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LAW'S MEANING

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Abstract

"General jurisprudence" aspires to offer general theories of law. For as long as anyone can remember, contributions in the field have been organized by their answers to a single question—the relationship between law and morality—and thereby divided into paradigmatic "positivist" and "natural law" camps. But, as scholars have increasingly recognized, this way of organizing things misses something important—it is not only views on the relationship between law and morality that explains how jurisprudential theories fit together.

This Article argues that jurisprudence might rather be approached by taking stock of the theory of legal meaning that a jurisprudential account relies on. Any account of law presupposes a "theory of legal meaning"—of legal metaphysics, epistemology, and philosophy of language—with which it can make sense of basic legal concepts. Prominent jurisprudes have, throughout the twentieth century, drawn on and applied positions on these matters elsewhere in philosophy in their legal philosophy.

This way of thinking about jurisprudence offers a new taxonomy of its essential disagreements. "Traditional Natural Law" theory, for instance, is better thought of as a particular theory of meaning rather than an account of the relationship between morality and legality. Both Hart and Dworkin rejected its theory of meaning and held moderate, perhaps unstable, accounts of their own, with more in common than has been appreciated. At the same time, this approach suggests a way forward—before theorizing about the relationship between "law" and "morality," it might be worth clearly reckoning with what those words could mean.

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INTRODUCTION

The field of "general jurisprudence" aspires to offer accounts of the nature of law in general.[1] And it has, by and large, done just that, from H.L.A. Hart's *The Concept of Law*,[2] through Dworkin's evolving tomes,[3] to Scott Shapiro's *Legality*[4]—in sophisticated, book-length works, general jurisprudence is organized around thorough, self-contained theories of what sort of thing the law is and of what it is composed. These theories necessarily address many questions, from the susceptibility of legal propositions to truth value, to the nature of adjudication, and the foundations of political philosophy.[5]

But one question, overwhelmingly, has dominated the intellectual history and contemporary framing of general jurisprudence—what is the relationship between law and morality?[6] Newcomers to the field are told that the basic battle lines of the field are drawn around answers to this question[7]—that the most significant organizing debate in jurisprudence is between "positivists," who claim that social facts alone ground legality, or there is "no necessary connection between law and morality," as the slogan has it;[8] while "antipositivists," or "natural law theorists" take law and morality to be ineluctably intertwined in some way.[9]

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[1] *See, e.g.*, Jeffrey S. Helmreich, *Overcoming Luck: Two Trends in Legal Philosophy*, 78 ANALYSIS REVS. 335, 336 (2018) ("Philosophy of law has until recently been dominated by abstract investigation into the nature of law, a pursuit known as 'general jurisprudence'").

[2] H.L.A. HART, THE CONCEPT OF LAW (3d ed., 2012).

[3] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, JUSTICE IN ROBES (2006); RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011).

[4] SCOTT SHAPIRO, LEGALITY (2013).

[5] *See, e.g.*, David Plunkett & Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry*, 129 ETHICS 37, 38 (2017) (discussing the range of philosophical questions touched on in works of general jurisprudence).

[6] *See, e.g.*, Raff Donelson, *The Pragmatist School in Analytical Jurisprudence*, 31 PHIL. ISSUES [manuscript at 2] (2021) (observing that the "focus on law's connection to morality dominates discussion"); *see also, e.g.*, Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L. J. 1160, 1162–1167 (2015) (summarizing different views on the relationship between law and morality in jurisprudence); Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed*, in RONALD DWORKIN 22, 27 (Arthur Ripstein, ed., 2007) ("[T]he debate is organized around . . . the relation between legality and morality.").

[7] *See, e.g.*, SHAPIRO, *supra* note 4, at 24 (describing this debate as "the public face of jurisprudence for many generations").

[8] *See, e.g.*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601 n. 25 (1958) (associating "positivism" with this slogan).

[9] *See, e.g.*, Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L. J. 2, 8

The notion that different accounts of the relationship between law and morality really captures what is most interestingly at stake among comprehensive theories of law, however, increasingly seems not to cut the mustard. Indeed, among self-described "positivists," it turns out that many *do* see some sort of necessary or common connection between law and morality, from accepting that moral reasoning might play a contingent role in the conditions of legality, to ascribing some necessary morality to law over non-law.[10] And positivists have taken Ronald Dworkin as their chief foil of the "natural law" school, but he was no such thing.[11] At the same time, other theories that have something to say about the law in general, but are not distinguished by a clear position on the relationship between law and morality—like Legal Realism, Critical Legal Studies, and Law and Economics—have been largely excluded from what passes for "jurisprudence."[12]

In short, both those within and without of the insular field of general jurisprudence have increasingly seen that the prevailing way of taxonomizing jurisprudential theories—by their theorized relationship between law and morality—misses something important, leaving us with an increasingly stale research program.[13] Indeed, there is widespread

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(2011) ("The standard way to put it is to say that, for the natural lawyer, morality is a necessary condition of legal validity. Positivists reject this claim . . . [and] claim that morality is not a necessary condition of legal validity."); Brian Bix, *Positively Positivism*, 85 VA. L. REV. 889, 904 (1999) ("Legal positivism, in its primary contrast with (traditional) natural law theory, is about the possibility and value of a descriptive, morally neutral theory of law.").

[10] *See, e.g.*, John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 222–23 (2001) (describing the thesis that "there is no necessary connection between law and morality" as "absurd and no legal philosopher of note has ever endorsed it as it stands"); HART, *supra* note 2, at 206 ("[W]e have, in the bare notion of applying a general rule of law, the germ at least of justice."); SHAPIRO, *supra* note 4, at 391 ("Law has a moral aim; when it fails to satisfy this aim, the law fails by its own terms.").

[11] *See, e.g.*, Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1089 (1997) (describing Dworkin as "legal positivism's most prominent contemporary opponent"); *see also* DWORKIN, LAW'S EMPIRE, *supra* note 3, at 35–36 (criticizing "natural law theory").

[12] *See, e.g.*, Brian Leiter & Jules L. Coleman, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 549 (1993) (describing Critical Legal Studies as an external attack on "analytical jurisprudence"); RICHARD POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 3 (1996) (criticizing the field of jurisprudence from a law and economics perspective); *see also* Bix, *supra* note 9, at 905 (describing the contrast between "positivism" and "critical race theory" as "more indirect").

