There are of course deep relations between these domains, but to keep the discussion manageable I'll bracket deflationary theories of truth. For discussion, *see* Thomasson (2017).

[167] An especially pernicious sweetener, along this vein, is the assurance that deflationism is in no way a kind of relativism (something many philosophers are anxious to avoid). It thus offers what appears to be a theory anchored in or by objective facts in the world, responsive to subjective (or at least individualistic) facts about use, all while avoiding the (purportedly) problematic features of representationalism we might find difficult to explain.

[168] Thomasson (2017:104-105).

[169] To appreciate how, consider an analogy one to Rawlsian reflective equilibrium (RE). On a standard interpretation (assuming for our purposes that RE is a method of justification), Rawls proposes that RE proceeds in three stages: first, we identify a set of considered judgments about justice; second, we formulate principles that account for these judgments; third, we determine how to address any divergences between the judgments from the first stage and the principles from the second. *See* Rawls (1999); Scanlon (2006:140-141).If we could press into service a method of justification that identifies a set of considered judgments (about justice, say) and ends there, that would effectively be an objection to RE. On the standard interpretation, RE says we need to move through three stages; if a one-stage alternative is successfully employed, it will ipso facto be a threat to RE. Deflationary challenges to CG represent a similar kind of threat.

One such view emerges from the family of so-called Social Position (SP) theories of race, gender, disability, and other kinds (often grouped under the header of 'social metaphysics' or 'social ontology'). In the balance of §2, I'll describe the basic tenets of SP theory and then explain how and why seems to present a challenge for CG. To preview, I'll argue that SP theory's challenge is either merely apparent, because a benign understanding of SP theory's central tenet is consistent with CG, or else need not worry us because the non-benign reading is untenable.

Section 2.1

SP theorists believe categories like gender and race are best understood in terms of the systemic beliefs and attitudes of the people in a given society. Roughly, what it is to be a 'woman' or to belong to a certain 'race' is to be perceived to occupy and expected to conform to social norms, roles, and behavior (in the former case, to wear makeup and default to housework; in the latter case, to have apparent bodily features presumed to be evidence of ancestral links to a geographic region).[170] The categories in question are social constructs created rather than found in nature.

There is a clear parallel between the SP thesis and the "social fact" thesis in jurisprudence, but more relevant for us is the fact that most (though not all) philosophers believe law, too, is a social construct. In fact, on one gloss, SP theory accounts for phenomena like race and gender by focusing on "external factors," that is, facts about the world, rather than individuals' internal mental states, or self-identifying beliefs.[171] All this sounds very much like the starting points of referentialism, described in Chapter 1. So it is not surprising that the two methodologies seem to coincide.

While Sally Haslanger and Charles Mills are the most well-known proponents of SP theory, Elizabeth Barnes has developed and defended it in ways that helpfully bring out the aspects we need to attend to. Barnes writes that "[w]hen we're engaged in the metaphysics of gender, we're trying to theorize *what it is in virtue of which* people have genders. We're trying to say what feature(s) of the world, if any, unify or explain gender."[172] Inquiry into disability, too, is a "project in social metaphysics" in

[170] *See* Haslanger (2012), (2019); (Barnes (2019).
[171] *See* Barnes (2019:3).
[172] Barnes (2019:2).

which Barnes is not "trying to give a theory of our folk concept DISABILITY" but rather "asking *what it is* for something to be a disability."[173]

The methodology underlying this type of inquiry sounds strikingly similar to CG. Barnes says that "a successful account of disability needs to say that paradigm cases of disability are in fact disabilities (and that paradigm cases of non-disability are not). I would hazard a guess that most of us didn't begin an interest in disability by interest in the abstract concept. We begin with an interest by ostension. We want to know what these kinds of things are, such that they have something in common with one another."[174]

We can effortlessly replace 'gender' or 'disability' with 'law' in each of these passages. Coupled with the apparent methodological parallels, it seems that CG and SP theory are closely aligned. However, when it comes time to operationalize the account—to assess claims involving the target terms—the two views are in deep tension. Barnes writes that not only does our best theory of gender not have to provide "an adequate account of who should count as women," but that "it's a mistake to expect it to", because "the project of developing a philosophical theory of gender can and should come apart from the project of giving definitions or truth conditions for sentences involving our gender terms."[175] Instead, she says, "our metaphysics can be one way, the true sentences of natural language another."[176] Once this possibility is in view, it follows that "one's metaphysics needn't line up neatly with the true sentences of natural language or the extensions of predicates."[177] This is a kind of Discontinuity Thesis (DT):

> **DT:** The truth conditions of natural language sentences for a domain *D* can be discontinuous with the metaphysics of *D*.

Put differently, DT states that the answer to to the question *What is it to be of kind K?* need not tell us what the extension of the predicate *K* is, as that predicate is not true (false) of precisely those

[173] Barnes (2016:16) (emphasis in original).
[174] Barnes (2016:10-11 (first emphasis added; second emphasis in original).
[175] Barnes (2019:1). Barnes adds that "[a] theory of the social reality that explains gender might guide or shape how we use our gender terms without thereby being a theory of those terms, or a theory that straightforwardly gives us the extensions of those terms." *Id.*
[176] *Id.* at 8.
[177] *Id.* at 8.

things which are (are not) of kind *K*.[178] DT is more general than, and independent of, SP; we can easily imagine, for example, debates in metaontology about the relationship between metaphysics and truth conditions, or about how semantics relate to truth conditions. Because of the presumed affinity of the respective subject matters (i.e., that law, race, gender, and disability are all of a piece as social constructs properly studied within social metaphysics), however, we can stick to SP as a primary foil.

At a high level, DT is a welcome idea for legal philosophers who think we should stop talking about jurisprudence in terms of metaphysics. Eliminativists like Scott Hershovitz, for example, contend that "the time has come for jurisprudence to drop the metaphysics and take up morals. The question that jurisprudence should aim to answer is how our legal practices affect our moral rights, obligations, privileges, and powers."[179] Hershovitz thinks that "for far too long, the end of jurisprudence has been answering the question posed by the Hart-Dworkin debate," and that because "[t]te metaphysical question posed in the Hart-Dworkin debate was a distraction," we "would do well to worry more about the moral consequences of our legal practices."[180] I don't find this line persuasive. As Andrei Marmor points out, Hershovitz seems to be expressing an autobiographical statement about his intellectual or research interests; it's not clear that there's an argument in his sentiments about what's important with which we can conclude anything about what's real, or true.[181]

DT might be thought to provide such an argument. Rather than wasting time with the "distractions" of the Hart-Dworkin debate, we can accept DT and happily move on to the more pressing matters Hershovitz describes, freed from the concern that our discourse won't be lining up tightly enough with the metaphysics underlying our subject matter. Of course, the viability of this shift turns on the extent to which DT is plausible, and that in turn depends on how we read it. On one

[178] Thanks to Mark Richard for suggesting this alternative. One reason I set out DT in terms of the 'metaphysics of D' is that it tracks the use of this phrase in the relevant literature in social metaphysics. *See, e.g.*, Mills (1998); Barnes (2020). Mills's view, as I'll discuss below, is a helpful contrast to Barnes's.

[179] Hershovitz (2015:1203).

[180] *Id.* at 1203-1204.

[181] Marmor (2018:154). ("To express lack of interest in a philosophical question is not a premise in a philosophical argument; it is, at best, an autobiographical statement, of the kind one should share with friends over dinner, not in academic publications."). To be fair to Hershovitz, he does provide arguments in other places in the text; the problem lies in the totalizing (and somewhat tautological) thought, as Marmor identifies in Hershovitz (2015), that jurisprudential arguments don't make much moral difference *from a moral point of view*.

reading, DT is a modest claim, compatible with CG. On another reading, however, it is in tension with CG.[182]

On the modest reading, Barnes is simply denying that metaphysics tells us the whole story about truth conditions. This is a more or less benign claim, and few would balk at it. I certainly do not. In fact, CG is premised on a similar notion: the idea that we need a two-step procedure like CG is *supported* by the claim that metaphysics is not by itself adequate to the task. Far from being problematic, then, DT's modest reading counts in favor of (the need for) something like CG.

On DT's strong reading (call it DT_S), it's not just that these two projects (metaphysics and truth conditions) "come apart." What gives DT_S its bite is the notion that the project of giving truth conditions for *K* predicates need not be answerable to the metaphysical considerations that inform us about what *K* is. The discontinuity between the two projects runs so deep, in other words, that claims about the extensions of *K* can be true or false independently of answers to the question what it is to be *K*. What it is to be *K* might "guide" or "inform" us about some of K's underlying properties (for example, according to SP theorists, it lies *in the nature* of the referent of 'woman' that individuals to whom it applies have been subordinated within a social hierarchy[183]), but truth conditions for sentences using it outrun the reach of the domain in which those properties are determined. DT_S is, roughly, a mirror-image of deflationism about truth, in which truth-ascriptions "play no robust explanatory role."[184]

At the limit, DT_S allows that truth conditions *override* metaphysics, so that, for example, if it turns out the nature of 'woman' is such that it excludes individuals of a certain chromosomal profile, we can ignore that constraint when using sentences involving 'woman.' SP theorists take this to be a feature rather than a bug of their theory. Haslanger for example writes that "references of social kind

---

[182] As I understand SP theorists, their views on the relationship between metaphysics and language—and more specifically, the gap between the two—is not to be consigned to the difference between semantics and pragmatics. That is, a core idea common to both readings of DT I will describe below is that there need not be a "direct equivalence between how we truly describe the world in natural language and our metaphysics," Barnes (2020:9) where true descriptions are semantic affairs (otherwise, Barnes's (2020) would be unmotivated).

[183] *See* Haslanger (2012). What SP theorists are concerned to retain are facts about the import of historical classifications of race and gender, permeating (perhaps invisibly) and felt despite however much we'd like to believe such facts have dissipated or can be dismissed by claims like "the way to stop discriminating on the basis of race is to stop discriminating on the basis of race." *Parents Involved v. Seattle*, 551 U.S. 701, 748 (2007). SP theorists want to reject such claims as not only facile but as *wrong* based on the nature of social categories like race and gender.

[184] DeRossett (2021:546).

terms are whatever satisfy certain normative conditions, e.g., the extension of 'family' is determined, in part, by whatever promotes a just social world."[185]

The same methodology underwrites the structure of like-minded one-criterion legal theories. For instance, Holmes's prediction theory tells us law has a metaphysical nature but that ascriptions of legal content need not turn on it, or even be answerable to it. What determines truth conditions is, as Holmes would say, its "material consequences." So thought and talk about law is deeply discontinuous with theories about its nature. Prominent law-and-economics theories operate in a similar vein. According to Kaplow and Shavell's consequentialism, whether ϕing is tortious rests on the social benefits of that decision. On this view, the ascription 'tort' to instances of ϕ turns on the court's view of ϕ's social burdens and benefits, but can still be judged as a correct or incorrect judgment. The theory refuses to give any quarter to relativism, but at the same time, bases truth conditions for legal claims *directly* on the views of the judge(s) deciding cases.

We'll return shortly to the problems such theories run into. For now, what I'm calling attention to is the common structure underwriting them. In each, an implicit commitment like DT_S promises a disciplined, world-constrained objectivity (so that we can form judgments about, and criticize, linguistic behavior such as ascriptions of 'tort') and yet operates with so capacious an approach to truth conditions that it substantive criteria float free of this same objectivity.[186] In gender theory, this "middle way" is used to underwrite the SP thesis; in law, judicial practice under Legal Realism or Holmes's prediction theory. In each, deflationism promises that the explanandum is rooted in an objective metaphysics so that criticism is well-founded, but truth conditions implicating it need not be constrained in any real way by that metaphysics. Metaphysics becomes epiphenomenal.

---

[185] Haslanger (2012:15). My objection is to the "in part" caveat in this thesis. Suppose the considerations that "promote a just social world" are very different from, or even irreconcilable with, the deliverances of an externalist theory of reference for 'family.' The tension can't be dissolved by just adding qualifiers like "in part" or giving metaphysics the role of "guiding" and "informing" truth conditions. See §2.2 for further discussion.

[186] When traditional deflationary approaches seek to downplay the nature and role of truth conditions, they replace them with verification or assertability conditions, or with an emphasis on communicative intentions, illocutionary force, or conventions of use. DT_S, however, insists on *retaining* the role of truth conditions as they function in representationalism while rejecting the notion that these conditions fall out of our metaphysis, thereby (attempting to) accommodate permissivism about language use together with critical assessment of it at the same time.

Section 2.2

If it's correct, DT_S makes trouble for CG. But is it correct? To the extent Barnes, Haslanger, or other SP theorists endorse it,[187] that support comes from the wrong kind of reason. The notion that individual self-ascription can be sufficient for truth conditions in a domain that has an epiphenomenal metaphysical backbone is motivated almost entirely by an "ameliorative" approach to the domain. For SP theorists in particular, the ameliorative approach blesses a permissivism under which individuals' self-ascriptions can *suffice* for truth conditions. For example, Barnes explicitly states that "we should, whenever possible, treat the sincere self-ascription of gender terms as true."[188]

Crucially, this is not because of the nature of gender. SP theorists endorse permissivism because they believe our existing social structures are "oppressive and should be challenged"; gender ascriptions have a political import that "is less about the application conditions for particular natural language terms and more about treating people as having first-person authority about their own gender identity and expression."[189] So the permissivism falls out of a morally and politically motivated conception of the project SP theorists want to engage rather than truths about the underlying nature of the relevant domain. Two responses are apt here, either of which can, I think, allow us to dismiss DT_S as a serious threat to CG.

First, the ameliorative approach is effectively a different project than the one CG engages. Haslanger and Barnes want to not just move from the question *what is x?* to the question *what do we*

---

[187] There is textual support both for and against attributing DT_S to Haslanger and Barnes. They say that truth conditions can be "guided" or "informed" by metaphysics, *id.* at 16, 25, and want to make room for the possibility that "people can still be incorrect in their use of gender terms because of the underlying metaphysical reality." *Id.* at 10. But they also advise that we should "simply bracket the terminological issues and just consider whether the [norms] in question are ones that are important to consider given the goals of our inquiry." *Id.* On their considered view, "[i]t's a mistake to focus too much on the mere truth of sentences like '*x* is a woman'" because "truth is relatively easy to come by for natural language sentences (especially if we don't endorse a robust correspondence-style theory of truth)." *Id.* at 18. Of course, it's no part of my project to defend a correspondence theory of truth. As I discuss in the main text, the permissivist self-ascription element of the ameliorative project is what makes Haslanger and Barnes's approach align with DT_S.

[188] Barnes (2020:19). Compare this aspect of SP theory with an older, more traditional social constructivism of the kind we find in Mills (1998:50-55). On Mills's view, self-ascription is one among seven criteria for judgments about race, and its metaphysical weight fluctuates. Mills acknowledges the concern that by permitting self-ascription into these criteria, his theory will be antirealist (subjectivist, or relativist) rather than objectivist (even on a social constructionist gloss on objectivity). The way to avoid this, he argues, is by construing self-ascription as an intersubjective rather than subjective criterion, shaped and driven ("crystallized" is his term) by other criteria, such as custom. *See id.* at 59.

[189] Barnes (2020:19),

want x to be?[190] They want to conceive the former *as* the latter.[191] Haslanger thinks the study of social kinds should consider not just "what forms of reality are created" but also—and crucially, on a par—"whether or how we might do better," such that "our conceptual frameworks should … give us the tools to envision and create better lives together."[192] These are laudable goals, but they are prescriptive rather than descriptive. To the extent they are supposed to be constitutive aspects of metaphysics, I think Haslanger and like-minded SP theorists have changed the subject, in the same way that law-and-economics scholars do in tort theory.[193]

One way for Haslanger to respond is to point out that 'metaphysics' itself must be afforded an ameliorative analysis, so that my objection amounts to foot-stomping about its scope or aims. This is a move in what is now called "metalinguistic negotiation," in which disputes about what even frame-level terms mean are systemically construed as disputes about what they should mean. As David Plunkett interprets Haslanger's project, she wants to "replace the concepts that we normally use to talk about social identity … with new ones that she has engineered," because they are better suited to "accomplishing the specific philosophical and political aims [she] thinks we should be pursuing."[194] But if that is Haslanger's gloss on METAPHYSICS as much as it is for RACE or GENDER, the same response above can be re-deployed at the higher level of generality. Haslanger's concept METAPHYSICS is not one I am using in in this dissertation, nor am I interested in metalinguistic negotiation.[195] I don't think there's much more to be said here.