[13] *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY vii (2d ed. 2009) (arguing that the traditional ways of "classifying theories of law" as positivist or "natural law" "serve to obscure rather than clarify"); Felipe Jiménez, *Legal Principles, Law, and Tradition*, 33 YALE J. L. & HUMAN. 59, 62–63 (2022) ("The general sentiment seems to be that general jurisprudence is at a dead end."); BRIAN LEITER,

recognition that the field of general jurisprudence is in something of a crisis, with increasing calls to re-conceptualize its scope and organization.[14]

This Article offers a novel, more illuminating lens through which to view and organize jurisprudential theories—by reference to the *theory of legal meaning* on which they rely, implicitly or explicitly.[15] That is, rather than first focusing on a theorist's views on the relationship between law and morality, we might focus on their positions on the nature of legal language and the metaphysics of law to which law's language refers (or doesn't).[16] For these purposes, I take a "theory of meaning" to be a theory of the relationship of three sorts of subsidiary theories—(1) a theory of *metaphysics*, or of *what exists*; (2) an *epistemic* theory, about how and what we *know*; and (3) a *philosophy of language*, or an account of the relationship of natural language to what exists and what we know.[17] So a theory of *legal* meaning is an account of *legal* metaphysics, epistemology, and language.

I argue that taking stock of jurisprudence in these terms offers a new, and more helpful, picture of what its interlocutors really disagree about, shows what is at stake among their positions, and sheds light on the path forward.[18] From this perspective, "Traditional Natural Law" theory, the

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NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 2 (2007) (describing jurisprudence as a "small, hermetic—and rather incestuous universe"); *see also* HART, *supra* note 2, at 199 (describing the rigid distinction between positivism and natural law as a "misleading dichotom[y]").

[14] *See, e.g.*, Plunkett & Shapiro, *supra* note 5, at 39 (offering a novel account of the logical space of jurisprudence after noting that "many philosophers are puzzled by general jurisprudence and unsure whether its central questions are even substantive"); ANDREI MARMOR, PHILOSOPHY OF LAW 95 (2011) (describing contemporary jurisprudential debates as having "degenerated to hair-splitting about something that makes very little difference to begin with"); Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 LEGAL THEORY 117, 117 (2004) (describing much of jurisprudence as "navel-gazing"); James Allan, *A Modest Proposal*, 23 OXFORD J. LEGAL STUD. 197, 209 (2003) (describing contemporary jurisprudential debates as "almost scholastic").

[15] *See, e.g.*, F.S.C. Northrup, *Law, Language, and Morals*, 71 YALE L. J. 1017, 1017 (1962) ("There is an essential connection between law, language, and morals.").

[16] *Cf., e.g.*, Jules Coleman, *Truth and Objectivity in Law*, 1 LEGAL THEORY 33, 33 (1995) ("With a few notable exceptions, contemporary jurisprudes have not addressed a variety of issues regarding the semantics and metaphysics of legal discourse . . . .").

[17] *See infra* Part II.

[18] *See, e.g.*, Michael S. Green, *Dworkin's Fallacy, or, What the Philosophy of Language Can't Teach Us About the Law*, 89 VA. L. REV. 1897, 1947 (2003) ("If someone purports to give a theory of the law, it is not unreasonable to demand an account of what method she employes when doing so."); *see also* Plunkett & Shapiro, *supra* note 5, at 68 (observing that the major figures of jurisprudence "hold controversial views about a range of topics within philosophy (e.g., philosophy of language, metaphysics, metaethics), as well as in other fields (e.g., sociology and law), that structures their approach to general jurisprudence").

rhetorical foil of positivisms, is best understood *not* as a theory of the moral grounds of legal validity, but rather a narrow suite of commitments about the nature of legal meaning.[19] Traditional Natural Law theories are those that claim there exists in the fabric of the universe a normatively-laden, thickly-determined abstract entity referred to by the English word "law," ready built with subsidiary abstractions referred to by "right," "obligation," etc., by which our positive law and legal discourse ought to be guided, and which is properly only law-so-called if it does.[20] *Part* of this theory is a position on the relationship between law and morality, but that hardly exhausts its provocation.

Seen through this lens, H.L.A. Hart, titan of "positivism," was not meaningfully arguing against any Traditional Natural Law picture—by the time he got around to it, nobody believed the metaphysical picture on which that theory relied.[21] Rather, Hart held a moderate theory of meaning popular at the time—that our concept-words, though not referential of some truth out there or pre-existing abstract entity, were meaningful in a social sense and describable.[22] That is what he set out to do, against the more conceptually skeptical theories of meaning of the Legal Realists and the "Classical Positivism" of Bentham and Austin, which dissolved the subsidiary concepts of law into sovereign edict.[23]

And Dworkin, on this account, was little like a Traditional Natural Law

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[19] *See infra* Part III.A.

[20] In philosophy and related fields, the term *abstract entity* (or *abstract object*) is used to refer to genuinely existing, mind-independent entities that are not concrete—for instance, numbers, on Platonist views. *See, e.g.*, José L. Falguera, Concha Martínez-Vidal & Gideon Rosen, *Abstract Objects*, in STAN. ENCYC. PHIL. (Edward N. Zalta, ed., 2022), https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=abstract-objects.
Concepts refer to units of thought—mental categories into which some things fall and others do not. *See, e.g.*, Eric Margolis & Stephen Laurence, *Concepts*, in STAN. ENCYC. PHIL. (Edward N. Zalta & Uri Nodelman, eds., 2023), https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=concepts. And *words* are particles in natural language. *See, e.g.*, STEVEN PINKER, WORDS AND RULES: THE INGREDIENTS OF LANGUAGE 2 (1999)

One of the things "theories of meaning," as I use the phrase throughout, take a position on is the relationship between these three categories—whether and how abstract entities exist in any sense; which ones do; the extent to which our concepts are meant to (and do) track the boundaries of abstract entities; the determinacy of our concepts; and the relationship between the words of natural languages and concepts. For more, see *infra* Part II.

[21] *See infra* Part I.B.

[22] *See, e.g.*, Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1911 (2004) (describing Hart's reliance on "the main themes of 1940s and 1950s ordinary language philosophy, an approach most associated with the Oxford philosopher J.L. Austin, but one in which Hart should be seen as a central figure and not merely a follower of others").

[23] *See infra* Part I.B.

theorist. Like Hart, much more than is often appreciated, he thought law and its subsidiary concepts socially constructed all the way down, not referential of anything "out there."[24] But in some ways Dworkin was *more* skeptical than Hart—he took legal concepts not to be meaningfully describable in a way separable from one's own views about what they *ought* to be.[25] For Dworkin, to describe the law was part and parcel of constructing it.[26] Today, Critical Legal Studies couples a similar metaphysical and linguistic skepticism with a particular, more negative account of *how* linguistic concepts are constructed, while certain strands of contemporary analytical jurisprudence, particularly in private law theory, rely on theories of meaning in some ways closer to that of Traditional Natural Law than either Hart or Dworkin.[27]

Granted, none of this is to say that debates about the relationship between law and morality are not worth having or have been thoroughly confused. The relationship between law and morality *is*, pre-philosophically, an essential question any robust theory of law must answer, and to which different theorists do have different answers.[28] But perhaps the question of law and morality is not the best place to start. Similarly, I am not suggesting that jurisprudence *reduces* to metaphysics, or that positions on narrow questions of jurisprudence are entailed in a one-to-one relationship by underlying theories of legal meaning.[29] There are plenty of things to disagree about.[30] The point is simply that theories of meaning offer an alternative, and perhaps more promising, point of entry into what is important and interesting in general jurisprudence.

Finally, though largely descriptive, my project in this Article is not

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[24] *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 3, at 83 ("*We* do not say (nor can we understand anyone who does say) that interpretation is like physics or that moral values are 'out there' or can be proved.").

[25] *See id.* at 73–74 (arguing that normative concepts like JUSTICE are not subject to shared linguistic criteria and can only be reasoned about in normative terms).

[26] *See, e.g.*, *id.* at 83.

[27] *See infra* Part III.E.

[28] *See, e.g.*, SHAPIRO, *supra* note 4, at 49 ("The debate between legal positivists and natural lawyers is so interesting, and has lasted for so long, precisely because it seems as though neither side can be right.").

[29] *See, e.g.*, Green, *supra* note 18, at 1950 ("Philosophy of language cannot provide us with a theory of law."); Andrew Halpin, *Or, Even, What the Law Can Teach the Philosophy of Language: A Response to Green's Dworkin's Fallacy*, 91 VA. L. REV. 175, 177 (2005) (arguing that philosophy of law and philosophy of language should not be "subsumed" into one another).

[30] *See, e.g.*, Plunkett & Shapiro, *supra* note 5, at 8 ("[W]hen one looks at the leading works in general jurisprudence, one finds a broad range of claims, not only metaphysical ones but also including *conceptual* (e.g., about the concept LAW), *semantic* (e.g., about the meaning of legal statements), and *epistemological* ones (e.g., about our knowledge of the law.").

exclusively taxonomic. This new perspective offers a glimpse of the path forward. For too long, entrants to and students of jurisprudence have been directed into the buckets of "positivism" or "natural law"[31]—the former requiring an enthusiasm for litigating admitted minutiae, the latter either apparently implausible or based on an often rather personalist commitment to the doctrines of Ronald Dworkin.[32] Seeing jurisprudential theories through the lens of theories of meaning, however, offers a richer array of paths in, a broader logical space in which to situate novel theories of the law yet to come.[33]

This Article proceeds in three parts. In Part I, I offer a brief overview of the intellectual history of Anglo-American jurisprudence, contextualizing the basic figures, their arguments, and their foils. Although often framed as an interminable debate between "positivism" and "natural law" over the relationship between law and morals, this intellectual history reveals, even in sketch, how the debates are in fact about much more, adjacent to and overlapping with broader debates in other areas of philosophy.

In Part II, I discuss what I am calling theories of meaning—theories of metaphysics, epistemology, and language, by illustrating the logical space of views on these topics and discussing some of the most significant historical positions in the twentieth century in particular. Where Hart and Dworkin both held and drew on moderate theories of meaning popular in the mid-century, philosophy has since diverged into more radically skeptical or realist camps, which largely ignore one another.[34]

Finally, in Part III, I apply the framework of theories of meaning as a lens through which to view some of the most important positions in jurisprudence—from recasting Traditional Natural Law theory as primarily a theory of legal meaning, to making better sense of Hart and Dworkin's

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[31] *See, e.g.*, Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 26 (2013) (arguing that cabining the Legal Process School as "positivist" "is not in itself implausible, but it is deeply misleading").

[32] *See supra* note 13.

[33] *See, e.g.*, SHAPIRO, *supra* note 4, at 24 ("Philosophers of law are for the most part engaged in a much broader inquiry into the identity of law and its implications."); Coleman, *Architecture*, *supra* note 9, at 75 ("What is to be gained, what insights gleaned, by the labels: positivism, normativism, natural law, inclusive positivism, and so on?").

[34] In one of the great confusions of legal philosophy, so-called "Legal Realists" are most distinctively united by *rejecting* what would be called "realism" (or "metaphysical realism") about legal concepts elsewhere in philosophy—the view that a putative entity exists in some mind-independent way. *See, e.g.*, Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 872, 872 (1989) (distinguishing "Legal Realism" from philosophical metaphysical "realism"). Throughout, I refer to the twentieth century American movement in legal theory as "Legal Realism," while "realism" generically refers to the philosophical view of "metaphysical realism" with respect to particular entities.

disagreements (and their contestable, increasingly passé points of convergence), and their relationship to more recent developments in Critical Legal Studies and analytical jurisprudence.

I. JURISPRUDENCE, IN BRIEF

For as long as anyone can remember, jurisprudence has been predominately framed as an inquiry into the relationship between law and morals, with its comprehensive theories of law cabined into two camps—the "positivists," who hold that morality plays no necessary role in grounding legal validity, and the "natural law theorists," who hold that it does.[35] But things have always been more complicated than that, and this framing obscures a complex intellectual history often involving interlocutors' casting their foils in reductive ways.[36] This Part offers a brief, highly stylized summary of this intellectual history, revealing both the field's preoccupation with the question of law and morals and the other things theorists thought they were contributing.

First, I discuss the origins of the modern jurisprudential debate with "Traditional Natural Law" theories and John Austin's rejoinder, before turning to the notorious Hart-Dworkin debate, which provided the basic framework for jurisprudence for the past fifty years. Finally, I bring the story to the present with a brief summary of the prevailing debates in today's jurisprudence.