Second, more substantively (and perhaps more interestingly), SP's permissivism makes the view internally unstable because it (the permissivism) functions like an exception to a rule that swallows the rule whole. Just as a plan to take action on Monday that consists of coming up with a

---

[190] Haslanger (2012:221).
[191] *See id.* at 21. *See also* Haslanger (2012:224). I should note that Haslanger seems to have changed her position over the years, and I'm not sure what her overall views about social metaphysics are, on balance. *Compare* Haslanger (2012:221ff) *with* Haslanger (2012:429ff, 381ff).
[192] Haslanger (2020:249, 257).
[193] The analogue in tort is the contrast between civil recourse theorists like Goldberg and Zipursky, who claim to be offering a descriptive theory of tort, and legal consequentialists like Kaplow and Shavell, who claim they are offering a prescriptive account of tort. *See, e.g.*, Duxbury (1997:301); Kaplow & Shavell (2002).
[194] Plunkett (2015:830).
[195] The same applies to Barnes's claims insofar as she thinks "the substantial work of metaphysics" lies in "explaining the nature of [certain empirical] constraints, rather than in explaining the application conditions for natural language [] terms." Barnes (2019:21).

plan for action on Monday is no plan at all, if self-ascription is a sufficient condition for truth, then—quite apart from whether the motivations for so holding are virtuous or laudable—the account in which that's so is not one in which metaphysics plays any meaningful role.[196] If (hypothetically) what it is to be a woman conflicts with permissivism about ascriptions of 'woman,' SP theorists favor the latter over the former. The metaphysics of gender don't "inform" or "guide" truth conditions here in any real way.

Now SP theorists might argue that this analogy is oversimplistic, or flat-footed. A better analogy, they might argue, is to a rule that contains an exception whose operation or applicability is defined under parameters so that it doesn't just swallow up the role. When push comes to shove (when a particular self-ascription conflicts with facts about metaphysical reality), ideological considerations trump metaphysical facts, according to SP theorists. Compare this to a dietary rule that says "don't eat sweets on weekdays, except (i) weekdays that are federal holidays or (ii) weekdays on which you might feel like eating sweets for some other reason, that reason to be evaluated by some separate body of considerations, *C*." My initial objection was that the exceptions render the rule toothless. The SP rejoinder here is that exceptions like (ii) are well-defined, just like exceptions like (i) are, because riders like *C* constrain the rule's application.

I don't think this response works. I agree that (i) is a well-defined parameter consistent with the rule. But (ii) seems like its application can swallow the rule whole. Even though *C* can discipline it (that is, prevent it from reducing to a free-for-all), *C* is an extension of (ii) itself, not the original rule.[197] What seems foreclosed is a "middle way" in which self-ascription carries *some* weight but is not *wholly dispositive* for truth conditions.

---

[196] This argument in no way relies on there being an isomorphic connection between metaphysics and language. In particular, I don't rely on the notion that there is a privileged true description of reality the sentences of which stand in an isomorphic correspondence to facts in the world. I don't find the view that we can glean facts about reality from our language, or what we can and cannot manage to represent grammatically, at all plausible. *Cf.* Rayo (2013).

[197] To help see this, compare Barnes's view to an adjacent position. On Robin Dembroff's view, "what matters to gender self-ascription are normative facts, not semantic or metaphysical ones." Dembroff thinks that "the metaphysics of gender is ultimately irrelevant to how we should use gendered language, whereas [Barnes] thinks the metaphysics of gender can inform our use of gendered language without thereby being an account of gender terms." Barnes (2019:25). Dembroff's view seems unproblematic: it forthrightly *rejects* giving metaphysics a role in determining truth conditions. Barnes's, on the other hand, purports to give it a role but then makes it epiphenomenal given the sufficiency condition she awards to permissivism.

The same instability play itself out in legal theory. Kaplow and Shavell's consequentialism seeks "to defend and entrench a single criterion as the basis for all scholarly [ascriptions] of law."[198] The problem isn't that the goal is a bad one, but rather that implementing it makes it impossible to distinguish a descriptively accurate legal domain from others (as a first-order claim, I take no position on that). For example, when a court holds that ϕing is, say, a private nuisance, it is not expressing the view that, in light of the *x, y,* and *z* features of ϕ, society will benefit from liability for ϕing. Rather, in treating ϕing as an instance of private nuisance, the court is declaring that ϕing falls under one of tort law's directives in light of *x, y,* and *z*.[199] That categorization qualifies ϕing as a tort in an indirect way, responsive to the domain's metaphysics rather than a one-criterion basis for the ascription of ϕing as 'tort' directly.

Holmes's prediction theory can, and should, be assessed similarly. The prevailing objection to the theory is that it leads to absurd results. The *reductio* is supposed to be that if Holmes is correct, judges trying to decide cases are making predictions about their own opinions, which makes no sense. It's not just that judges couldn't get cases right under such a conception, Holmes's critics argue, but also that they couldn't get them wrong either—if law consists of "prophecies" of what courts do, it will consist of self-fulfilling prophecies that don't track what's actually going on when judges reason about how to determine the law.[200]

I'm not particularly impressed with this objection. Read charitably, Holmes's reference to predictions is an allusion to the entire legal system, not just one-off judicial decisions. When Judge Hercules determines what the law is in a given case, Holmes's claim is that Hercules is predicting what will happen all the way through: whether the appeals court above him will agree with his decision, or instead send the case back on remand, or whether his reasoning can be borne out by the body of precedent with which it presumably accords. Even the highest courts can be said to be "predicting" cases in the sense that in reaching decisions they are predicting whether their rulings will be enforced, or overturned by later courts, or abided by the country at large. Holmes's view seeks to liquidate legal

---

[198] Adler (2005:824). I've replaced "evaluation" with "ascription" in the original to make the analogue clearer.
[199] *See, e.g.*, Goldberg &Zipursky (2020:239).
[200] The prevailing objection to Holmes's prediction theory is made, and taken to be definitive, by Hart (2012:10), Fuller (1940:94), and Cohen (1937:17), among others.

questions; the perspective need not be any one court's isolated decision at one juncture in a case, but rather that of the system as a whole.

I'm not defending the prediction theory here—my point is only that it can't be dismissed so easily. The problem with it, on my view, is the same one applicable to SP theory in gender studies and to Kaplow and Shavell's consequentialism in tort law: it runs into a structural instability, undermining it from the inside out. Holmes claims there are deep facts about the law, and that we can be correct or mistaken about them; at the same time, truth conditions for legal judgments turn on a criterion that can be sufficient—that can be applied to settle questions about legal content *directly*. If that's right, however, it's hard to see how this criterion doesn't swallow up any constraining force the underlying legal facts are supposed to have, especially if they are inconsistent with judicial practice. If the deep facts (turn out to) involve a role for robust normativity, for example, or excludes judicial practice of the kind posited as determinative by Holmes, under the prediction theory they are nonetheless epiphenomenal. What would it matter, for instance, if law is in fact a department of morality, or instead an amoral series of prices if judgments about what law is in a given case turn on the predictable "material consequences" of conduct? In practice, the metaphysis seems nominal at best.[201]

In contrast, CG posits a close structural link between the metaphysical facts about a domain and the truth conditions of sentences used to talk about it. Its referentialist component is compatible with the idea that facts about dubbings and initial baptism sometimes do not fully determine truth conditions (and so is compatible with if not bolstered by DT's weak reading). So CG is *not* a view on which determining truth conditions for assertions like "ϕing is a tort because it's an invasion of

[201] Though I promised not to do any Dworkin exegesis in this dissertation, my argument here resembles Dworkin's critique of inclusive legal positivism (according to which law is ultimately conventional but can contingently depend on morality). Dworkin argues that inclusive positivism is "Pickwickian," that is, positivist in name only. Attributing to Coleman what he calls "the abstraction strategy," Dworkin argues that inclusive positivism describes conventions at an order of generality so that any given substantive dispute among officials can be construed as nonetheless in accord with convention. For example, it's plausible that a legal system's rule of recognition is that law must be "fair" or "just." If Alice and Bob disagree about what is fair in a given case, Alice thinks the law is *x*, and Bob thinks the law is *y*, the inclusive positivist can say they share a convention because the rule of recognition is that the law is whatever is fair, and on that much Alice and Bob agree even as they disagree about *x* and *y*. A rule of recognition so characterized will satisfy the central tenet of inclusive legal positivism—because everyone will agree that that the law is whatever is fair, and that's thus a convention within the system—but do so trivially. Dworkin's point, I gather, is that if we characterize the rule of recognition abstractly enough, any first-order rule will accord with it, and positivism will lose all but its most Pyrrhic meaning. *See* Dworkin (2006:188-198). My point is that, similarly, if under theory *T* truth conditions for sentences in *D* need not be answerable to *D*'s metaphysics, the extent to which *T* is attuned to *D*'s metaphysics under DT is Pickwickian.

privacy" is an attempt to "limn the metaphysical structure of the world."[202] But the notion that we can ignore or override such facts based on first-order criteria (normative values, political goals, empirical claims) while retaining the realism that recognition of such facts allows renders any such package untenable.

Section 2.3

Where does this leave us? DP's weak reading need not concern us. DT_S, however, is effectively a denial of CG, suggesting that we can instead gesture towards metaphysics nominally to avoid the appearance of an unappealing collapse into relativism or subjectivism and then shift to what is a very different enterprise. Different theorists have different interests, of course, and even those who seek to reimagine what it means to do metaphysics are entitled to pursue their projects. There's also something to be said for loose talk, or, in a slightly different but related vein, a compelling distinction between what Richard calls "theorizing about language" and "the humdrum business of deciding what [a speaker] *A* is talking about."[203] Insofar as the two are different activities, even claims like DT_S need not concern us to the extent what its proponents care about is communication, or the practical effects of assertions in the real world.

Sometimes, however, the two activities (theorizing about language and deciding what speakers are talking about) are closely linked. Given their import, ascriptions of 'law' constitute one such context. Truth conditions for legal ascriptions aren't innocent or academic enough to relativize to schemas of interpretation so that although they "can't be used simultaneously by a single interpreter," we can nonetheless shrug our shoulders, say "big deal," and get on with it.[204] As SP theorists

---

[202] Rayo (2013:11). Rayo asks: "If ordinary assertions of [a sentence] are not intended to limn the metaphysical structure of the world, what could be the motivation for thinking that the truth conditions of the *sentence asserted* play this role?" *Id.* (emphasis in original). He thinks the only plausible answer is a view on which logical form ought to correspond to metaphysical structure. But truth conditions of assertions can be closely tied to, or responsive to, attempts to limn metaphysical structure along the representationalist lines sketched in §2.0 without fully exhausting the role. CG and DT's weak reading agree about this; DT_S, in practice, cannot.

[203] Richard (2019:117).

[204] *Cf.* Richard (2019:117). SP theorists may point out that contexts in which race or gender ascriptions are involved have practical import, too, in just the way legal ascriptions do. But that actually helps my argument against DT_S, for then, in contrast with the (relatively) less loaded contexts in which we can consign ourselves to truth relative to a schema of interpretation (to use Richard's example, contexts where we have to interpret sentences like "*A* said there is a dog in front of her house"), there is all the more reason to limit or narrow the gap between metaphysics and truth conditions. If it *really matters* whether ascriptions like "norm *L* is a law" or "person *W* is a woman" are true (false), the nature of what it is to be

characterize their interests, they want to criticize linguistic usage; they are worried about "exclusionary problems" concerning individuals' self-identification, for example, and so want to anchor language use to reality so that criticism of such usage is not a subjective affair. If *this* is the relevant context, DT_S *is* implausible. Metaphysics must play a meaningful rather than nominal role in the determination of truth conditions if we want a basis for criticism of predicate use. In terms of CG, first-order normative considerations can inform our understanding of the representational traditions that help make up the body of information we study when we seek to identify concepts at Step 1; they do not inform our understanding of the content of these concepts at Step 2.[205]

We can use Dworkin's chain novel analogy to illustrate this difference.[206] DT_S agrees with CG that later chapters of a novel can diverge from earlier chapters. But there are limits to this divergence. According to CG, later chapters must preserve the basic plot and character profiles introduced in the earlier chapters; DT_S, on the other hand, suggests they can diverge much more widely—not just in degree, but in kind. Not only can we introduce new characters or more deeply develop the plot; we can depart from the genre into which the earlier chapters fall; we can write the later chapters of what was historical fiction as science-fiction or fantasy; we can transform a traditional novel into an epic poem or play, moving from prose into iambic pentameter based on—as Haslanger or Barnes might put it—what we want the novel to be.[207] If *this* is the view SP theorists adopt, it is untenable for the

---

a law or a woman matters even more. (Even here, though, it matters what our ultimate goals are. If they are in making the world a better place, relative to a set of moral or political views, truth may be less important. I don't know that I agree with this notion, but it's a topic well worth a more fulsome discussion than I can provide now.)

[205] A lingering question here is, just what level of indeterminacy *can* CG accommodate? It is an appealing and popular thought across many theories of meaning that causal facts contribute to determining the adequacy of ascriptions of meaning or reference, but that that does not entail a commitment to such facts determining meaning or reference all by themselves. Indeed, one might deny there is any one best interpretation scheme with which to get from causal environmental facts to reference. *See, e.g.*, Richard (2019:136). The reason I am less laissez-faire than theorists like Richard is that when it comes to the presuppositions involving law (specifically involving the consequences of the rule of law, including the surrendering of liberties and acceptance of coercion in exchange for particular forms of ordered liberty through a social compact), there are fewer acceptable interpretative schemes than may at first appear. Even when we're only talking about the semantic values of "the simplest expressions that make up our sentences," which Richard deems to be the most indeterminate, *id.* at 140, if they are to figure in sentences successfully describing (the bulk of) legal practices taken to be justificatory backstops, as noted in Chapter 1, there are only so many semantic values that can do the job.

[206] To recall, Dworkin's chain novel metaphor describes precedent in judicial decision-making. Precedent constrains judges, he writes, as though they are a group of novelists who must write *seriatim*. "Each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on, aiming jointly to create, so far as they can, a single unified novel that is the best it can be." Dworkin (1986:229).

[207] On my view, the degree to which later chapters can diverge from earlier ones while maintaining the essential characteristics of the novel is a hard question of interpretation. The *kinds* of divergence that are possible, however, are much more circumscribed. CG can accommodate later chapters in which the central conceits of the main characters

reasons discussed in Chapter 1. It's too discontinuous to be a plausible conception of what theorizing about law is within the relevant representational traditions.

Section 3.1

A big reason why deflationary approaches by SP theorists need not concern us is that despite the close parallels in subject matter, SP theorists turn out to be engaged in a different project (ameliorative analysis). The same cannot be said, however, of the deflationism defended by philosophers like Horwich, Thomasson, and Schiffer. These philosophers characterize their project as descriptive, so if their arguments are plausible, CG won't be able to avoid them in the same way it skirts around SP. Neo-Carnapian deflationists and like-minded quietists like Scanlon pose just this type of threat.[208]

Begin with a typical deflationism about reference. As Horwich puts it, for a singular term *t* to refer to *x* is for *t* to be the name '*n*' and for *x* to be the item *n*.[209] That's all there is to it. Truths such as that 'Plato' refers to Plato are "not merely the start of the story but the whole story."[210] Thomasson adds that "we should expect no informative or substantive theory of what the reference relation consists in, whether causal, descriptive, teleological, etc."[211] Unlike claims like (R), on this view, reference is not a matter of grasping how tokens of '*t*' refer to *x* iff *t* satisfies a relation like ≈(*x*, "this(Γ)"). There is no generalizable answer to the question what reference relations consists in, only local, case-by-case determinations for given terms.[212]

We can abbreviate the view with a variation on DT, aimed to more specifically target the relation between metaphysics and language:

---

become more or much less pronounced, for example, or in which plotline takes a dark turn; DT_S, however, seems to not only entertain but welcome shifts in the very nature of the project.