A. Origins

Let's start with a stipulated foil—"Traditional Natural Law" theory. Part of the difficulty in jurisprudence is that where the "positivist" school is clearly organized around its core figures and works—John Austin, *The Concept of Law*, etc.—"Traditional Natural Law" theory is less directly attributable to any particular individual or encapsulated in any single text. Rather, it is perhaps better understood as a long-running tradition, with

[35] Precise definitions of these terms are controversial and much debated. *See, e.g.*, Bill Watson, *Explaining Legal Agreement*, 14 JURISPRUDENCE 221, 238 (2023) (observing that "[h]ow to define" positivism and antipositivist commitments "is itself a matter of debate"). Below, I stipulate a definition of "Traditional Natural Law" theory, *infra* Part I.A, remain agnostic on the boundaries of "natural law" more generally, and largely proceed on a general sense rather than precise definition of "positivism"—in large part because the point is that the boundaries of these concepts is less significant than is often supposed.

[36] *See, e.g.*, Coleman, *Architecture*, *supra* note 9, at 66 ("[M]y view is that most of what positivists and their critics have believed about positivism and its alternatives is mistaken or, if not mistaken, terribly misleading.").

roots in ancient Greek and Roman thought,[37] that organizes a cluster of theories and ways of thinking about law attributable to such figures as Pufendorf,[38] Grotius,[39] Leibniz,[40] Blackstone,[41] eighteenth and early-nineteenth century jurists generally,[42] the founding fathers of the United States in particular,[43] and certain religious thinkers.[44]

For our purposes, let us stipulate as a "Traditional Natural Law" theory a jurisprudential account that holds that (1) there exists such a thing as "true law," in the fabric of the universe, accompanied by derivative, equally real, abstract entities that our legal concept-words like "right" and "duty" refer to;[45] (2) that positive law ought ascertain, emulate, and apply these true principles; and that (3) positive "law" that purports to deviate from "true

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[37] *See, e.g.*, John R. Kroger, *The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law*, 2004 WIS. L. REV. 905, 934–35 (2004) (discussing Roman conceptions of natural law and their influences).

[38] *See, e.g.*, SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 33–38 (James Tully, ed., Michael Silverthorne, trans., 1991) (offering an account of natural law); *id.* at xvi (describing Pufendorf's project).

[39] *See generally, e.g.*, HUGO GROTIUS, THE JURISPRUDENCE OF HOLLAND (R.W. Lee, tr., ed., 1926) (systematizing Dutch law in light of natural law).

[40] *See generally, e.g.*, ROBERT BERKOWITZ, THE GIFT OF SCIENCE: LEIBNIZ AND THE MODERN LEGAL TRADITION (2005) (describing Leibniz's natural law theory).

[41] *See, e.g.*, WILLIAM BLACKSTONE, 1 COMMENTARIES *39–40 ("[A]s God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man . . . he laid down certain immutable laws of human nature. . . . These are the eternal, immutable laws of good and evil . . . to which three general precepts Justinian has reduced the whole doctrine of law."); Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 PEPP. L. REV. 491, 492 (2008) (describing Blackstone's account of natural law).

[42] *See, e.g.*, Stephan M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1387 (1997) ("Antebellum legal science was premodern because it retained a faith in natural law principles as the foundation of the common law system and the ultimate source of legal knowledge."); Stephan A. Siegel, *Historicism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1542 ("[T]he jurists who dominated late-nineteenth-century constitutional law believed that American law reflected moral reality, and that American institutions were natural rather than conventional.").

[43] *See, e.g.*, Vincent Phillip Muñoz, *If Religious Liberty Does Not Mean Exemptions, What Might it Mean? The Founders' Constitutionalism of Inalienable Rights of Religious Liberty*, 91 NOTRE DAME L. REV. 1387, 1405; 1409 (2016) (discussing the natural law theories of the framers of the U.S. Constitution); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1127 (1987) (discussing the relationship between the framers' view of natural law and the positive law of the Constitution).

[44] *See, e.g.*, THOMAS AQUINAS, SUMMA THEOLOGIA (1485) (offering an account of natural law).

[45] *See, e.g.*, Aaron J. Rappaport, *On the Conceptual Confusions of Jurisprudence*, 7 WASH. U. JURIS. REV. 77, 83 (2014) ("Traditional theorists . . . assumed that . . . [c]oncepts were not simply products of the human psyche, but part of the 'furniture' of the universe").

law" is, in some sense, not properly "law"-so-called. And suffice it to say, that, details aside, some theory of law along these lines was popular among Anglophone theorists, the bar, and the bench, in the late Enlightenment.[46]

Three clarifications about Traditional Natural Law theories are in order. First, Traditional Natural Law theories cannot—and no sympathetic theorists should be read as—denying the social reality of positive law out of sync with "true law."[47] That would be silly.[48] No Traditional Natural Law theorist—nor anyone else—could deny that are immoral things *purported* to be, and indeed sometimes called, "law."[49] Rather, the Traditional Natural Law theorist argues that this is *necessarily* a moral failing, maybe a conceptual one, and that such purported law is not "true law" at all.[50] So when a theorist such as Sir Matthew Hale writes that positive law "cannot forbid what the Law of Nature injoins," he must be read as arguing that positive law *ought not* attempt to do this, and if it does, is in some

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[46] *See, e.g.*, MATTHEW HALE, OF THE LAW OF NATURE (David S. Sytsma, ed., 2015) ("It is the Law of Almighty God given by him to Man with his Nature discovering the morall good and moral evill of Moral Actions, commanding the former, and forbidding the latter by the secret voice or dictate of his implanted nature, his reason, and his conscience."); CALVIN'S CASE, 77 ER 377 (1608) ("The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction."); *see also* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1252–53 (2016) (summarizing the influence of English natural law theorists, including Coke, Hale, and Blackstone on the American founders).

[47] *See, e.g.*, Dan Priel, *Toward Classical Legal Positivism*, 101 VA. L. REV. 987, 993 (2015) ("The idea that putative laws can be immoral and still remain (in a certain sense) 'valid' did not need the genius of Hobbes or Bentham to be discovered. It was always known, because it is a trivial observation.").