[208] Scanlon says that while his views have "obvious similarities" to Carnap's, he denies that they are neo-Carnapian largely because existence questions on his view are not to be determined by linguistic rules. *See* Scanlon (2014:19). In the interests of space, I will focus here on philosophers who willingly sign up as Neo-Carnapians, but will discuss similar ideas from Scanlon's quietism to help illustrate the general points at issue. (I think Scanlon's quietism is a species of deflationism, but can't argue for that conclusion here.)

[209] Horwich (1998:115).

[210] *Id.* at 118.

[211] Thomasson (:188).

[212] As we'll see below, there are still rules for the uses of terms that generalize. So, for example, referents for 'red' may be determined by the rule that the predicate is to be applied in observational conditions that are ostended to.

> **DT*:** Determining the truth conditions of natural language sentences for a domain *D* need not involve any metaphysical theorizing about *D*.

Neo-Carnapians develop an argument for DT* through Carnap's distinction between two kinds of existence questions. Speaking about any kind of entity requires identifying terms within a linguistic framework, that is, a system of ways of speaking and thinking that are subject to rules. Questions about entities within the framework are "internal" to it, and are the types typically asked by ordinary language users. In contrast, the questions typical of metaphysics are "external" to the framework insofar as they aim at somehow transcending it. Carnap believes external questions (like *do numbers exist?*) are posed "neither by the man in the street nor by scientists, but only by philosophers,"[213] and, if construed as factual, are ill-formed because they attempt to do what cannot be done, that is, be meaningfully evaluated outside of a specific linguistic framework.[214]

If we delete the 'linguistic' qualifier, Scanlon's quietism suggests the same basic idea. As long as our thought and talk is guided by "well defined" and "internally coherent" criteria of identity, we are free to adopt "truth conditions for sentences containing terms referring to them which allow existential generalization from such sentences."[215] There is no generally-applicable notion of existence; all ontological questions are domain-specific, a notion Scanlon concedes is "radically anti-metaphysical."[216] So the truth values of statements about a domain are determined by "the standards of the domain that they are about."[217]

The way to separate well- and ill-formed existence questions boils down to how the questions are posed (for Scanlon, the domain in which they are asked). After their introduction, rules of use provide application conditions that tell us when it is proper to use terms. Once they are in place, they form the basis for accepting, rejecting, or otherwise testing statements made with those terms. For example, we can introduce rules from the determinate use of number terms ("there are two apples in my hand") to noun terms ('number') and sentence forms ("two is a number"). We can go from

---

213 Carnap (1950:207).
214 For discussion, *see* Thomasson (2016).
215 Scanlon (2014:27).
216 *Id.* at 10.
217 *Id.* at 19.

predicates ('red') to properties (<red>), introducing rules to permit sentences like 'red is a property.'[218] We can assess claims such as *unicorns exist* using evidentiary rules for spatiotemporally extended entities. For any given kind, *K*, we can rigidify reference to application conditions and then evaluate the relevant sentences.[219] In these ways, we can get what Schiffer calls "something-from-nothing" inferences—inferences with conclusions that imply the existence of something from premises that do not.[220]

Application conditions must be bare rather than sortal. That is, they cannot work by applying a substance sortal to the objects that fall under it, in the way that the concept TABLE applies to tables. That kind of sortal application, the subsumption of something under its kind, presupposes the existence of the kind in question. For this reason, deflationists are uniformly quite clear that that is not what they have in mind when they hold that rules of use provide application conditions with which to assess existence claims: "the application conditions for a term *K* must not be understood as appealing to the existence of *K*s."[221] Instead, they must provide bare application conditions that tell us what suffices for the truth of an existence claim, or under what conditions something exists, without subsumption under a concept or kind already in place.

In sum, rules of use, including application conditions, help constitute the frameworks that make possible meaningful discourse. Only by using terms in accordance with the rules constitutive of the framework can we evaluate sentences comprised of them. These rules, and in particular these application conditions, must not appeal to the existence of the very things they are meant to provide existence conditions for. For instance, something like *'K' applies iff Ks exist*, while true, cannot be such a rule because it would merely amount to subsumption. It is only with bare application conditions that

---

[218] *See* Carnap (1950); Price (2009); Thomasson (2016a).

[219] So *K*s exist iff the application conditions actually associated with *K* are satisfied.

[220] *See* Schiffer (2003:56-57).

[221] Thomasson (2015:96); Thomasson (2016b:38). The prohibition on sortal application extends beyond the need to avoid circularity. As Thomasson notes, without such a restriction, an "understanding of application conditions could provide no help in evaluating the truth of existence claims via claims about reference, and those about reference in terms of the fulfillment of application conditions." Thomasson (2015:96). The whole point of the deflationary approach is to tell us how to evaluate existence claims through appeal to the notion of the application of a given concept. But if the conditions for the application of the concept presuppose the existence of the objects the conditions for whose existence we are evaluating, the route through reference will be pointless. So the prohibition on sortal application conditions is a consequence of the priority that easy ontology puts on concepts, or language: without it, we would need, as Thomasson concedes, "a prior and more substantive understanding of existence to determine whether application conditions are fulfilled." *Id.*. For discussion, *see id.* 96-99; *see also* Evnine (2016).

we are, as Thomasson puts it, "truly inferring the existence of a new entity" (Schiffer's something-from-nothing inference), rather than "an old one under a new label."[222]

Whereas internal questions use terms in accordance with the rules constituting their linguistic framework, attempts to pose external questions are hopeless. To raise an existence question such as *are there numbers?*, we either use the relevant terms according to their rules of use, in which case they are internal and resolved easily (because, in being governed by those rules, are answerable using empirical and conceptual means), or else insist with traditional metaphysicians that they can't be resolved in this way, in which case they are "severed" from their rules. So severed, they are rendered meaningless: without rules anchoring use, a term like 'number' might as well be a term like 'asjkaf,' where the question *are there asjkafs?* has no sense or constraints under which it can be meaningfully assessed. So a question such as *do unicorns really exist?*, if the *really* is (attempted to be) read as independent of any specific framework, is an unanswerable pseudo-question.

This deflationism seems to provide powerful support for DT* because it suggests that well-formed ontological inquiries are answerable through a straightforward combination of conceptual and empirical work, and conclusions about them can be reached through inferences from uncontroversial premises—"easy ontology," so called. Conceptual analysis is used to determine the application conditions derived from semantic rules of use; empirical investigation then discovers whether those conditions are met in a context *c*. For example, if there are atoms arranged table-wise at *c*, we apply the term 'table' at *c*; if there are instead atoms arranged ball-wise at *c*, we do not apply the term 'table' at *c*. The question whether there exist tables at *c* is easy in that it reduces these two non-metaphysical tasks, neither of which "leaves any work for the metaphysician."[223] The core claim—the kind *K* exists iff the application conditions associated with *K* are satisfied—is metalinguistic; there is simply no metaphysics left to do.

The procedure easy ontology prescribes can be difficult—determining the application conditions for 'racism' will be trickier than for 'table'—but deflationists believe the *type* of inquiry can be resolved "without relying on any work that is … answerable neither by direct empirical methods

[222] Thomasson (2015:98).
[223] Cameron (2021:36). *See also* Thomasson (2019:257) ("stating that easy ontology provides "deductively valid arguments that take us from an undisputed claim and a conceptual truth to an ontological claim").

nor by conceptual analysis."[224] Just as we get the existence of tables from uncontroversial premises about particles arranged table-wise, we get the instantiation of 'woman' from (less uncontroversial, but still not mysterious) premises about historical facts about society, or the existence of law from (again, less uncontroversial but still not mysterious) premises about social facts about official attitudes, with no need for esoteric views on natural law or normativity.

The reasoning involved in these inferences wears its accessibly on its sleeves. For instance, once we are in a position to know the application conditions for terms like 'basket,' 'red,' and 'apple,' we can get from (4) to (5) and (6):

(4) The apples in this basket are red.
(5) The apples in in this basket have the property of being red.
(6) There exist properties, like redness.

Proponents of DT* should find this music to their ears, because it is not just that we are then entitled to (5) and (6) based on linguistic and conceptual mastery together with empirical information. More strongly than that, as Thomasson writes, those who do not accept conclusions like (5) and (6) from premises like (4)—those who "deny the ontological claims or suspend judgment until deeper inquiries into metaphysics are completed—are open to rebuke."[225] Once we have the relevant information and possess mastery of the relevant terms or concepts, it is a mistake to require metaphysical inquiry of the kind CG demands.[226]

Section 3.2

Neat and tidy though easy ontology may seem, it cannot deliver on its promises. We are supposed to be able to render the question whether some *K* exists, a paradigmatically metaphysical

[224] Thomasson (2021:6).
[225] Thomasson (2015:233). The similarities between easy ontology and SP theorist run deep. Thomasson is sympathetic to the permissivism discussed in §2. Writing about debates about free will, for instance, she says that the question whether choices that are neither coerced nor manipulated are 'free' is a debate about "whether that is the correct analysis or explication of how our actual common terms work," and so a debate about "whether those are the only conditions we *should* require in order to attribute freedom," Thomasson (2019:257) (emphasis in original). Thomasson concludes: "These are important and interesting issues—but not issues that require any mysterious epistemically metaphysical work." *Id.*
[226] In this way, easy ontology also paves the way for various forms of jurisprudential eliminativism, such as Hershovitz (2015).

question, easy by inferring from *K*'s application conditions an answer to whether it is instantiated at *c*. But consider a concept like LAW:

(4*) The words in this court opinion are law.
(5*) The words in this court opinion have the property of being law.
(6*) There exist properties, like legality.

According to easy ontology, determining the truth conditions of (4*)-(6*) should not require any metaphysical theorizing. But (4*) seems obviously disanalogous to (4). It will pay to clarify what exactly the problem here is. The following biconditional, call it EA for easy inference, should suffice as a purely conceptual matter:

EA: $(f_1 \wedge f_2 \wedge f_3 \wedge \ldots f_n) \leftrightarrow L$

EA tells us that iff a certain conjunction of facts obtain, a certain law exists, in just the way that iff certain particles are arranged tablewise, a table exists. (4*) is a toy version of "the words in this court opinion," an abbreviation representing the conjunction or set of social facts $(f_1 \wedge f_2 \wedge f_3 \wedge \ldots f_n)$ that suffice for there to be law. But the contention between positivists and antipositivists is that the antipositivist holds that law's instantiation is not wholly determined through empirical inquiry: on his view even the most detailed conjunction of social facts does *not* suffice to make something count as law. And from the other direction, the exclusive legal positivist will insist that there can *only* be such a conjunction—that, necessarily, non-social facts cannot be present on the left-hand side of the biconditional.

Deflationists might respond that the reason (4*) is disanalogous to (4) is that we disagree about the application conditions for 'law.' We then have a verbal dispute, but that doesn't indicate a problem with easy ontology, any more than the observation that the application conditions for 'racism' are harder to pin down than are those for 'table': the view has always been that existence questions can be reduced to easy inferences once we agree on the term's application conditions.[227] That is, once we

[227] *See, e.g.*, Thomasson (2009:457).

do the conceptual and empirical work, we either will or will not be able to find the facts to plug into EA; if we do, we are warranted in saying either *L* does or does not exist; if we don't, we don't have a well-formed question to answer.

I don't think this response is satisfactory. There is a deeper, two-horned dilemma here. EA purports to give us the application conditions for law, but it is not a *definition* of law: it is, by the deflationist's own lights, a minimal condition for law's existence that makes that existence turn on having the warrant to say that the term can be correctly applied: if we can justifiably say that the term applies, that's all there is—that's all we need—to conclude that law exists. In other words, EA's purpose is to provide an account of when law is instantiated *given* whatever it is that law is. As Scanlon might put it, its own truth is to be determined by and within the corresponding domain.

The first horn of the dilemma is that this existence condition does not have enough content to justify anything beyond the sheer existence of an object, including anything about that object's other properties (aside from trivial properties such as being self-identical). Even if we suppose for the moment that positivism is true so that law's application conditions are disambiguated, a necessary aspect of the view is that law comes into existence in some particular way, and with some particular properties, in virtue of certain facts obtaining. It's not just that, as a matter of supervenience, when there are certain facts, there is a law; the view is that the facts make it the case that a law exists, and that the law is determined by the facts, with a certain substantive content and profile. But with EA, we are not entitled to conclude that *L* is law, because we don't have enough information about *L*'s properties.

In this light, the real problem with (1*) is not that 'law' can be ambiguous between positivist and antipositivist reading. Rather, it's that the deployment of bare application conditions for existence cannot get us from the left-hand side of the conditional to *law* as the object on the right-hand side even if we disambiguate between these readings (so that we could go from right to left if, *ex hypothesi*, we did what the deflationist prescribes and settled the first-order debate between positivism and antipositivism).

The conjunction on the left-hand side cannot suffice because more must be true of *L* than what follows from the satisfaction of $(f_1 \wedge f_2 \wedge f_3 \wedge \ldots f_n)$ alone. The conjunction does not have the

resources to allow us to identify *L* with law, for if the conjunction supplies us with an existence condition there is nothing in virtue of which any other properties might belong to the objects that comes into being as a result of that condition being fulfilled. EA can't distinguish between conditions for what exits and *what it is to* exist. (To some extent, this is by design: recall Scanlon's willing rejection of a *general* notion of existence.)

Suppose now that we add the features that do allow us to identify *L* with law in the form of a definition for law into EA. That would require not just that when we have $(f_1 \wedge f_2 \wedge f_3 \wedge \ldots f_n)$ we have *L*, but that when we have $(f_1 \wedge f_2 \wedge f_3 \wedge \ldots f_n)$, we have *L and* L's content is determined by $(f_1 \wedge f_2 \wedge f_3 \wedge \ldots f_n)$. But, in referring to *L* in this way, we have a case of sortal application—application of the conjunction of facts *to* some thing presupposed to be there (because application of a concept to its instances presupposes something there for the concept to apply to). This is the second horn of the dilemma. In order to give EA the resources it needs to specify the properties that license identification of *L* with law, we must resort to sortal application. And that defeats the whole purpose behind easy ontology.

I've been talking about abstract terms like 'law,' but the point applies widely, and can perhaps be easier appreciated through other cases. Here I will explore two: a common, everyday object, and a philosophical term of art. The same two-horned dilemma applies to both. This shows that the objections to easy ontology are general, just as it shows—a general theme of this entire dissertation—that the treatment of jurisprudence should be of a piece with analytic philosophy in general, rather than cabined in the way it has been up until recently.

Consider the case of TABLE. EA can be suitably specified:

EA$_T$: particles arranged tablewise $\leftrightarrow$ *T*

The problem is that we need much more to be true of the object on the right-hand side of the biconditional than the bare existence conditions give us on the left-hand side. We need the former to exist in a certain relation to the latter; to have the same weight, mass, and spatiotemporal location; to be bonded, bounded, and behave in a certain way and under certain causal conditions. All of these

latter properties are substantive, and they do not follow as a purely logical or conceptual matter even if we accept EA_T, because EA_T gives us only the bare application conditions for the existence of tables—conditions for the application of the concept not to *tablewise-arranged* particles conceived as a prepackaged object, as it were, but to the particles themselves, barely, without already being prepackaged thus-and-so. The bare application of EA_T gives us *T*, but as a radically minimal object. *T* might have the same existence conditions as tables, but we are not entitled to draw any further conclusions about *T*'s properties.

It will not do for the deflationist to respond by adding details to the left-hand side of the biconditional. We can build in as much detail as we like, so long as these details are bare application conditions for existence. Anything beyond that takes us to the second horn of the dilemma. For instance, if we revise EA_T so that it specifies that when we have particles arranged tablewise, we have *T* such that it is constituted by those particles (and so we get the features of spatiotemporal identity we need in order to identify *T* with tables), the "it" we will be referring to will presuppose the existence of something prepackaged thus-and-so, thereby violating the prohibition against sortal application.

So the deflationist is caught in a dilemma. Either application conditions provide only for the existence of some object, with which we are not warranted in associating any further identifying properties, or else we pack those properties into the application conditions, in which case we will no longer be providing bare application conditions for existence, and thus no longer makes a claim true by definition alone. (Recall that application conditions tell us what it is for something to exist, not what it is for something that exists to be of a certain kind.)

At its heart, the problem is that easy ontology is too stingy for its own good. The left-hand side of the biconditional warrants something too minimal, and which comes into existence just in case there are particles arranged tablewise. The properties constitutive of tables are not implied by *T*'s mere existence, for the left-hand side of the conditional only tells us that *T*, *whatever it may be*, exists. In order to identify *T* with the properties that comprise tables, we must proffer a piece of genuine first-order metaphysics. So long as EA_T is taken to give us bare application conditions, we are not warranted in saying *anything* about *T* other than that it exists. All we have is a supervenience claim.

What would it look like for EA_T to be revised so that we could identify *T* with tables? Something like, *particles arranged tablewise* ↔ *T such that T is a table.* The deflationist might be tempted to say that the addition (*such that T is a table*) is not sortal in that what the revised EA_T is saying is that when certain particles are arranged tablewise, that suffices for the application to the particles (rather than to the table) of the concept TABLE. This is essentially an appeal to the "is" of constitution, distinct from sortal application because the particles constitute the table but are not identical to it.[228]

The problem is that constitutive application draws on metaphysics to posit the relevant properties distinctive of the table (such as its relationship to the particles, its identity and persistence conditions, and so on). It is a piece of substantive metaphysics, paradigmatically what first-order debates about identity, substance, and mereology look like.[229]

The dilemma applies not just in cases of everyday objects but also for technical concepts for which we specify features from the ground up, without constraint by common intuition. For example, Evnine identifies the first horn of the dilemma for mereological fusions, which exist just in case any two objects exist:

> [I]t seems unproblematic to say … that we can associate with any given condition the concept of an object that exists just as long as that condition is met. But one cannot simply assume that the objects falling under such concepts meet some further condition; hence, it cannot be part of the concept of something for the existence of which the obtaining of some condition is conceptually sufficient, that things falling under the concept must have any further properties that do not follow logically from the existence condition.[230]

The second sentence sums up the first horn of the dilemma. If the existence condition for the concept FUSION is that the fusion of A and B exists just in case A and B exist, then there cannot be some further condition, that the fusion of A and B has A and B *as its parts*, included in the concept's application conditions. But without that further condition, we are not warranted in identifying the

---

[228] So "such that *T* is a table" is not an instance of sortal application, whereas "such that *it* is a table" would be. Thomasson seems to be sensitive to this distinction when she writes that we can get a something-from-nothing inference of the form "if there are particles arranged tablewise, then there is table," and then caveats in a footnote that on this claim "tables are not *identified with* particles arranged tablewise, so we do not have a co-referential concept." Thomasson (2016b:38) (emphasis in original). The problem is that the latter is what she needs, as the former, on the first horn of the dilemma, has too little content.

[229] *See, e.g.*, Wiggins (2001).

[230] Evnine (2016:150).

object on the right-hand side of the biconditional with what we need: a fusion is not just any object that exists when A and B do, but rather an object that exists *and has A and B as its parts*. With that further condition added, however, we end up on the second horn, with EA augmented such that it consists of more than bare application conditions for existence, but rather also a piece of substantive metaphysics not true merely by definition.

Upon reflection, the dilemma should not be too surprising. There is a reason why easy ontology is described as deflationary, pleonastic, or minimalist. While its proponents may dislike some of these labels (objecting that the labels wrongly assume some further sense against the backdrop of which their position comes up short),[231] they reveal something important about the position. The chapter in Thomasson (2015) introducing easy ontology is titled "The Unbearable Lightness of Existence." In fact, easy ontology can only provide entities that are *too* light.

One response for deflationists is to avoid the second horn of the dilemma by giving an account of application conditions for existence claims that does not violate the prohibition on sortal application. Thomasson thinks this can be done, and in fact uses law as an example. She proposes, as a rule, "if members of the legislature vote for a bill that the president signs, then a law comes into existence."[232] This is a filled-in version of EA, where the antecedent is an abbreviation of the conjunction ($f_1 \wedge f_2 \wedge f_3 \wedge \ldots f_n$). And for the same reasons, it doesn't work.

Thomasson argues that "the rule that helps introduce the new noun term guarantees that the term may be applied and so that there is a law if those conditions are fulfilled, thereby settling the question of whether laws exist."[233] The idea is that the rule does not require appealing to the existence of law, and so is not a sortal application condition.

I agree that the rule is such that we must agree that it guarantees *something* comes into existence. But what makes it the case that what it guarantees is a law? The rule is a stipulation, but what it stipulates is a minimal object to which even positivists—those most sympathetic to the deflated, minimalist sense of what it is to be law—are not warranted in concluding has the properties of law. Positivists believe the content of a law is determined by the facts that bring it into existence; that the

[231] In just the way that it would be a mistake to say there is any sense in which tables "really" exist.
[232] Thomasson (2015:101).
[233] *Id.*

law is brought into existence by those facts, and isn't constrained by anything other than those facts; that if those facts involve "the legislature vot[ing] for a bill that the president signs," then the law is identical to the content of the bill, and so on. None of that is entailed by the rule Thomasson proposes. Alternatively, if we augment the rule with definitional claims, the rule won't be true by definition alone, but rather will become a combination of definitional and existential claims of first-order jurisprudence.[234]

In sum, no such rule, if it is to be an existence condition, can provide anything further about the properties that may or may not belong to the entity brought into existence; if, on the other hand, it is construed as providing those further properties, it cannot be a bare application condition for existence, true by definition. The rule by itself cannot do double duty, and easy ontology can't underwrite DT* after all. If we want to understand the nature and make true claims about some domain of discourse, we will need to draw on the metaphysics of the objects that lie within that domain.

While this is a problem for neo-Carnapians, it sounds like something quietists like Scanlon can accept. As he puts it, "the question about entities is not whether they really exist. This question is settled by the standards of the domain … The question is only whether we have reason to be concerned with these entities and their properties."[235] This is, of course, one way of formulating Reasons-Fundamentalism. But when we add these commitments together, Scanlon is exposed to an unappealing consequence, in some ways a mirror-image of the problem for easy neo-Carnapians. Easy ontology is too sparse: it doesn't have the resources to vindicate interesting existence claims. Scanlon's quietism is too rich: it permits any existence claim so long as is formulated within an "internally coherent" and "well-defined" domain. Because Scanlon thinks reasons are "independent of us" (because truth conditions do not depend on our choices or actions), his (what we might call) existence

[234] The rule Thomasson needs is something like "members of the legislature vote for a bill that the president signs ↔ a law comes into existence such that *its* content is determined by that bill." On the second horn of the dilemma, there is no logical or conceptual entailment that follows from the existence of a bill passed by the legislature and signed by the President; the new rule is no longer a bare application condition. That it yields some *x* such that *x* is a law is a combination of an existence claim, which tells us what it is for something to exist, together with a substantive claim, which tells us what something that exists must be like if it is to be of a certain kind. It is a claim about something (a) that exists and (b) that *it* is of a certain kind. In augmenting (a) with (b), we appeal to a sortal application condition.

[235] Scanlon (2014:27).

permissivism leads to the result that reasons are arbitrary, or merely conventional, inconsistent with the realism behind Reasons-Fundamentalism. One of these commitments will have to be abandoned.

Can Scanlon just redeploy Reasons-Fundamentalism at a higher level of abstraction? *What reason do we have to accept this existence claim?*, he might ask, proffering that the answer will be determined by the domain in which the question is of interest, or importance. But 'reason' is itself subject to the permissivist objection. Reasons-Fundamentalism takes it to be a primitive, but what's to stop us of talking about 'schmeasons' to accept claims that mimic reasons to accept them, in a similar but distinct normative domain? What Scanlon cares about is the real-world, practical upshot of our normative thought and talk—that's what I suspect motivates his rejection of neo-Carnapian deflationism in the first place: he cares less about linguistic rules or terminological disputes and more about on-the-ground reasons for action. But there's no escaping the problem that, on the ground, under his permissivism we are free to deploy conflicting domain-dependent considerations so that reasons to ϕ may conflict with schmeasons not to ϕ. Inter-domain conflict can't be settled if we're not willing to countenance ontological commitments metaphysically robust enough to provide a privileged, inter-domain—external—role for truth conditions incompatible with DT*.[236]

Conclusion

In this chapter, I've tried to address objections to the metaphysical side of the twin methodological commitments underlying CG. I've done so by entertaining alternatives that are especially attractive to theorists working in domains similar to law—domains of social categories in which the explananda are socially constructed, and so in which the referents of linguistic terms may be purchased under a deflationary pricing scheme. The motivation for this type of move is understandable, and it would be nice if we could get on with the business of ordering and organizing our lives and institutions without needing to do heavyweight metaphysics. But the proposals for so doing are inadequate; they don't have the resources needed to satisfactorily understand the relevant

[236] To be clear, I'm not suggesting that Reasons-Fundamentalism is false, only that it sits uncomfortably, if not in irreconcilable tension, with DT*. My own view is that Scanlon should give up his permissivism about existence questions, thereby freeing Reasons-Fundamentalism to be a heavyweight metaphysical thesis. Of course, the topic deserves more space than I can afford here.

explanandum. As the examples I've used illustrate, this inadequacy is not specific to law, but is a general feature of the impoverished alternatives to CG. Insofar as we want to understand the nature of the objects of our thought and talk independently of that thought and talk, we will need to engage with their underlying metaphysics.

CHAPTER 3

Chapter Abstract: This chapter has two aims, one folded within the other. The more general aim is to show, and not just tell, how CG is a valuable theoretical enterprise. To do this, I first identify a claim that is pervasive in general jurisprudence: that law is ultimately an artifact. Call this the Artifact Thesis (AT). AT plays a key role in three different areas: in substantive disagreements about general jurisprudence; in substantive disagreements about departments of law, such as tort; and in methodological disagreements about legal theorizing. CG provides a principled way to evaluate AT in each of these areas. Because the first two are substantive disagreements, CG simply outlines how disagreements can be resolved. The third is methodological, and so CG can evaluate it directly. This type of evaluation is the second aim of the chapter. Antipositivists claim it is impossible to determine legal content without engaging in normative theorizing. This claim—beyond its reliance on AT—is in tension with CG's insistence on a clean division of labor between normative and non-normative theorizing. By the end of the chapter, I hope to have argued that CG's modular, two-step framework is a superior account of legal theorizing.

Section 1

The Artifact Thesis (AT) says that law is an artifact. For many, AT is so obvious as to be worth little scrutiny.[237] The thesis denies that law is a natural kind in the way gold, electrons, or elephants are. Whatever it might be in a given society or over a certain time period, AT says, law is at bottom a human creation.[238] There's some controversy about which historical figures accept or deny AT (Schauer suggests that Cicero denies it, while Aquinas accepts it),[239] and there's been pervasive mistakes about how its truth (if it's true) figures in general jurisprudence. My interests here, however, are in using CG to show how disagreements about AT can be more productively engaged. AT operates in the background in almost every interesting department of law, so the payoff seems well worth the effort.

---

[237] *See* Leiter (2011:666); Marmor (2018:57); (Himma (2017), (2020). Surveying the literature, Jonathan Crowe writes, "it is often stated that law is an artifact. Many authors take this claim as obvious." Crowe (2014:737). *See also* Burazin (2016:385); Priel (2018:240); Crowe (2019:156) (all noting that the claim that law is an artifact is taken for granted in general jurisprudence).

[238] *See* Schauer (2018:29).

[239] *Id.* To my own chagrin, I'm being sloppy with how I characterize AT. Schauer writes that AT is a denial of the claim that law is "part of the furniture of the world," *id.*, but that is a frustratingly ambiguous claim. What he presumably means is that it's intuitively not in some obvious sense like gold or elephants, but, by parity of reasoning, is morality also not part of the furniture of the world? It seems false that [it's wrong to inflict needless pain] depends on humans actually rather than counterfactually existing. Other varieties of metaethical naturalism don't even require us to entertain counterfactuals of this kind, and it's not difficult to swap legal for moral predicates in such principles. I'll resist the urge to engage in first-order metaethics, however, and leave it with the note that AT is supposed to be a claim about law's *ultimate* existence in the scheme of grounding discussed in Chapter 2.

As a threshold concern, however, one might wonder why it matters whether we affix the label 'artifact' to law. Even if there is disagreement about it, isn't the issue merely terminological? Unfortunately, it is not. Rightly or wrongly, AT is taken to be a path-determinative starting point for claims concerning law's nature, properties, and relation to other forms of normativity. Consider the following snapshot of a recent volume on AT, verbatim from the editor's introduction:

- "Brian Leiter argues that the artifactuality of law entails that law cannot have essential attributes (not even functional ones) and thus defends a metaphysically-deflated version of legal positivism."[240]
- "Frederick Schauer argues that the artifactuality of law entails that the content of the concept of law is determined by contingent contextual considerations."[241]
- "Andrei Marmor argues that law is (like fictions and games) an intangible compound artifact that creates closed, prefixed contexts… It follows from this characterization of law that genuine disagreements about what law is are not possible because collective acceptance is constitutive of what artifacts are."[242]

The structure of the argument in each case is that *given* AT, some to-be-explored consequent follows. There are two points worth observing here. First, the entailment doesn't follow even if the antecedent is true—the artifactuality of law does not entail that it cannot have essential attributes, as Leiter says, or that its content is determined by contingent considerations, as Schauer does.[243]

But—and this cuts in the opposite direction, dialectically—we should not for that reason dismiss AT as unworthy of attention. It's tempting to do so because, we might imagine, any argumentative work in this vicinity will be done by the question whether law has essential properties.

---

[240] Burazin et al. (2018:viii-x) (emphasis added).
[241] *Id.* (emphasis added).
[242] *Id.* (emphasis added).
[243] Leiter briefly wonders whether artifacts like chairs might have essential properties based on their function. But he dismisses the notion much too quickly: "The essential function of a chair, one might say, is to provide support to those who want to sit. But does that mean that the boxes in my new apartment are chairs because I rest on them while getting settled? And does it mean that decorative chairs are not chairs, because no one should or will sit on them?" Leiter (2018:13). This is not a good argument. First, the fact that an object B might possess a property *x* claimed to be essential to A does not mean it's not essential to A: a property can be essential to an object without being possessed only by that object. So Leiter just confuses an essential condition for an exclusive one. Second, decorative chairs are derivative or parasitic on standard chairs—the very idea of a decorative chair is to present a *variation* on the standard case, one that indeed can help us understand the properties of the standard case by juxtaposing it to a variant that is different in some specific ways. Leiter's general objection is that he's not aware of an analysis of essential properties that does not rely on appeal to the intentions of a creator (for the type, rather than any given tokens), *see id.* at 13-14 (the implication being, because law has no creator, it cannot, as an artifact, have essential properties). This, too, can be rebutted rather quickly. Synthetic elements like technetium and bohrium are artifacts, they have essential properties, and that specification doesn't rely on the intentions of their creators. The same is probably also true of some artwork.

The fact that AT makes no difference on that point (because artifacts *can* have essential properties) doesn't obviate the need to pay attention to AT itself.

An initial reason why not is that, as theorists seeking to improve the discipline, we should appreciate the role AT has played in jurisprudence, and the extent to which it has been thought to figure as a true antecedent in arguments like the three described above. Like the conflation between law's necessary features and law's essential features discussed in Chapter 2, the conflation between law's essential features and law's (supposed) artifactuality has been pervasive, systematic, and extraordinarily influential (in a bad way).[244]

But a stronger reason why we shouldn't dismiss AT is that the logical conditional need not be true, strictly speaking, in order for AT to shape jurisprudential arguments. AT's truth status may not entail conclusions of the kind legal philosophers draw, but it can *help* make them true or false, or determine how to evaluate them. Just as it is easier to identify the essential properties of electrons than it is to identify the essential properties of hip-hip music, inquiry into law's nature can be significantly shaped by whether or not it is an artifact. AT is thus important regardless of the fact that the conditional implicit in each of the above claims is logically false.

This far into the dissertation, I won't belabor the point about how CG can facilitate the inquiry into AT too much. In the face of skepticism about natural law, though, it suffices to briefly survey the types of historical claims that should exert pressure of the kind legal philosophers too often ignore. Even a cursory dip into history—again, something legal theorists and philosophers have taken curious pride in ignoring up until very recently—shows how deep-seated the notion of natural law is.