[48] *See, e.g.*, Coleman, *Architecture*, *supra* note 9, at 11 ("If history is to be a guide, one cannot help but be struck by the fact that morally bad law is not merely possible but all too frequently realized."); Scott Hershovitz & Steven Schaus, *Dworkin in His Best Light* (forthcoming 2024) [manuscript at 26] ("Lots of law seems immoral, and not just in places like Nazi Germany."); SHAPIRO, *supra* note 4, at 49 (observing that a theory that "preclude[s] the possibility of morally illegitimate legal systems" cannot be right).

[49] *See, e.g.*, Priel, *supra* note 47, at 995 ("That lawyers have considered some edicts as 'legal' despite these edicts being immoral . . . is not something anyone would bother to contest."); Schauer & Wise, *supra* note 11, at 1087 ("When legal positivism is understood as the ability to claim the existence of immoral human law in a nonmetaphorical sense, the contemporary obviousness of this claim appears sufficient to justify the charge that legal positivism particularly, and the natural law/positivism debate more generally, are not worth worrying about.").

[50] *See, e.g.*, Michael Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George, ed., 1992) (distinguishing theories of law that hold that the truth conditions of legal propositions entail the truth of moral propositions from those that do not); Leiter & Coleman, *supra* note 12, at 626 ("Some legal theories, including all forms of substantive natural law theory, make the truth of some moral claims part of the truth-conditions of various legal claims.").

meaningful sense not "law" at all.[51]

Second, in denying that positive law that deviates from true law is properly called "law," Traditional Natural Law is not merely making a semantic claim.[52] Traditional Natural Law necessarily recognizes two distinct concepts—"true law," and the "positive law" of this or that jurisdiction, and argues that the latter ought necessarily track the former.[53] But it doesn't matter what words we use to refer to each of these concepts. It is common in natural law writings, presumably for rhetorical reasons, to call the former "Law," and the latter "human law," or "positive law," but that is not logically compelled.[54] It could be the former is "true law" and the latter simply "law." Or, as the Europeans have it, "*ius*" and "*lex*." The point is that, for a Traditional Natural Law theorist, denying immoral laws the label "law" is not a semantic claim about the meaning of the, or any, word.[55]

Finally, although a "natural law" theory could perhaps be consistent with a variety of understandings of the content of the concept of true law, Traditional Natural Law theorists have generally held that true law is a complex concept populated with a rich menagerie of subsidiary, morally significant concepts—of right, claim, duty, wrong, promise, and so on.[56] In other words, Traditional Natural Law theorists take it that contemporary systems of positive law, which build a complex hierarchy of relational norms and duties rather than offering a single parsimonious edict like "do the right thing," are roughly on the right track.[57]

This is the set of theories to which John Austin was responding when he launched the "positivism-antipositivism" framing of the jurisprudential

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[51] HALE, *supra* note 46, at 194.

[52] *See, e.g.*, Green, *supra* note 18, at 1923 ("[T]hat judges or other officials have a practice of calling certain norms 'law' is irrelevant as to whether the norms are properly called 'law'").

[53] *See, e.g.*, Coleman, *Architecture*, *supra* note 9, at 13 ("The more charitable view is that the natural lawyer's claim invokes a distinctive concept of law that departs from the ordinary one.").

[54] *See, e.g.*, HALE, *supra* note 46, at 194.

[55] *See, e.g.*, Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence*, 88 VA. L. REV. 1119, 1188–89 (2002) ("[A]ccording to classical natural law theory, an unjust or immoral law norm *cannot* be legally valid (that is, it is not legally valid in any possible legal system)").

[56] *See, e.g.*, Jeffrey Pojanowski, *Redrawing the Dividing Lines Between Natural Law and Positivism(s)*, 101 VA. L. REV. 1023, 1024–25 (2015) ("For classical positivists, natural lawyers erroneously accept a nonmaterialist understanding of nature in general and human nature in particular.").

[57] *See, e.g.*, Schauer, *supra* note 22, at 1945–46 (contrasting this view with the notion that present positive law is "a function of social choice . . . not usefully thought of as in any way 'natural'").

debate in his 1832 *The Province of Jurisprudence Determined*.[58] Against Traditional Natural Law, Austin argued that the concept of law is not in fact coterminous with any pre-existing abstract entity "true law," nor does it have any necessary claim to morality—the word "law" could only possibly refer to positive law, and positive law is just the commands of sovereigns, which can be formulated at the sovereign's pleasure, and used for good or ill.[59] Moreover, Austin had a very different view of the substance of morality than the Traditional Natural Law theorists—he was a Benthamite utilitarian; a moral realist for whom the purportedly moral language of rights, duties, and relations in positive law was a distraction from the true criterion of utility maximization.[60] Austin, in other words, was a skeptic about subsidiary legal and moral concepts, but not about morality generally.[61]

In the century and a half from John Austin to H.L.A. Hart, this part of Austin's paradigm—that morally-significant legal concepts do not refer to abstract entities "out there" for us to discover *a priori*—became increasingly taken for granted.[62] In the United States, from the turn of the twentieth century, Oliver Wendell Holmes and the Legal Realists carried this point further, questioning whether legal concepts were *anything* other than a façade for the ad hoc exercise of power based on its preferences.[63] But even their primary foil—Christopher Columbus Langdell—did not subscribe to anything much like Traditional Natural Law theory—Langdell

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[58] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832); *see also* Bix, *supra* note 9, at 904 ("Legal positivism originates in the works of Jeremy Bentham (1748–1832) and John Austin (1790–1859)—especially Austin . . . .").

[59] *See generally, e.g.*, AUSTIN, *supra* note 58.

[60] Jiménez, *supra* note 13, at 68 ("Austin's point seemed to be that there is a fully autonomous entity called 'morality,' which stood independently from law, could be determined without it, and could be called upon for the normative evaluation of legal norms and legal systems.").

[61] *See, e.g.*, Pojanowski, *supra* note 56, at 1027 ("[T]here is a strong vein of skepticism—cynical acid—in classical positivism about the value and determinacy of legal discourse's strange and subtle ways and vocabulary.").

[62] *See, e.g.*, Schauer, *supra* note 22, at 1947 (describing "most versions of natural law" as "off the table"). In the exception that proves the rule, German philosopher Adolf Reinach argued that basic legal concepts are metaphysically real in 1912, but knew he was arguing against the grain. *See* ADOLF REINACH, THE A PRIORI FOUNDATIONS OF THE CIVIL LAW 4 (John F. Crosby, trans., 1983) ("We really do find what one has so emphatically denied: the positive law *finds* [] legal concepts . . . .").