For example, the U.S. Supreme Court stated in 1842 that "the law of nature forms part of the municipal law."[245] In 1873, a Wisconsin state judge proclaimed that natural law is "the foundation of

---

[244] In the collection of essays quoted above, the editor observes that "Surprisingly, for all these statements, a complete analysis of what the claim that law is an artifact ontologically entails and what consequences, if any, this claim has for philosophical accounts of law has yet to be made." Burazin (2018:vii). The collection jumps immediately to the supposed entailments, and AT itself is never vindicated. Even some antipositivists endorse Leiter's claim that "unlike natural kinds, human artifacts like law lack essential features," and conclude that "law, unlike water or gold, is not a natural kind, but a product of human choice and action." Pojanowski (2021:1474). Positivists grant this claim-by-fiat. Leiter proclaims that law is an artifact as his starting point, dismissing alternatives out of hand, *see* Leiter (2018:8), (2011:666), while Marmor thinks it is "fairly obvious" that law is an artifact, and then goes further to assert that legality "just is what people [in a given community] take it to be," so that "there is nothing more to what law is, in terms of its ontological grounding." Marmor (2019:163, 164, 166).

[245] *U.S. v. Holmes*, 26 F. Cas. 360, 368 (C.C.E.D. 1842).

all civil law."[246] In Missouri in 1877, the appellate court held that a defendant was guilty of embezzlement only if he knew the property in question was not his own because "the universality of the natural law deems no one to merit punishment unless he intended evil."[247] Moving into this century, Stuart Banner notes that U.S. law expresses "preexisting doctrines of natural law,"[248] while R.H. Helmolz has conduced a survey showing that both the courts and the American public understood "enacted law" as "building upon principles of justice stated in the natural law."[249] Blackstone—perhaps the most prominent figure in the Western legal tradition on either side of the Atlantic—is considered by historians (with no stake in the debate between positivists and antipositivists) to have held that "the law of nature is a valid source of law."[250]

Importantly, courts today characterize themselves as working within the same representational tradition as those working in the 1800s, referring by 'law' to the same referent their predecessors did. It is precisely for this reason that they have the authority they do when they decided cases—there is samesaying across time underwriting their legitimacy, in the way there would not be if judges today started deciding cases by flipping a coin, or consulting Muslim *sheikhs*. Judicial authority obtains, in part, as a function of courts successfully referring to the same, historically continuous phenomenon whose understanding is the basis for citizens giving up individual liberties to be governed as a society under a social compact.[251] As these (and many more) historical sources within our representational tradition suggest, AT is not at all obvious. To the contrary, it is in tension with hundreds of years of

[246] Banner (2021:41).
[247] *State v. Reilly*, 4. Mo. App. 392, 397 (1877).
[248] Banner (2021:21).
[249] Holmholz (2015:2).
[250] *Id.* at 133
[251] This is the point I take Abraham and White (2022) to be grasping towards. One interesting implication is that some of what passes as law in the United States may not actually be law. There are a few ways to respond to this concern. First, CG's Step 1 involves balancing the bulk of the thought and talk found in the representational traditions so that no one or two uses are dispositive. We have to fit the data, but as with all scatter plots, not every data point will be captured by the line that best accounts for most of them. Second, I'm not averse to biting the bullet and concluding that much of U.S. law today is not actually law. If it cannot be grounded through the appropriate causal connections, the more principled thing to say is that we have changed the topic (and, correspondingly, this incurs new justificatory demands for the coercive power our institutions exert). *Cf.* Goldberg (2005:541) (describing Locke's view that "an individual's delegation of governing power to the state does not include a renunciation of his right to obtain redress…the individual consents only to channel the exercise of that right through the law, and, in return, the government is placed under an obligation to provide *such law*) (emphasis added). I don't think Goldberg has my line of thinking in mind here, but I think it is similar in spirit.

thought, talk, and practice about law—a fact philosophers eager to distinguish their enterprise from distinct endeavors like history, anthropology, and lexigraphy unjustifiably ignore.[252]

Let's now move from a context in which CG can point out problems and identify places to look for solutions to a context in which it can make sharper arguments, and reach conclusions of its own (because the dispute is itself methodological).

Section 2.1

General jurisprudence is riven with disagreements about methodology—one reason why this dissertation has focused so directly on methodological issues. In this section, I'll begin by describing some of the background commitments and then illustrate how they affect downstream views about both how to theorize about law and the space of possibilities in which we can do so.

One of (if not the) most important disagreements here concerns the question whether a theory of law must involve value judgments by the theorist who purports to stand apart from her explanandum. A distinguished line of philosophers dating back to Hobbes, through Austin, and crystallizing at Oxford with Hart, Raz, and Gardner, holds that the "existence of law is one thing; its merit or demerit is another."[253] Hart's positivism is premised on the view that a legal system's rule of recognition can be identified without any kind of moral assessment,[254] while Raz contends that legal norms are "fully determined by social sources."[255] Following Stephen Perry, we can call this position methodological positivism.[256]

Pushback on methodological positivism comes from within Oxford as well. Finnis objects that "no theorist can give a theoretical description and analysis of social facts without also

---

[252] *See, e.g.*, Hart (2012:213); Leiter (2003:46); Raz (2009:20); Coleman (2001:177); Shapiro (2011:7); Kramer (2018:4). On the theoretical front, too, the notion that law is something other than an artifact is not implausible, or *prima facie* unlikely because theoretically more problematic or unattractive on meta-theoretical grounds like those of consilience or simplicity. There is no reason to believe an essentialist account of law must identify a simple conjunction of properties. For example, it would be wrong to conclude that non-retroactivity is not an essential property of law because certain legal rules apply retroactively: law's essential properties may be complex and disjunctive rather than simple and conjunctive; any one property may be a contingent constituent of a more complex set, which is itself necessary.

[253] Austin (1879:220).

[254] Hart (2012:240) ("My account is descriptive in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law."). *See also id.* at 107-10.

[255] Raz (1979:37, 46).

[256] *See* Perry (1996).

understanding what is really good for human persons, and what is really required by practical reasonableness."[257] Dworkin claims that identifying law requires an approach that interprets preexisting legal materials in their best moral light.[258] Following in Dworkin's footsteps, Perry argues that methodological positivism is internally unstable,[259] while Jeremy Waldron, Dan Priel, and Jeff Pojanowski all take the same tack.[260]

Perhaps ironically, the best point of traction here comes from the one philosopher who straddles the disagreement. Raz says that "legal philosophy is an inquiry into the nature of law."[261] Talk of "the nature of law," in turn, is talk of "those of the law's characteristics which are of the essence of law, which make law into what it is [and] without which law would not be law."[262] Hart's famous Postscript to *The Concept of Law* details the methodological component of this view, noting that positivism is "general and descriptive"—general in accounting for law as an institution independent of any particular culture or time, descriptive in providing an account independent of any moral evaluation or judgment.[263]

While Hart described this project as "descriptive" rather than "evaluative," his fellow positivists now concede that that was a misstep. I contend the misstep was merely terminological.[264] We can see this from Hart's articulation of the substantive theory, especially when he stresses that an adequate theory of law cannot be based purely on the observable behavior of participants within a legal system.[265] Raz reinforces the point when he insists that the lens through which we search for

---

[257] Finnis (2011:3)
[258] Dworkin (1986:216).
[259] *See* Perry (2001).
[260] *See* Waldron (2001); Priel (2010), (2012); Pojanowski (2021). *See also* Postema (2004:332-335) ("no account of the nature of law can hope to advance our understanding of law and legal practice without relying at important points on normative considerations").
[261] Raz (2009:49). Correspondingly, "a theory of law should be one that consists of necessary truths, for only necessary truths about law reveal the nature of law." *Id.* at 24.
[262] *Id.* Raz continues, "the essential properties of law are universal characteristics of law. They are to be found in law wherever and whenever it exists. Moreover, these properties are universal properties of the law not accidentally, and not because of any prevailing economic or social circumstances, but because there is no law without them." *Id.* at 25.
[263] Hart (2012:239-40).
[264] Antipositivists sometimes set up a straw man against which to argue. *See, e.g.*, Waldron (2001:422); Perry (1996:361) ("positivists maintain that legal theory is a purely descriptive, non-normative enterprise that sets out, in the manner of ordinary science, to tell us what one particular corner of the world we inhabit is like."). As I argue, we should not interpret Hart to be endorsing a "purely" descriptive enterprise that conceives of jurisprudence "in the manner of ordinary science." That is too wooden and uncharitable a reading of what positivists are trying to do.
[265] *Id.* at 242.

law's nature is human self-understanding, so that jurisprudence proceeds by "helping us to understand how people understand themselves."[266]

In fleshing out the idea, contemporary positivists now distinguish between "direct" and "indirectly" evaluative theorizing. Despite (in some sense, because of) what Hart inadvertently slipped into saying, positivists stress that it is indirectly evaluative theorizing they are interested in. This approach is not purely descriptive in the way approaches in the hard sciences are but also not evaluative in the way moral judgments are. Julie Dickson, developing Raz's initial formulations, thinks we can picture the contrast as two ends of a spectrum, or continuum. On one end, there are thin, "purely meta-theoretical" values like simplicity, clarity, elegance, comprehensiveness, consilience, and coherence, all of which apply in theory construction of all kinds, including naturalist approaches to targets in the hard sciences like physics or chemistry. On the other end of the spectrum are moral judgments such as imputations of worth, justice, or goodness. These latter judgments are normatively thick, or robust: the agent making them thereby endorses or condemns, or otherwise morally evaluates the subject matter.

Somewhere along the middle lie judgments that are not as thin as the meta-theoretical but also not as thick as the moral: judgments about features of an explanandum that are important or significant, rather than incidental or extraneous. For example, a theorist who wants to understand Catholic mass must make judgments about which features Catholics hold important or significant (say, kneeling, gesturing, the Eucharist) and which they do not (the size of the cup, the pace of the sacrament).[267] The observed phenomena must be sorted and catalogued, but not merely reported or observed—an account of Catholic mass in which the color of the pews is listed right along with the Eucharist would be deficient even if it contained all of the practice's essential features.

As this example shows, indirectly evaluative judgments can be deployed in many ways. A tort theorist, for example, must acknowledge and understand the significance (if any) of the "bilateral" or "relational" structure of tort,[268] while downplaying the fact that some of its principles have Latin names

---

[266] Raz (1994:237); *see also* Raz (1990:170-77).

[267] This example is Dickson's. *See* Dickson (2001:68-69).

[268] In tort theory, bilateralism is the property whereby causes of action must be brought by victims seeking redress from purported wrongdoers, rather than, say, drawing on a common pool of resources for compensation. Corrective justice and

(*rea ipsa loquitur*) and others do not. Tort theorists do not make judgments about whether what they find in tort law is good or bad, or worth having or rejecting; they evaluate the data, sorting, parsing, and prioritizing it in order to explain it. This activity is exactly what positivists have in mind, albeit at a more abstract level of inquiry. They seek to identify legal content, or better understand legal phenomenon, without resort to moral reasoning.

Antipositivists believe even indirectly evaluative theorizing is not possible in jurisprudence. Law is "a special part" of political morality, Dworkin claims,[269] and Greenberg rejects the notion that legal norms "exist or can be identified independently of anything moral."[270] Priel argues that jurisprudence could not, even in theory, "combine a scientific-like aim of neutral description with a humanistic method of inquiry,"[271] as any attempt to do so will result in something internally "unstable."[272] Perry concurs that such an approach results in an "unsatisfactory hybrid,"[273] while Pojanowski sums up the position by stating that indirectly evaluative theorizing is "an untenable hodgepodge that combines features of theorizing about the natural sciences with more humanistic approaches to interpreting social practices."[274] Put formulaically, "a theory about the nature of law cannot at the same time (a) pick out essential features, (b) based on the understanding of the participants, (c) while remaining morally neutral about the practice."[275]

Because the thesis is aimed at vindicating a "moralized approach to general jurisprudence,"[276] let's call it the Moralized View of Legal Theory (MVLT):

> **MVLT:** A legal theory about the nature of law cannot at the same time (a) pick out essential features, (b) based on the understanding of the participants, (c) while remaining morally neutral about the practice.

Elaborating on the position, Pojanowski writes:

---

civil recourse theorists believe tort's bilateralism is essential to its identity, while law-and-economics theorists do not. *See, e.g.*, Coleman (2001).

[269] Dworkin (2006:35).

[270] Greenberg (2017:293).

[271] Priel (2012:269).

[272] *Id.* at 275.

[273] Perry (2001:354).

[274] Pojanowski (2021:1471).

[275] Pojanowski (2021:1464). *See also* Perry (2001), Priel (2010).

[276] *Id.*

> [Y]ou cannot have all three at the same time. The essentialism is inconsistent with the humanistic, hermeneutic understanding of human practices, for it is rooted in a model of social science that seeks to mirror the natural sciences. The resistance to moral evaluation leads to a particularism that belies any claim to general jurisprudence and, by presuming its own overarching understanding of rationality, is incoherent on its own terms.[277]

Proponents of MVLT conceive of indirectly evaluating theorizing as an effort to impose a naturalistic, disciplined, and orderly rigor associated with the hard sciences onto an explanandum that belongs within the "softer" humanities. Perry, for example, writes that "the methodology of science" is "a very different kind of theoretical enterprise from philosophy,"[278] so that what is "appropriate if one intends to do science" is inappropriate for jurisprudence, for which "the most appropriate procedure is conceptual analysis."[279] He concludes that efforts like Hart's result in an "unsatisfactory hybrid,"[280] because it tries to mix and match an explanans from the hard sciences with an explanandum from the humanities.

If they can show that MVLT is correct, antipositivists will have gone some way in showing that the kind of project positivists since Hart have pursued—a "descriptive enterprise" that "is morally neutral and has no justificatory aims"[281]—is not viable. The next section evaluates this move.

Section 2.2

According to MVLT, we must either conceive of law "as a moral ideal grounded in a broad vision of moral philosophy," or else consign ourselves to "the reportage of the opinion pollster."[282] As it turns out, the claim is mistaken. To see how CG adds value in assessing the thesis, we need to appreciate some of the background commitments in play.

First, evaluating something without morally judging it seems straightforward and uncontroversial. Consider a practice like basketball. To understand basketball, we must identify what

---

[277] *Id.* at 1487.
[278] Perry (2001:353-54).
[279] *Id.* at 313.
[280] *Id.* at 354.
[281] Hart (2012:240).
[282] Pojanowski (2021:1487). Pojanowski endorses Finnis's claim that "moral evaluation [of law] is necessary to transcend descriptive reportage." *Id.* at 1461-62.

is essential about the game and what is not. This requires making evaluative judgments. But there doesn't seem to be any pressure to engage in moral reasoning here. To grasp that the shape of a basketball is essential while its color isn't is to evaluate it, but it does not require the thick evaluative judgments positivists avoid. Doesn't this show that MVLT is too strong?

Unfortunately, things are not so straightforward. Basketball is not only constituted by stipulated rules, it is plausibly reducible to those rules. We can grasp its nature without needing to inquire into its participants' self-understanding—reading the rulebook will, arguably, tell us all that we need to know. (This may be resisted on the grounds that the rulebook doesn't teach strategy or clue us into what it's like to play the game, but I don't think we should concede the overall point. On the relevant notion of 'understanding,' there's no need to grasp *phenomenal* aspects of the game, and one can perform well if one is assumed to grasp the rules perfectly. We can substitute a high-processing robot in place of a human in the thought-experiment if that helps.) An open-ended background system (rather than a highly regimented, temporally bounded scenario) such as law is not like this. So the (b) component in MVLT doesn't come into play, and even rich social practices without that component are not MVLT's target.[283] Indeed, one of Hart's core insights is that we must afford at least *some* importance to participants' self-perspectives.

To do this, Hart draws on a "hermeneutic" methodology that involves the portrayal of human behavior not as a purely rule-governed phenomenon, but as a practice from an internal point of view (recall his explanation of a traffic light: a *reason for* action, not a *prediction of* action.[284]) As hermeneutists see it, the nature of a social practice like law turns on the meanings it is given by those who partake in it, so that grasp of the concepts and rules that comprise it cannot be imposed on it from the outside.[285]

---

[283] I suppose it's plausible to argue that basketball cannot be understood without reference to its participants' internal point of view. The risk in making this move is that it dilutes the sense of normativity we have in mind when we say that law's (claim to) normativity is the reason why it is so complex. Normativity cannot be conceived merely as the basis for a practice being rule-governed (even phenomena adequately understood through laws of mechanical regularity are rule-governed). If we do accept that games with thin normativity require grasping the internal point of view, we can undermine MVLT more easily rather than less, as examples like basketball will then be an effective *reductio*.