[63] *See, e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 59 YALE L. J. 238 (1930).

took law to be a descriptive, *inductive* science of precedent.[64]

Meanwhile, on the Continent, in the 1930s, Hans Kelsen built an elaborate account of law's internal logic on metaphysically arbitrary stipulations—like Austin, he denied the external existence of law as an abstract entity, but wanted to build a more elaborate foundation for it than Austin's reductive command theory would allow.[65] By the 1950s everyone, it seemed, was a "positivist" in Austin's sense—or, at least, no one was defending the existence of a normatively thick entity "law" waiting to be discovered; as in Traditional Natural Law theory.[66]

You might think that Lon Fuller, in the 1940s and 1950s, was an exception. Indeed, he said he was arguing for "natural law theory" and purported to defend that school against Hart.[67] Perhaps he was. But the thin brand of "natural law" Fuller espoused looked nothing like Traditional Natural Law theory. Indeed, Fuller limited the essential content of the (our?) concept "law" to an extremely thin handful of uncontroversial, quasi-moral criteria (arguably criteria of coherence or logical consistency).[68] For Fuller, for example, law is not properly so-called if it is self-contradictory or impossible to be followed.[69] Call this "natural law" if you want, but a thick legal ontology of morally-significant subsidiary abstract entities derived from some umbrella-entity "law" or "true law" it is not.

B. Hart & Dworkin

It was against this backdrop that H.L.A. Hart wrote what would be the most influential work in jurisprudence of the twentieth century—his 1961

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[64] *See, e.g.*, Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2081; 2086 (1995) ("[Holmes's] attribution of natural law to Langdell was groundless. . . . It is ironic that Langdell was associated with a viewpoint that in an important way was the opposite of what he was trying to argue.").

[65] HANS KELSEN, PURE THEORY OF LAW (Max Knight, trans., 2009) (arguing that legal systems are built on a "presupposed" *grundnorm*); MARMOR, *supra* note 14, at 16–17 ("At this point, Kelsen famously argued, one must *presuppose* the legal validity of the constitution. . . . [T]here is simply no alternative.").

[66] *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 3, at 4 ("[N]o one thinks [legal propositions] report the declarations of some ghostly figure: they are not about what Law whispered to the planets.").

[67] *See, e.g.*, Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 630 (1958).

[68] LON L. FULLER, THE MORALITY OF LAW 33–38 (2d ed. 1969); *see also* SHAPIRO, *supra* note 4, at 394 ("Much ink has been spilled over the question of whether the principles Fuller identifies are best characterized as moral, and hence, whether he has discovered an important link between law and morality.").

[69] FULLER, *supra* note 68, at 35–36.

The Concept of Law.[70] Although it has come to be seen as the paradigmatic articulation of "positivism," as against "natural law," it was not written *against* that theory, at least not Traditional Natural Law theory, at all.[71] Hart, rather, was writing against other positivists—he thought he had a better, more grounded and more nuanced account of our concept of law than Austin or Kelsen.[72]

Taking the concept of law not as a metaphysically real abstract entity, but a describable social construction (famously, he described his project as one of "descriptive sociology"),[73] Hart noticed that Austin's account of law as command misses something important about our social understanding of it—not all laws, such as the validity rules of contract, look like "commands;" most legal officials pursue their duties out of a sense of obligation, not merely submitting to a "gunman writ large."[74] So Hart postulated the "rule of recognition" as essential to the concept of law—a meta-test, constituted by an internal attitude of acceptance among legal officials, for what counts as valid law.[75]

Thus, though understood to be the organizing text of late-twentieth century "positivism"—a position supposed to be circumscribed by its views on the relationship between law and morality—Hart's primary contribution was not *in defense* of positivism, but a critique *within* it.[76] Indeed, *The*

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[70] HART, *supra* note 2; BRIAN A.W. SIMPSON, REFLECTIONS ON "THE CONCEPT OF LAW" 1 (2011) (describing *The Concept of Law* as "the most successful work of analytical jurisprudence ever to appear in the common law world").

[71] *See, e.g.*, Robert P. George, *Natural Law*, 31 HARV. J. L. & PUB. POL'Y 171, 195 (2008) ("Professor Hart was careful never to promote the sort of caricature of natural law one finds in the writings of Kelsen and Holmes.").

[72] *See, e.g.*, Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 TEX. L. REV. 945, 949 (2006) (suggesting that Hart tried to "move beyond the conceptually rigid positivisms of Austin and Kelsen"); MARMOR, *supra* note [MARMOR], at 34 ("Hart's extensive critical focus on Austin creates the impression that he found Austin's reductive definition of law profoundly inadequate. That is true . . . ."). *see also* Philip Soper, *Book Review: Dworkin's Domain*, 100 HARV. L. REV. 1166, 1169 (1987) ("When H.L.A. Hart wrote *The Concept of Law*, legal theory was wide open . . . .").

[73] HART, *supra* note 2, at vi (describing his project as one of "descriptive sociology").

[74] *See, e.g.*, *id*. at 82 (distinguishing legal obligation from submission to a gunman).

[75] *Id.* at 94; *see also* Hershovitz, *supra* note 6, at 1168 (summarizing the theory of the "rule of recognition").

[76] *See, e.g.*, Frederick Schauer, *(Re)taking Hart*, 119 HARV. L. REV. 852, 882 (2006) (reviewing NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004)) ("We therefore owe Lacey a debt of gratitude for bringing back some of the lost Hart and for helping to reintroduce Hart's main adjudication-independent and positivism-independent contributions to contemporary theory."); Donald H.J. Hermann, *H.L.A. Hart by Neil MacCormick*, 55 S. CAL. L. REV. 1155, 1165–67 (1982) (summarizing Hart's primary contributions as seeing legal systems as coherent wholes, organized around the rule of recognition and the internal point of view).