[284] Hart (2012:87).

[285] "Each culture constitutes its own reality, a language game with its own rules that are not readily translatable to other cultures. Motives, reasons, decisions, and actions by groups and individuals are intelligible by reference to the rules governing the form of social life in which the agent participates and, while those immersed in the practice can understand the social rules that are implicit in meaningful behavior, they can do so only as insiders within that social practice. To do anything less than enter this lifeworld is to introduce a distorting redescription of the culture's views in light of one's own, and thereby fall short of full understanding." Pojanowski (2021:1477) (internal quotation omitted).

Only from within this internal point of view is the practice intelligible *qua* practice, rather than as a set of predictable regularities (so that, for example, we can understand how deviation from its norms can generate warranted criticism).

While positivists are on board up to this point, they also seek to maintain critical distance from their explanandum. They don't want to "share or endorse the insider's internal point of view or in any other way to surrender a descriptive stance,"[286] because their goal is to "understand what it is to adopt the internal point of view"[287] rather than to adopt it oneself. This critical distance can't be reconciled with hermeneutics, antipositivists say, because the latter involves a relativism that makes the former impossible. Indeed, hermeneutics so prescinds from judgement that, for example, "it is not sensible to say whether belief in tribal witch doctors is more or less rational than Western medical science because concepts of rationality and truth [are] themselves completely relative to particular cultures."[288]

Positivists reject this relativism—the goal of general jurisprudence, after all, is to arrive at correct judgments about the nature of a general, non-culture-specific phenomenon.[289] That goal requires being able to reach conclusions about how some participants' self-understandings can be "confused, insufficiently focused, or vague," while others can be "more important and significant."[290] Hermeneutics doesn't seem to afford—or even want to afford—these types of conclusions.

That said, I don't think antipositivists accomplish much by pointing to this tension. Positivists need bear no allegiance to hermeneutics, however it is conceived and whatever affinity it might bear to the positivist project. It's true that Hart invokes the hermeneutic method, and positivists like Dickson follow suit in trying to further develop Hart's approach. But there's no necessary connection or dependence relation between the two, and there's no logical pressure to try to make them fit together. As we'll see, indirectly evaluative theorizing can be done without the relativism hermeneutics

---

[286] Hart (2012:242).

[287] *Id.* (emphasis added). Technically this is probably another misstep by Hart, as the goal is not to understand *what it is* to adopt the internal point of view (that's a higher-level methodological inquiry) but rather to see things as participants do within it. But his intended meaning is apparent enough.

[288] Pojanowski (2021:1480) (internal citation omitted). Pojanowski is describing the hermeneutic method associated with Peter Winch. I take no position on whether his construal is accurate, whether Winch's views are representative of hermeneutics, or whether the discipline can in fact afford a critical stance more generally. (Even if antipositivists have misconstrued hermeneutics in their criticism of methodological positivism, the same argument can be made against methodological positivism from within the common law. *See* Postema (2004:332-335).)

[289] Hart (2012:240); Raz (1979:103).

[290] Dickson (2001:138); Raz (2009:20-24).

incurs. So I don't see any need to explore similarities between the two beyond whatever intrinsic interest that exercise might have for intellectual historians.

The more important question is, can positivists reject hermeneutics while maintaining its insight into the importance of the internal point of view? The challenge they face, as Pojanowski puts it, is how to "center their legal theory on participants' point of view while escaping a vicious hermeneutic circle."[291] Antipositivists believe the challenge can't be met because disagreements among both the participants' self-understandings can only be resolved by determinations that use, or rely on, moral reasoning. But while many antipositivists make this point,[292] none provides a good argument for it. The form of the argument looks something like the following:

> P1. To understand a practice, we must consider its participants' point of view.
> P2. Participants disagree about what is essential to the practice.
> P3. To evaluate participant disagreement, theorists must discern what is essential to the practice.
> C1. Theorists cannot discern what is essential to the practice without engaging in moral reasoning.

But the argument is not valid. Positivists and antipositivists agree on P1, P2, and P3. But C1 does not follow from them, and without another premise, there is no reason to conclude that indirectly evaluative theorizing cannot accomplish its stated goals. Some antipositivists fail to see this because they conflate normative theory with moral theory. Pojanowski, for example, spends a lot of time on P1-P3 (which is unnecessary, because positivists concede all three), summing them up thus:

> [S]ocial practices are only comprehensible in light of an overarching framework of rationality and human needs, one that the observers "impose" or, less skeptically, cannot help but presume to share with the participants whose actions they seek to understand. Social practices are constituted by the meanings and beliefs of their practitioners … [W]e can pick out those patterns only in the context of a narrative structure whose coherence flows from an overarching judgment about the point of the practice.

I don't think positivists need to deny any of this. Pojanowski then leaps to the following conclusion:

---

[291] Pojanowski (2021:1482).
[292] *See* Perry (1996, 2001); Priel (2010:653-56)); Pojanowski (2021:1485-87).

> To make sense of the welter of human practices that march under the banner of law … one has to identify how human law should truly serve the common good—and therefore the underlying human goods that provide the basis for any sound conception of the common good.

It may be that law is "only comprehensible in light of an overarching framework of rationality and human needs," but why does this type of framework involve having to identify "how human law should truly serve the common good"? Pojanowski thinks the latter is the only way to fill out the requirements the former demand. How might he support this claim? While Pojanowski does not play it out, I think we can draw out at least two different ideas here.

The first is that whatever the welter of human practices consist of, they are not intelligible without a conception of the "human goods" they are aimed at. But that is demonstrably false. To take just one example, a large part of the improvement made by behavioral economics over traditional economics lies in the former's recognition of the limits and fallacies in our everyday talk, thought, and practice. It uses empirical observations about behavior, tests various principles of rationality, offers prescriptions about conduct, and generates "a narrative structure" whose coherence does not in any way flow from views about "the common good."

Inquiries into loss aversion (people are more often averse to losses than eager for gains), availability heuristics (people more often rely on easily-recalled information rather than data), and bounded willpower (people more often prefer short-term over long-term rewards) all show how behavioral economics offers an understanding of our practices that is sensitive to the internal point of view without having to engage in directly evaluative theorizing.[293] We aren't cost-benefit calculating machines; we commit fallacies of reasoning; the limits to our thinking and acting are deep-seated and predictable. All of this has been incorporated within legal institutions (regulatory agencies, public policy agendas, executive branch programs) that are useful, reliable, and testable but nonetheless do not make any moral judgments.[294] At minimum, behavioral economics shows how social practices are comprehensible without adopting a view about "the common good."

---

[293] *See generally*, Kahneman (2013); Thaler (2016).
[294] *See, e.g.*, Sunstein (2014).

We can construct a second, more plausible argument on behalf of antipositivists by expanding on a hint in Pojanowski's last sentence. We might find that it is an empirical fact—borne out by something roughly similar to Step 1 in CG—that the concept of law is the concept of an institution essentially purposed to facilitate the common good. This is a better way to defend MVLT because it adds a premise (we can refer to it as P4) specifically about law: because people disagree about what the common good is, theorists must engage in moral reasoning to decide—on behalf of, or in place of, everyday disagreements—what is actually essential to law.

The additional (admittedly plausible) premise can be developed into an argument from function resembling some of Perry's antipositivist claims, following some of Dworkin's later work.[295] On this view, because a society's practices be conceptualized in more than one way, choosing among conceptualizations requires that we attribute a point or function to law. This, in turn, involves not just evaluative considerations, but moral argument.[296] Under P4, we can't sort or sift through conflicting data without attributing a point or function to the explanandum, reference backwards from which will allow us to organize it into an actual theory (as opposed to mere reportage).

Now initially, this argument seems to fare no better than the last because indirectly evaluative theorizing can satisfy P4. Assume any function for law that the antipositivist prefers; even with the assumption in place, a functional explanation need not involve *moral* evaluation. Perry seems to think the argument from function vindicates C1 because he believes functional explanation is either causal or moral,[297] but that's a false dichotomy: we can try to make sense of a practice—impose order on it, attribute a point to it, and so on—without endorsing or condemning it, or forming any moral judgments about it. The descriptors typically present in ascriptions of function (e.g., whether some x

[295] Here I am going to focus on the version of the argument made by Perry. Another version can be found in Dworkin's middle and late-period works, *Law's Empire* and *Justice for Hedgehogs*. I am not going to entertain Dworkin's version because it would take us too far afield: it involves Dworkin's view that an external or "Archimedean" skepticism about morality is incoherent (and so there is no such thing as metaethics—every argument about the nature of morality is itself a moral argument). Dickson (2001) attempts to refute Dworkin's version of the argument from function in *Law's Empire*, but her discussion preceded his further development in *Justice from Hedgehogs* and would need to be modified in light of it. For critical discussion of the mature argument, *see* Smith (2010).

[296] Perry (1997:123). *See also* Perry (2001:354) ("[T]here are indefinitely many descriptions that can be offered of any given practice…If there is conceptual confusion, lack of clarity, or disagreement within the practice, an accurate external description must simply report that fact; it cannot offer clarification.").

[297] *See id.* at 114.

is important or useful, or alternatively, trivial or inconsequential) appear to be value-laden, but the ascription is made by the theorist standing in the shoes of the participant.

Just as a meat-eating sociologist makes judgments about what is important and what is incidental in the dietary plans of vegetarians, so too a philosopher's attribution to law of a point or function is not a claim about the all-things-considered moral value of that point or function. Hart does at one point say that conceiving of law as having secondary rules (such as the rule of recognition) in addition to primary rules allows legal institutions to function better, but the scope of that assessment is narrow rather than wide, rooted in a nested judgment about a practice from a critical distance. That is, when rendered more precise, Hart's claim should be read as "*L* has *p*, and this makes it good *L*" rather than "*L* has *p*, and this makes *L* good."[298] Perry offers no reason to think that adding P4 makes the argument valid.

Section 2.3

There is, however, another way antipositivists can make the argument from function more appealing. Because of how P1 works, we might think that a positivist's endorsement of it can, just by itself, lead to an infinite regress vindicating MVLT's claim that indirectly evaluative theorizing is unworkable. To see how, step back for a moment and consider the theorist's task. In trying to understand the nature of law, we must discern what is essential in the practices that comprise it. To do this, we must discern what participants take to be essential to the practices. But what happens if they disagree not only about what is essential, but also on the grounds of that disagreement? We must sort through these grounds (must decide which of them are legitimate) in order to evaluate competing participant conceptions of what is essential. But because P1 requires considering participants' internal point of view, if there is disagreement at this further level, we must then assess the grounds of *that* disagreement. In this way, the exercise can go on forever.

Let's illustrate the concern with an example. Recall the disagreement among tort theorists on the question whether the bilateral property of tort is essential to it. For some jurisdiction *J*, we can

[298] *See* Hart (2012:202). The distinction is typically missed by antipositivists like Perry and Waldron. *See* Perry (2001); Waldron (2001).

imagine Alice and Bob are participants (say, as judges) in *J*. Per P1, tort theorists must consider Alice and Bob's internal point of view about tort law in *J*. Alice and Bob may well disagree: Alice may believe that tort's bilateralism is essential to it, while Bob might think it is incidental. Tort theorists must then inquire into the legitimacy of the grounds of this disagreement—how well the grounds support the beliefs for which they are used. How are they supposed to do this? If P1 is true, their inquiry into the legitimacy of the grounds of the disagreement between Alice and Bob must take into account Alice and Bob's internal point of view not just about whether tort's bilateralism is essential, but also their internal point of view about the significance of the grounds of that disagreement.[299] And of course, they may disagree at this further level. We thus have an infinite regress, or a stalemate: any time there is disagreement about a practice the assessment of which requires taking its participants' internal point of view into account, the grounds of that disagreement must itself be evaluated, and the further evaluation must take the internal point of view about those grounds into account.

Antipositivists have an easy escape from the regress. As they see it, we bring our moral values to bear, making sense of disagreements by evaluating how well they accord with the purposes for which law exists as an ideal.[300] The ideal forms a part of substantive political morality, as Dworkin says, or acts as a standard against which to measure competing participant conceptions, per Finnis. Without an independent orientation of this kind, indirectly evaluative theorizing seems unworkable.

If we think about how to resolve disagreements in this way, MVLT appears to be correct after all. And indeed, the objection seems to be in the spirit of what antipositivists have in mind. Priel, for example, thinks that in order to assess which "of the many pronouncements on a legal practice is more or less important or more or less accurate, the theorist must take a prior stand on what the practice she is interested in comprises of, what it is about, and so on. But if this is the case, it renders any

---

[299] Suppose the grounds for Alice's view that tort's bilateralism is essential is the result of a careful study into the history of tort law in *J*, while the grounds of Bob's view is his beliefs about how society should be governed. To make the contrast more vivid, suppose a third participant, Charlie, forms a view about tort's bilateralism based on a coin flip. To assess bilateralism's significance in *J*, tort theorists must assess these three grounds—must evaluate whether they warrant the use to which the participants put them when forming their views. And to do this, per P1, the theorists must consider the participants' internal point of view about the significance of the three grounds. For example, they may judge that they can discard Charlie's views pretty quickly, while Alice and Bob's view are plausible enough that they will be more difficult to assess.

[300] *See, e.g.*, Pojanowski (2021:1485-86) ("Whether the ideal be solving coordination problems, justifying the use of force, ensuring equal concern and respect, or some combination thereof, the ideal(s) against which various instantiations of law are judged to be successful or defective in varying degrees explain the human practice we call law.").

resulting account about the nature of law circular."[301] (I'm not sure the problem is of circularity rather than a regress, but the criticism seems to be pressing along similar lines.)

Under CG, however, it becomes much more manageable. The key to making P1 tractable is to conceive of both the inputs and methods of the overall enterprise as less individualistic than antipositivists realize. In trying to understand the nature of law, we discern, first, what the target terms pick out, and whether individuals are samesaying or talking past one another when using them. They share the concept LAW if their concepts are causally connected in the right way rather than substantively similar. They help constitute a historically continuous representational tradition within which individual viewpoints are not discrete "conceptualizations." They interact with, depend on, and build off of one another as pieces of a larger puzzle. Assembling the puzzle involves pragmatic considerations, such as the fact that interlocutors use terms in order to communicate with one another—to understand and to be understood, to make rational inferences in order to accomplish their goals, and so on.

Members of a representational community are in this way *prima facie* committed to holding their views answerable, or justifiable, to the views of the community as a whole, informed by others' actions, attitudes, and dispositions. When Alice and Bob use terms like 'tort,' they are implicitly committed to a partly deferential process of communication. As rational agents, they understand that the inputs and methods of deliberation, conversation, and action must be intersubjectively valid. For instance, the claim that terms like 'tort' or 'law' are thick concepts and so function as success terms implicating moral evaluation cuts no ice if it's too far removed from participants' self-understanding, but that criterion is itself constrained by how reasonably it conforms to the understandings and interests of the community as a whole, over time.

The regress worry might seem to loom at this point. But unlike the positivist concession that participant self-understanding is *somehow* important and so must *somehow* be taken into account—where the "somehow" can be filled in using moral reasoning, but not otherwise—CG specifies what exactly

[301] Priel (2010:653). *See also* Pojanowski (2021:1486).

is important about it.[302] A theorist's account must be justifiable to the understanding of the participants so that, given ideal conditions and knowledge, they can recognize the target and share the same concepts theorists use to navigate them. In this light, PI is a constraint on the activity at Step 1 that helps fill in the application conditions for co-reference.

When we proffer an account of the referent of 'tort' in *J*, it must be justifiable to participants like Alice and Bob (under the assumption that they possess some suitable set of empirical information and cognition).[303] Any one of them may be mistaken, and we may be warranted in affording them less weight so long as it is possible for the participants to recognize their mistakes without effecting a change of topic.[304] This justificatory constraint is a kind of border all proffered semantic assignments must respect, and we can use it to rule out certain participant views (like Charlie's). But—and this is where we escape the threat of infinite regress—it is a mistake to think our task is to resolve disagreement among participants. We take disagreement into account during Step 1, but even there, it gets folded into a larger body of inputs. The ultimate goal is not the goal of resolving participant disagreement itself, any more than trying to hit one free throw in a basketball game is the same as trying to win the game.[305] The question for the theorist is, *under suitably specified conditions, can a proposed semantic assignment be justified to the participant of the practice in which it figures?* The fact that there is disagreement among participants makes the job harder, but that does not mean we don't have the tools to undertake the task. We need to identify the interests the community as a whole has when it uses terms and concepts, and their internal disagreements don't alter that.

The thought that generates the worry about an infinite regress only arises within an unstructured inquiry. Antipositivists are correct that there must be an external means of organizing

---

[302] As Pojanowski and Miller concede, extant scholarship too often "leaves unresolved precisely *how* one should attend to legal concepts on their own terms" as well as "*why* it is important to attend to the internal point of view." Pojanowski and Miller (*forthcoming*, 2022).

[303] This constraint isn't unique to causal theories of reference. Internalists like Chalmers and Jackson have something similar in mind when they write that "if a subject possesses a concept and has unimpaired rational processes, then sufficient empirical information about the actual world puts a subject in a position to identify the concept's extension." Chalmers and Jackson (2001:323).

[304] McDowell (1998) contains an interesting discussion of why this form of intersubjective justification need not be true for certain normative facts if a person's epistemic starting point somehow blocks it. This is an important point (and potential objection), but unfortunately, I cannot explore it here.

[305] A more elegant analogy would perhaps be to Rawls's distinction between justifying a practice and justifying a particular action that falls under that practice. *See* Rawls (1955).

our data, but they are mistaken in thinking that that leads us from P1 to C1. The external friction, as it were, need not be a moral sensibility: epistemic and environmental constraints help delimit the scope of possible semantic assignments. Within a structured methodology of the kind CG imposes, if a semantic assignment is justifiable to an idealized participant, P1 is satisfied. The key is that the inquiry is structured, with a clean division of labor between the kind of inquiry appropriate at Step 1 and at Step 2.

Somewhat ironically, Jeremy Waldron hints at the solution to the regress problem I am proposing in a passing endorsement of MVLT (because, I suspect, a two-step inquiry like CG does not occur to him). Waldron's position is that "since law and legal system are normative concepts, one who seeks a jurisprudential understanding must also have some grasp of what is at stake when a distinction is drawn between (say) legal rules and other sorts of rules, or between law and other 'norm-ish' enterprise (like cricket or corporate administration."[306] Waldron identifies an objection to MVLT according to which we understand what it is to accept and follow a norm in a way that also grasps what is "generally taken to be the point of law among those who are committed to the enterprise, and what it would be like to take that as a point."[307] He rejects the possibility

> because at the stage of grasping, understanding, and reporting what this point of view was (while not necessarily endorsing it), the Hartian theorist would turn out not to be doing jurisprudence at all, in his own voice. Instead, he would be doing something like the history or sociology of jurisprudence. The real first-order jurisprudents would be those whose point of view he was trying to grasp…If the legal theorist is not presenting those [beliefs and attitudes of self-identified participants in the legal practice] in his own voice, then he is doing legal theory in *oratio obliqua*. He is, in effect, grasping what it is like to do legal theory, but he is not doing it himself.[308]

Waldron is making a deep point here. The difference between his views and mine is that I think the notion that legal theorists are "not doing jurisprudence" at a certain point is a feature rather than a bug within the mooted picture. Under CG, at Step 1 we *should not* be doing jurisprudence, if that tasks involves grasping the nature of law. That is a task for Step 2. At the first stage, the

[306] Waldron (2001:425).
[307] *Id.*
[308] *Id.* at 425-426.

appropriate work *is* historical, or sociological. Before a substantive metaphysics can be proffered, the explanandum must be identified, and—this is, in a way, the entire thrust of CG—the manner in which this should be done is not the same as the manner in which the nature of the explanandum is identified.

For example, a law-and-economics theorist like Posner argues that tort's bilateralism is an incidental feature because our interests in thinking and talking about tort are best realized through that judgment. The judgment must be answerable to Alice and Bob, but only to a certain extent, namely, to the extent that that is an accurate portrayal of Alice and Bob's views as participants within the practice. Whether or not it is accurate is a question of history and sociology, *not* legal theory. Posner has (presumably) no training or background to equip him with this type of work. Much like law professors who sit in their offices discussing 18th-century Framers' views about what 'arms' can be for the purposes of the Second Amendment, the needed disciplinary specialty is not a legal one.[309] If the story about how Posner's judgment best satisfies the purposes of the practice in which terms like 'tort' figure is plausible, the judgment may be justified. There is no threat of infinite regress, though, because P1 is not applicable all the way through the exercise, as though Alice and Bob's understandings of tort's bilateralism are autonomous, self-standing conceptualizations with no external standard against which to measure.

In sum, CG's structured procedure reveals the methodological flaw at the heart of MVLT. There is no in-principle reason to believe that the only alternative to the naturalist approach used to study the hard sciences is either fully subjectivist or moralized; indeed, without historical spadework to back it up, there is no reason to believe it is "inappropriate" or "untenable" to use the naturalist method in jurisprudence at all. Reaching that conclusion requires the sort of legwork legal philosophers have been too quick to reject: history, sociology, anthropology, and even lexigraphy. Far from being tedious and uninteresting, these disciplines are prerequisites to any productive debate about the nature of law, or any of its departments.

[309] There is some truth, after all, to the pejorative term "law office history." In this context, CG can be deployed as a corrective against naïve forms of originalism in modern constitutional law.

CONCLUSION

A theory of the nature of law must begin not with what law is, but with the extensions to which 'law'—a rigid property designator—refers. Through semantic ascent, we attempt to identify the shared object of our thought and talk through a structured, systematic inquiry anchored but not limited to the self-understandings of the participants of the relevant practices. CG can help sharpen jurisprudential disagreements about how this inquiry should proceed. It does so in an indirect way, putting us in a position to evaluate theories based on how well they align with, or conform to, independently compelling constraints on theory building.

Once we realize the steps needed in order to be competent with TORT, for example, we will be in a position to identify weaknesses in the law-and-economics approach to tort law not as a matter of extensional but rather conceptual integrity. Similarly, CG shows how a core antipositivist argument like MVLT depends on a false dichotomy that leaves no room for indirectly evaluative theorizing. When we approach jurisprudence in the way CG recommends, this bifurcation is revealed to be flawed and flat-footed, inattentive to the richness and flexibility the right metasemantic framework can provide. There is no in-principle reason why the study of law, like the study of water or gold, cannot simultaneously pick out its essential features based on the understanding of its participants while remaining morally neutral. Similarly, there is no basis to begin jurisprudential analysis with an artifact as our target, *a priori*. In clearing space for such disparate possibilities, CG can help jurisprudence move at least one step forward, freed from at least a few methodological blind spots.

REFERENCES

- Abraham, Kenneth and G. Edward White. TORT LAW AND THE CONSTRUCTION OF CHANGE (2022)
- Adler, Matthew. *Fairness versus Welfare*, 115 ETHICS 824 (2005)
- Alexy, Robert. LAW'S IDEAL DIMENSION (2021)
- Almog, Joseph (et al., eds.). THEMES FROM KAPLAN (1989)
- Atiq, Emad. *There are No Easy Counterexamples to Legal Positivism*, JOURNAL OF ETHICS AND SOCIAL PHILOSOPHY (2020)
- ——. *The Uncertain Foundations of Public Law Theory*, CORNELL J. L. PUB. POLICY (*forthcoming*)
- Austin, John. THE PROVINCE OF JURISPRUDENCE DETERMINED (1879)
- Austin, J.L. *A Plea for Excuses*, 57 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 11 (1956)
- Banner, Stuart. THE DECLINE OF NATURAL LAW (2021)
- Bach, Kent. THOUGHT AND REFERENCE (1994)
- Barnes, Elizabeth. THE MINORITY BODY (2016)
- ——. *Realism and Social Structure*, 174 PHILOSOPHICAL STUDIES 2417 (2017)
- ——. *Gender and Gender Terms*, NOUS 1 (2019)
- ——. *Feminist Metametaphysics*, *in* BLISS & MILLER (eds.), THE ROUTLEDGE HANDBOOK OF METAMETAPHYSICS (2021)
- Bennett, Karen. *By Our Bootstraps*, 25 PHILOSOPHICAL PERSPECTIVES 28 (2011)
- ——. BUILDING THINGS UP (2017)
- Berker, Selim. *The Unity of Grounding*, 127 MIND 729 (2018)
- ——. *The Explanatory Ambitions of Moral Principles*, NOÛS (2019)
- Bilgrami, Akeel. BELIEF AND MEANING (1994)
- Bix, Brian. *Conceptual Questions and Jurisprudence*, 1 LEGAL THEORY 465 (1995)
- ——. *Raz, Authority, and Conceptual Analysis*. 50 AM. J. JURIS. 311 (2005)
- ——. *Joseph Raz and Conceptual Analysis*, 6 NEWSL. ON PHILOSOPHY & LAW (2007)

- Blackstone, William. COMMENTARIES ON THE LAWS OF ENGLAND (2016)
- Braddon-Mitchell, David. *A Priori Analysis and the Methodological A Posteriori*, in Daly (ed.), THE PALGRAVE HANDBOOK OF PHILOSOPHICAL METHODS (2015)
- Brandom, Robert. FROM EMPIRICISM TO EXPRESSIVISM (2015)
- Burazin…….
- Burge, Tyler. *Individualism and the Mental*, 4 MIDWEST STUDIES IN PHILOSOPHY 73 (1979)
- Burgess, John. *Madagascar Revisited*, 74 ANALYSIS 195 (2014)
- Cameron. Ross. *Truthmakers and Ontological Commitment*, 140 PHILOSOPHICAL STUD.1 (2008)
- ——. *Truthmaking and Metametaphsics*, in Bliss & Miller (eds.), ROUTLEDGE HANDBOOK OF METAMETAPHYSICS (2020)
- Cappelen, Herman. FIXING LANGUAGE (2018)
- Carruth, Alexander, et al. (eds.), ONTOLOGY, MODALITY, AND MIND (2018)
- Cavell, Stanley. MUST WE MEAN WHAT WE SAY? (2015)
- Chalmers, David & Frank Jackson. *Conceptual Analysis and Reductive Explanation*, 110 PHILOSOPHICAL REVIEW 315 (2001)
- Chilovi, Samuel and George Pavlakos, *Law-Determination as Grounding*, 25 LEGAL THEORY 53 (2019)
- Cohen, Felix. *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937)
- Coleman, Jules. THE PRACTICE OF PRINCIPLE (2001)
- ——. *Beyond Inclusive Legal Positivism*, 22 RATIO JURIS 359 (2009)
- ——. *The Architecture of Jurisprudence*, 121 YALE L. J. 1 (2011)
- Coleman, Jules and Ori Simchen, *"Law,"* 9 LEGAL THEORY 1 (2003)
- Coleman, Jules (ed.), HART'S POSTSCRIPT (2001)
- Conaghan, Joanne. *The Essence of Rape*, 39 OXFORD J. LEGAL STUD 151 (2019)
- Correia, Fabrice. *On the Reduction of Necessity to Essence*, 84 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 639 (2012)

- Correia, Fabrice & Benjamin Schneider (eds.). METAPHYSICAL GROUNDING (2012)
- Crowe, Jonathan. *Law as an Artifact Kind*, 40 Monash University Law Review 737 (2014)
- ——. NATURAL LAW AND THE NATURE OF LAW (2019)
- Dasgupta, Shamik. *Metaphysical Rationalism*, 50 NOÛS 379 (2016)
- Davidson, Donald. INQUIRIES INTO TRUTH AND INTERPRETATION (2001)
- Devitt, Michael. DESIGNATION (1981)
- Devitt, Michael & Sterelny. LANGUAGE AND REALITY (1999)
- DeRosset, Loius. *Hollow Truth*, 130 PHILOSOPHICAL REVIEW 533 (2021)
- Dickie, Imogen. FIXING REFERENCE (2015)
- Dickson, Julie. EVALUATION AND LEGAL THEORY (2001)
- Donnellan, Keith. *Proper Names and Identifying Descriptions*, 21 SYNTHESE, 335 (1970)
- Dorr, Cian et al. THE BOUNDS OF POSSIBILITY (2021)
- Dummett, Michael. FREGE: PHILOSOPHY OF LANGUAGE (1981)
- Duxbury, Neil. PATTERNS OF AMERICAN JURISPRUDENCe (1997)
- Dworkin, Ronald. TAKING RIGHTS SERIOUSLY (1977)
- ——. *Natural Law Revisited*, 34 U. FLORIDA L. REV. 165 (1982)
- ——. LAW'S EMPIRE (1986)
- ——. JUSTICE IN ROBES (2008)
- ——. JUSTICE FOR HEDGEHOGS (2011)
- Ehrenberg, Kenneth. THE FUNCTIONS OF LAW (2016)
- ——. *Replies to Comments on* The Functions of Law, 10 JURISPRUDENCE 255 (2019)
- Eklund, Matti. CHOOSING NORMATIVE CONCEPTS (2017)
- Eliot, T.S. SELECTED PROSE OF T.S. ELIOT (1975)
- Enoch, David. *Is General Jurisprudence Interesting?*, in Plunkett & Shapiro (eds.)., DIMENSIONS OF NORMATIVITY (2019)
- Evans, Gareth, THE VARIETIES OF REFERENCE (1982)

- ——. COLLECTED PAPERS (1985)
- Evnine, Simon. *Much Ado about Something-from-Nothing*, *in* BLATTI & LAPOINTE (eds.), ONTOLOGY AFTER CARNAP (2016)
- Fine, Kit. *Essence and Modality*, 8 PHILOSOPHICAL PERSPECTIVES 1 (1994)
- Finnis, John. NATURAL LAW AND NATURAL RIGHTS (2011)
- Fodor, Jerry. THE ELM AND THE EXPERT (1995)
- Fuller, Lon. THE LAW IN QUEST OF ITSELF (1940)
- Geertz, Clifford. THE INTERPRETATION OF CULTURES (1973)
- Glasgow, Joshua. *Is Race an Illusion or a Very Basic Reality?*, in Glasgow (et al.), WHAT IS RACE? (2019)
- Goldberg, John. *The Constitutional Status of Tort Law*, 115 YALE L.J. 524 (2005)
- ——. *History, Theory, and Tort: Four Theses*, 11 J. TORT L. 17 (2018)
- Goldberg, John and Benjamin Zipursky. *Torts as Wrongs*, 88 TEXAS L. REV. 917 (2010)
- ——. *Civil Recourse Revisited*, 39 FLA. ST. U. L. REV. 341 (2011)
- ——. RECOGNIZING WRONGS (2020)
- Gordon, Robert. *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1014 (1997)
- Green, Michael. *Dworkin's Fallacy, or What the Philosophy of Language Can't Teach Us About the Law*, 89 VA. L. REV. 1897 (2003)
- Green, Leslie & Brian Leiter (eds.), 1 OXFORD STUDIES IN THE PHILOSOPHY OF LAW (2011)
- ——. 2 OXFORD STUDIES IN THE PHILOSOPHY OF LAW (2013)
- ——. 3 OXFORD STUDIES IN THE PHILOSOPHY OF LAW (2018)
- Greenberg, Mark. *How Facts Make Law*, in Hershovitz (ed.), EXPLORING LAW'S EMPIRE (2008a)
- ——. *How Facts Make Law II*, in Hershovitz (ed.), EXPLORING LAW'S EMPIRE (2008b)
- ——. *Reasons Without Values?*, in Villanueva (ed.), LAW: METAPHYSICS, MEANING, AND OBJECTIVITY (2007)