Concept of Law reserves discussion of the relationship between law and morality for a short and rather obscure chapter at the end, actually *conceding* that law might need some minimum, quasi-moral content to be validly so-called, but arguing on pragmatic grounds that it is better to "adopt" a broader concept of law that encompasses morally iniquitous law, rather than bifurcating the concept into good law and bad.[77]

In this context, H.L.A Hart may seem an odd choice of foil for someone trying to make a point about the necessary relationship between law and morality—but he was who the other organizing thinker of post-War jurisprudence, Ronald Dworkin, had available.[78] The so-called "Hart-Dworkin debate" would go on to delineate the boundaries within jurisprudence until (very nearly, and maybe still) the present, and is understood as a debate about the relationship between law and morality—whether morality is a necessary criterion of legality.[79] In this debate, Hart is thought of as the paradigmatic "positivist," and Dworkin something of a "natural law theorist."[80]

Dworkin—though one of the polar figures in the organizing debate of contemporary jurisprudence—is a notoriously oblique thinker, difficult to interpret and place in a variety of ways.[81] But a Traditional Natural Law theorist he was not.[82] Dworkin agreed with Hart that there is no normatively

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[77] *See* HART, *supra* note 2, at 209–210 ("If we adopt the wider concept of law, we can accommodate within it the study of whatever special features morally iniquitous laws have, and the reaction of society to them. . . . Study of [law's] use involves study of its abuse."); *see also* MARMOR, *supra* note 14, at 116 ("At points it seems that Hart claimed not only that a general recognition of [positivism's] truth is morally good, but that certain aspects of the content of [positivism] are good as well. Of particular concern is chapter 5 of *The Concept of Law*.").

[78] *See, e.g.*, Bix, *supra* note 9, at 921 (describing the "importance of Ronald Dworkin in modern English-language jurisprudence"); Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22 (1967) ("I want to make a general attack on positivism, and I shall use H.L.A. Hart's version as a target, when a particular target is needed.").

[79] *See, e.g.*, Shapiro, *The "Hart-Dworkin" Debate*, *supra* note 6, at 27("[T]he debate is organized around . . . the relation between legality and morality."); *see also* Plunkett & Shapiro, *supra* note 5, at 65 (describing the "so-called Hart-Dworkin debate" as "central to the development (and self-concept) of general jurisprudence . . . .").

[80] *See id.*; Philip Soper, *Some Natural Confusions About Natural Law*, 90 MICH. L. REV. 2393, 2393 (1992) ("In legal theory, the return of natural law as a viable challenger to positivism is marked, most notably, by the work of Ronald Dworkin.").

[81] *See, e.g.*, Donelson, *supra* note 6, at 3 (discussing difficulties and disagreements in interpreting Dworkin); Jiménez, *supra* note 13, at 62 (arguing that Dworkin's position on jurisprudential questions evolved over his career); Himma, *supra* note 55, at 1195 (discussing disagreements in Dworkin interpretation); Coleman, *Truth and Objectivity*, *supra* note 16 (describing parts of Dworkin's jurisprudence as "quite confused").

[82] *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 3, at 35–36 (distinguishing his position from natural law theory).

significant, metaphysically real abstract entity "law" or "true law" on which positive law must draw to be properly so-called.[83] He agreed that law is a social construction all the way down, and agreed that different communities can have radically different legal systems, properly so-called, drawing on different local cultures and ideologies.[84] He finds debates about whether to dignify legal systems like those of the Third Reich with the word "law" beside the point.[85]

Rather, Dworkin disagreed with Hart not so much in thinking him wrong about the relationship between law and morality but misguided at a more fundamental level—Dworkin took Hart to be purporting to offer an inert descriptive account of the socially-constructed, linguistic concept of law, which he found facile, because people disagree *normatively* about the law is.[86] For Dworkin, "law," "morality," and related concepts are what he calls "interpretive"—ongoing exercises in a kind of bounded aspirational social construction.[87] For Dworkin, reasoning about interpretive concepts is the irreducibly normative exercise of offering the "best" interpretation of the social practice thus far.[88]

Dworkin, moreover, thinks that normative claims about what is morally "best" are also interpretive, and cannot be right or wrong in an ahistorical, mind-independent sense.[89] Thus, because reasoning about the law is necessarily moral reasoning, and because moral reasoning is likewise interpretive, the concepts of law and morality ultimately dissolve into one another, making judging an exercise is political morality, most obviously in hard cases.[90] This conflation of what he calls legal and moral reasoning is

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 45–49; DWORKIN, HEDGEHOGS, *supra* note 3, at 204 ("[D]ignity like so many of the concepts that figure in my long argument, is an interpretive concept."); *see also* Michael S. Moore, *Metaphysics, Epistemology & Legal Theory*, 60 S. CAL. L. REV. 453, 457 (1987) ("One of Dworkin's central tenets is that justification in law, ethics, aesthetics and science is a matter of coherence and not a matter of finding indubitable first premises.").

[87] *Id.*; Coleman, *Architecture*, *supra* note 9, at 41 ("When it comes to methodology, Dworkin holds that law is an interpretive concept and that one can understand its nature only in the light of the value one assigns to it."); Moore, *Metaphysics, Epistemology & Legal Theory*, *supra* note 86, at 471 ("[F]or Dworkin, legal interpretation proceeds by developing conceptions (theories) of textually authoritative concepts . . . .").

[88] *Id.*

[89] *See, e.g.*, Leiter & Coleman, *supra* note 12, at 626 ("Dworkin . . . rejects moral realism and the strong objectivity of legal facts."); DWORKIN, RIGHTS, *supra* note 3, at 25 (critiquing moral realism).

[90] *See, e.g.*, DWORKIN, RIGHTS, *supra* note 3, at 87 ("[J]udges must make fresh judgments about the rights of the parties who come before them, but these political rights reflect, rather than oppose, political decisions of the past.").

where Dworkin is taken to disagree most sharply with legal positivism.

But note how different the sense in which Dworkin uses the word "morality" is from that of Traditional Natural Law. For the Traditional Natural Law theorist, the concepts of true law and morality capture external, timeless abstract entities. For Dworkin, these concepts are context-dependent, evolving constructions—an entirely different ontological species.

C. Jurisprudence Today

This Hart-Dworkin debate would go on to organize jurisprudence for the next fifty years. But it was somewhat one-sided as a literal matter—Hart barely responded to Dworkin, who laid out his views with increasing detail in a series of books over decades, until Hart briefly responded in substance in a posthumously published postscript to the second edition of *The Concept of Law*.[91] The task of defending "positivism" against an account that provided for a necessary relationship between law and morality, then, primarily fell to Hart's followers—including Joseph Raz, Jules Coleman, and Scott Shapiro.[92] That this proliferation of self-described positivists organized mostly around their disagreement with Dworkin, moreover, has meant that, although Dworkin still has his defenders,[93] most of the action in jurisprudence in late-twentieth and early-twenty-first century jurisprudence has been internal to "positivism."