- ——. *The Standard Picture and its Discontents*, in Green & Leiter (eds.), 1 OXFORD STUDIES IN THE PHILOSOPHY OF LAW (2011)
- ——. *The Moral Impact Theory of Law*, 123 YALE L. J. 1118 (2014)
- Goudkamp, James and John Murphy. *The Failure of Universal Theories of Tort Law*, 21 LEGAL THEORY 47 (2015)
- Harman, Gilbert. REASONING, MEANING, AND MIND (1999)
- Hart, H.L.A. *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958)
- ——. THE CONCEPT OF LAW (1961/2012)
- Hasday, Jill. *Contest and Consent: A Legal History of Marital Rape*, 88 CALF. L. REV. 1373 (2000).
- Haslanger, Sally. *Gender and Race: What Are They? What Do We Want Them to Be?*, 34 NOUS 31 (2000).
- ——. RESISTING REALITY (2012)
- ——. *Tracing the Sociopolitical Reality of Race*, in Glasgow et al., WHAT IS RACE? (2019)
- ——. *Going On, Not in the Same Way*, in Burgess, et al. (eds.), CONCEPTUAL ENGINEERING AND CONCEPTUAL ETHICS (2020)
- Helmholz, R.H. NATURAL LAW IN COURT (2015)
- Hershovitz, Scott. *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015)
- Himma, Kenneth. *Law as a Social Artifact* (*reviewing* Burazin, *Can There be an Artifact Theory of Law?*, 29 Ratio Juris 385 (2016), https://juris.jotwell.com/law-as-a-social-artifact/) (2017)
- ——. MORALITY AND THE NATURE OF LAW (2019)
- ——. COERCION AND THE NATURE OF LAW (2020)
- Hofweber, Thomas. *Why Our Natural Languages are Ideal Languages for Metaphysics*, in Miller (ed.), THE LANGUAGE OF ONTOLOGY (2021)
- Holmes, Oliver W. *The Path of the Law*, 10/110 HARV. L. REV. 457/991 (1897/1997)
- ——. THE COMMON LAW (1881/1991)
- Himma, Kenneth. *Trouble in Law's Empire*, 23 OXFORD J. L. STUD. 345 (2003)

- ——. *Immodesty in Dworkin's Theory*, in Waluchow & Sciaraffa (eds.), THE LEGACY OF RONALD DWORKIN (2016)
- ——. MORALITY AND THE NATURE OF LAW (2019)
- Hutchinson, Allan. *Razzle-Dazzle*, 1 JURISPRUDENCE 39 (2015)
- Iurlaro, Francesa. THE INVENTION OF CUSTOM (2021)
- Jackson, Frank. *Armchair Metaphysics*, in O'Leary-Hawthorne et al. (eds.), PHILOSOPHY IN MIND (1994)
- ——. FROM METAPHYSICS TO ETHICS (1998)
- ——. LANGUAGE, NAMES AND INFORMATION (2010)
- Joyce, Richard. MORAL FICTIONALISM (2005)
- Kaplan, David. *Quantifying In*, 19 SYNTHESE 178 (1968)
- ——. *Afterthoughts*, in Almog et al (eds.), THEMES FROM KAPLAN (1989)
- ——. *Bob and Carol and Ted and Alice*, in Davidson (ed.), ON SENSE AND DIRECT REFERENCE (2007)
- Kaplow, Louis and Steven Shavell. FAIRNESS VERSUS WELFARE (2002)
- Khalidi, Muhammad and Liam Murphy. *Disagreement About the Kind Law*, 12 JURISPRUDENCE 1 (2020)
- Kim, Jaegwon. *Supervenience as a Philosophical Concept*, 21 METAPHILOSOPHY 1 (1990)
- Koch, Steffen. *The Externalist Challenge to Conceptual Engineering*, SYNTHESE (2018)
- Kramer, Matthew. H.L.A. HART: THE NATURE OF LAW (2018)
- Kripke, Saul. NAMING AND NECESSITY (1980)Mallon, Ron. THE CONSTRUCTION OF HUMAN KINDS (2016)
- LaPorte, Joseph. NATURAL KINDS AND CONCEPTUAL CHANGE (2004)
- ——. RIGID DESIGNATION AND THEORETICAL IDENTITIES (2013)
- Leiter, Brian. *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17 (2003)
- ——. NATURALIZING JURISPRUDENCE (2007).

- ———. *The Demarcation Problem in Jurisprudence*, 31 OXFORD J. L. STUD. 663 (2011)
- ———. *Legal Positivism About the Artifact Law*, in Burazin et al. (2018), LAW AS AN ARTIFACT (2018)
- Levenbrook, Barbara. *Mark Greenberg on Legal Positivism*, in Spaak & Mindus (eds.), CAMBRIDGE COMPANION TO LEGAL POSITIVISM (2021)
- Lewis, David. CONVENTION (2002)
- Linnebo, Oystein. THIN OBJECTS (2018)
- Marmor, Andrei and Scott Soames (eds.), PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN LAW (2013)
- Marmor, Andrei (ed.), LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY (1995)
- ———. INTERPRETATION AND LEGAL THEORY (2005)
- ———. THE LANGUAGE OF LAW (2014)
- ———. *What's Left of General Jurisprudence?*, 10 JURISPRUDENCE 151 (2019)
- McDowell, John. MIND AND WORLD (1994)
- ———. MEANING, KNOWLEDGE, AND REALITY (1998a)
- ———. MIND, VALUE, AND REALITY (1998b).
- McSweeney, Thomas. PRIESTS OF THE LAW (2019)
- Mills, Charles. BLACKNESS VISIBLE (1998)
- Moore, Michael. THE SEMANTICS OF JUDGING (1980).
- ———. *A Natural Law Theory of Interpretation*, 58 CAL. L. REV. 277 (1985)
- Murphy, Liam. WHAT MAKES LAW (2014)
- Nagel, Thomas. THE VIEW FROM NOWHERE (1986)
- Nye, Hillary. *A Critique of the Concept-Nature Nexus in Raz's Methodology*, 37 OXFORD J. LEGAL STUD. 48 (2017)
- ———. *Metaphysics Before Method?*, 10 JURISPRUDENCE 246 (2019)
- Novaes, Catarina. *Carnapian Explication and Ameliorative Analysis*, 197 SYNTHESE 1011 (2020)

- Patterson, Dennis. LAW & TRUTH (1996)
- —— (ed.). A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (2010)
- Patterson, Dennis. *Can We Please Stop Doing This?*, in Banaś & Dyrda (eds.), METAPHILOSOPHY OF LAW (2016)
- Perry, John. *Cognitive Significance and the New Theories of Reference*, 2 NOÛS 1 (1988)
- Pettit, Philip. *Analyzing Concepts and Allocating Referents*, in Burgess, et al. (eds.), CONCEPTUAL ENGINEERING AND CONCEPTUAL ETHICS (2020)
- Pirie, Fernanda. THE RULE OF LAWS (2021)
- Priel, Dan. *The Misguided Search for the Nature of Law* (2015)
- Pavlakos, George & Veronica Rodriguez-Blanco (eds.). REASONS AND INTENTIONS IN LAW AND PRACTICAL AGENCY (2015)
- Peacocke, Christopher. THE PRIMACY OF METAPHYSICS (2019)
- Perry, Stephen. *The Varieties of Legal Positivism*, 9 CAN. J. L. & JURISPRUDENCE 361 (1996).
- ——. *Interpretation and Methodology in Legal Theory*, *in* (Marmor, ed.), LAW AND INTERPRETATION (1997)
- ——. *Hart's Methodological Positivism*, *in* (Coleman, ed.), HART'S POSTSCRIPT (2001)
- ——. *Method and Principle in Legal Theory*, 111 YALE L.J. 1757 (2002)
- Pirie, Fernanda. THE RULE OF LAWS (2021)
- Pojanowski, Jeff. *Reevaluating Legal Theory*, 13
- Plunkett, David. *A Positivist Route for Explaining How Facts Make Law*, 18 LEGAL THEORY 139 (2012)
- ——. *Which Concepts Should We Use?*, 58 INQUIRY 828 (2015)
- Plunkett, David and Daniel Wodak. *Legal Positivism and the Real Definition of Law*, 13 JURISPRUDENCE 1 (2022)
- —— and Scott Shapiro. *Law, Morality, and Everything Else*, 128 ETHICS 37 (2017)
- Pojanowski, Jeff and Paul Miller, *The Internal Point of View in Private Law*, 67 AM. J. OF JURISPRUDENCE (*forthcoming*, 2022)

- Pojanowski, Jeff. *Reevaluating Legal Theory*, 130 YALE L. J. 1288 (2021)
- Posner, Richard. *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972)
- ——. THE ECONOMICS OF JUSTICE (1981)
- ——. THE PROBLEMS OF JURISPRUDENCE (1993)
- ——. *Instrumental and Noninstrumental Theories of Tort Law*, 88 INDIANA L. J. 469 (2013)
- Postema, Gerald. BENTHAM AND THE COMMON LAW TRADITION (2004)
- Priel, Dan. *Description and Evaluation in Jurisprudence*, 29 LAW AND PHILOSOPHY 633 (2010)
- ——. *Jurisprudence Between Science and the Humanities*, 4 WASH U. JUR. REV. 269 (2012).
- Putnam, Hilary. *Is Semantics Possible?*, 1 METAPHILOSOPHY 187 (1970)
- ——. *Meaning and Reference*, 70 THE JOURNAL OF PHILOSOPHY 699 (1973)
- ——. MIND, LANGUAGE AND REALITY (2003)
- ——. *The Development of Externalist Semantics*, 79 THEORIA 192 (2013)
- Quine, W.V.O. FROM A LOGICAL POINT OF VIEW (1953)
- ——. WORD AND OBJECT (1960)
- ——. ONTOLOGICAL RELATIVITY AND OTHER ESSAYS (1969)
- ——. THEORIES AND THINGS (1981)
- Raz, Joseph. THE AUTHORITY OF LAW (1979)
- ——. PRACTICAL REASON AND NORMS (1990)
- ——. ETHICS IN THE PUBLIC DOMAIN (1994)
- ——. BETWEEN AUTHORITY AND INTERPRETATION (2009)
- ——. FROM NORMATIVITY TO RESPONSIBILITY (2009)
- Rawls, John. *Two Concepts of Rules*, 64 THE PHILOSOPHICAL REVIEW 3 (1955)
- ——. A THEORY OF JUSTICE (1999)
- Rayo, Agustin. THE CONSTRUCTION OF LOGICAL SPACE (2013)
- Recanati, Francois. *Can We Believe What We Do Not Understand?*, 12 MIND & LANGUAGE 84 (1997)

- ———. MENTAL FILES (2012)
- Richard, Mark (ed.). MEANING (2003)
- ———. MEANING AS SPECIES (2019)
- Rosen, Gideon. *Metaphysical Dependence*, in Hale & Hoffman (eds.), MODALITY (2010)
- ———. *Real Definition*, 56 ANALYTIC PHILOSOPHY 189 (2015)
- ———. *Ground by Law*, 27 PHILOSOPHICAL ISSUES 279 (2017)
- ———. *What is a Moral Law?*, Shafer-Landau (ed.), 12 OXFORD STUDIES IN METAETHICS (2017)
- ———. *Metaphysical Relations in Metaethics*, McPherson & Plunkett, ROUTLEDGE HANDBOOK OF METAETHICS (2017)
- ———. *Normative Necessity*, Dumitru (ed.), METAPHYSICS, MEANING, AND MODALITY (2020)
- Sachs, Stephen. *Finding Law*, 107 CAL. L. REV. 527 (2019)
- Said, Edward. CULTURE AND IMPERIALISM (1993)
- Scanlon, T.M. *Rawls on Justification*, in Freeman (ed.), THE CAMBRIDGE COMPANION TO RAWLS (2006)
- ———. BEING REALISTIC ABOUT REASONS (2014)
- Schiffer, Stephen. THE THINGS WE MEAN (2003)
- Schauer, Fred. THE FORCE OF LAW (2015)
- ———. *Law as a Malleable Artifact*, in Burazin et al. (2018), LAW AS AN ARTIFACT (2018)
- Schwartz, Stephen. *Putnam on Artifacts*, 87 THE PHILOSOPHICAL REVIEW 566 (1978)
- ———. *Reply to Kornblith and Nelson*, 21 THE SOUTHERN JOURNAL OF PHILOSOPHY 475 (1983)
- Schroeter, Laura. *Why Be an Anti-Individualist?*, 77 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 105 (2008)
- Schroeter, Laura & Francois Schroeter. *Rationalizing Self-Interpretation*, in Daly (ed.), THE PALGRAVE HANDBOOK OF PHILOSOPHICAL METHODS (2015)
- Schroeter, Francois et. al. *A New Interpretivist Metasemantics for Fundamental Legal Disagreements*, 26 LEGAL THEORY 62 (2020)

- Simchen, Ori. *Metasemantics and Objectivity*, in Villanueva (ed.). LAW: METAPHYSICS, MEANING, AND OBJECTIVITY (2007)
- ——. SEMANTICS, METASEMANTICS, ABOUTNESS (2017)
- Sider, Theodore. WRITING THE BOOK OF THE WORLD (2012)
- Simmonds, Nigel. LAW AS A MORAL IDEA (2008)
- Smith, Michael. *Dworkin on External Skepticism*, 90 B.U. L. REV 509 (2010)
- Soames, Scott. BEYOND RIGIDITY: THE UNFINISHED SEMANTIC AGENDA OF *NAMING AND NECESSITY* (2003)
- ——. REFERENCE AND DESCRIPTION (2005)
- ——. RETHINKING LANGUAGE, MIND, AND MEANING (2015)
- ——. *Fruits of the Causal Theory of Reference*, Biggs & Geirsson (eds.), ROUTLEDGE HANDBOOK OF LINGUISTIC REFERENCE (2020)
- Shapiro, Scott. LEGALITY (2011)
- ——. *The Hart-Dworkin Debate*, in (Ripstein, ed.), RONALD DWORKIN (2012).
- Sider, Theodore. WRITING THE BOOK OF THE WORLD (2012)
- Stalnaker, Robert. *Common Ground*, 25 LINGUISTICS AND PHILOSOPHY 701 (2002)
- Stavropolous, Nicos. OBJECTIVITY IN LAW (1996)
- Sunstein, Cass. VALUING LIFE (2014)
- Tamanaha, Brian. A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001)
- ——. A REALISTIC THEORY OF LAW (2017)
- Thaler, Richard. MISBEHAVING (2016)
- Thomasson, Amie. *Modal Normativism and the Methods of Metaphysics*, 35 PHILOSOPHICAL TOPICS 135 (2007)
- ——. ORDINARY OBJECTS (2007)
- ——. *Norms and Necessity*, 51 THE SOUTHERN JOURNAL OF PHILOSOPHY 143 (2013)
- ——. *Deflationism in Semantics and Metaphysics*, in Burgess et al. (eds.), METASEMANTICS (2014)

- ———. ONTOLOGY MADE EASY (2015)
- ———. *Carnap and the Prospects for Easy Ontology*, *in* BLATTI & LAPOINTE (eds.), ONTOLOGY AFTER CARNAP (2016a)
- ———. *Easy Ontology and Its Consequences*, in Ostertag (ed.), MEANINGS AND OTHER THINGS (2016b).
- ———. *Replies to Comments on* ONTOLOGY MADE EASY, 99 *Philosophy and Phenomenological Research* 251 (2019).
- ———. *What Can We Do, When We Do Metaphysics?*, D'Oro & Overgaard (eds)., CAMBRIDGE COMPANION TO PHILOSOPHICAL METHODOLOGY (2017)
- Waldron, Jeremy. *Normative (or Ethical) Positivism*, in Coleman (ed.), HART'S POSTSCRIPT (2001)
- Waluchow, Will & Stefan Sciaraffa (eds.). PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW (2013)
- Watson, Bill. *The Decline of Natural Law and the Rise of Exclusive Legal Positivism*, 75 SMU. L. REV. 174 (2022)
- Weinrib, Ernest. *Corrective Justice in a Nutshell*, 52 U. TORONTO L. J. 349 (2002)
- ———. THE IDEA OF PRIVATE LAW (2012)
- ———. CORRECTIVE JUSTICE (2013)
- Van Inwagen, Peter. MATERIAL BEINGS (1990)
- Wedgewood, Ralph. THE NATURE OF NORMATIVITY (2007)
- Wiggins, David. SAMENESS AND SUBSTANCE RENEWED (2001)
- Williams, Michael. *How Pragmatists Can Be Local Expressivists*, in Price (ed.), EXPRESSIVISM, PRAGMATISM, AND REPRESENTATIONALISM (2013)
- Williamson, Timothy. THE PHILOSOPHY OF PHILOSOPHY (2008)
- Yablo, Stephen. *No Fool's Cold*, in Garcia-Carpintero & Macia (eds.), TWO-DIMENSIONAL SEMANTICS (2006)
- Yalcin, Seth. *Belief as Question Sensitive*, 97 PHILOSOPHY AND PHENOMENOLOGICAL RESEARCH 23 (2016)

- Zipursky, Benjamin. *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 Florida St. L. Rev. 299 (2011)