Those debates became increasingly insular. The generation of post-Hart "positivists" agreed on what they took to be Dworkin's basic critique of Hartian positivism—that Anglo-American law seems, as a descriptive matter, to incorporate moral reasoning in judicial reasoning, and that positivism's efforts to distinguish moral and legal reasoning are wrong, but they disagreed on how to respond to it.[94] The so-called "inclusive positivists" agreed that moral reasoning could be part of a legal system, if incorporated by the rule of recognition,[95] while exclusive positivists hold

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[91] *See* HART, *supra* note 2, at 238–276; Nicos Stavropoulos, *The Debate That Never Was*, 130 HARV. L. REV. 2082, 2082 (2017) (discussing this dynamic).

[92] *See generally, e.g.*, RAZ, *supra* note 13; JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001); SHAPIRO, *supra* note 4.

[93] *See, e.g.*, Hershovitz, *supra* note 6, at 1195 (arguing that law must be interpreted as a moral practice, following Dworkin).

[94] Jules L. Coleman, *Negative and Positive Positivism*, 1 J. LEGAL STUD. 139, 140–41 (1982) (defining the "separability thesis" as a core commitment of positivism).

[95] *See, e.g.*, Himma, *supra* note 55, at 1150 ("Coleman is the leading proponent of inclusive legal positivism, according to which the conventional rule of recognition can incorporate moral norms . . . .").

that the concept of law necessarily excludes moral consideration.[96]

This debate between the inclusive and exclusive legal positivists has had a notoriously outsize role in jurisprudence since the 1980s.[97] And as passionately as it has been argued, it has become increasingly difficult for outsiders (and, occasionally insiders) to make sense of its stakes.[98] What is purportedly at stake, indeed, is whether—in any conceptually possible world—a rule of recognition *could* reference or incorporate morality.[99] The inclusive legal positivists are not arguing that any actual legal systems incorporate morality in their rule of recognition; nor do the exclusive positivists suggest that there are any actual legal systems that never rely on morality in making legal decisions (they just deny that such decisionmaking qualifies as "law").[100]

In the meantime, theorists such as John Finnis and Michael Moore, critiquing both Hart and Dworkin, have offered jurisprudential theories that look much more like Traditional Natural Law theories—accounts under which morality exists timelessly and externally and can and should guide positive law.[101] But even though these theories clearly lie on the opposite end of some important jurisprudential spectrum from most accounts with respect to the relationship between law and morality, they don't fall cleanly into the framework of the Hart-Dworkin debate, and have been largely banished to the fringes of jurisprudence.[102] Far more ink is spilled by self-described positivists against Dworkin than Finnis.[103]

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[96] *See, e.g.*, RAZ, *supra* note 13, at 1–40.

[97] *See, e.g.*, Jiménez, *supra* note 13, at 62 (summarizing the schism between inclusive and exclusive positivism).

[98] *See, e.g.*, Shapiro, *supra* note 4, at 3 ("I realize of course that there are many people out there who wonder why anyone would or should read a book about analytical jurisprudence, let alone *write* one."); *see also* MARMOR, *supra* note 14, at 95 ("Whether this combination is possible turned out to generate a huge debate in contemporary legal philosophy, but one that may have given contemporary analytical jurisprudence a bad name.").

[99] *See, e.g.*, Himma, *supra* note 55, at 1123 (describing the debate in terms of "conceptual possibility").

[100] *See, e.g.*, Shapiro, *supra* note 4, at 274 ("I must confess that the debate between exclusive and inclusive positivism is essentially [a semantic dispute]. The point of contention, after all, is whether it is proper to call a nonpedegreed norm that judges are bound to apply a *legal* norm.").

[101] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985).

[102] *See generally, e.g.*, NICHOLAS BAMFORTH & DAVID A.J. RICHARDS, PATRIARCHAL RELIGION, SEXUALITY, AND GENDER: A CRITIQUE OF NEW NATURAL LAW (2008) (arguing that the "new natural law" to which they ascribe Finnis cannot be separated from theorists' religious views).

[103] *See, e.g.*, Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1159 (1999) (describing Dworkin as "positivism's arch-opponent").

And, similarly, much work that bears on what sort of thing law is has taken place in parallel—exiled from "jurisprudence" seminars and legal philosophy publications.[104] This is most prominently the case with the intellectual heirs of Legal Realism—Law and Economics and Critical Legal Studies ("CLS"). After all, although criticized by both Hart and Dworkin, and defended by card-carrying jurisprude Brian Leiter,[105] the Legal Realists themselves are hard to place in the Hart-Dworkin debate—their primary contribution to legal philosophy apparently has to do with the nature of legal language and the mechanics of adjudication, not the relationship between law and morality.[106]

And Law and Economics and Critical Legal Studies ("CLS") have fared even worse. Both follow Legal Realism in skepticism that the conceptual language of the law does and even could guide the practical outcomes of legal cases.[107] Law and Economics scholars generally argue that instead the driving force of legal doctrine is utility maximization, and this is a good thing;[108] CLS proponents that the driving force is shoring up the power of the governing class, and this is bad.[109] These are jurisprudential theories—they are theories of the law that purport to explain its nature and the ways in which it operates. And yet, although these theories have been perhaps the most broadly influential theories of law of the late-twentieth century,[110] they are largely dismissed by scholars self-consciously working within "jurisprudence" (or at least "analytical jurisprudence").[111]

Granted, some of this surely has to do with the proponents of these theories polemically dismissing the kind of questions with which

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[104] *See, e.g.*, Schauer & Wise, *supra* 11, at 1080–81 ("The debates between positivism and natural law, or between positivism and anything else, it is said, is the preoccupation of a small group of philosophically obsessed but socially unaware jurisprudes, many of whom are English and most of whom are dead.").

[105] *See generally* LEITER, *supra* note 13.

[106] *See supra* 63 & accompanying text.

[107] *See, e.g.*, LEITER, *supra* note 13, at 95–96 (arguing that law and economics was a continuation of the basic project of Legal Realism).

[108] *See generally, e.g.*, POSNER, *supra* note 12.

[109] *See, e.g.*, Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994) ("Even ideas like 'truth' and 'justice' themselves are open to interrogations that reveal their complicity with power."); *see also* Scott Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 452, 452 (2001) (arguing that we ought to "demystify the power hierarchies embedded in liberal individual rights discourse"); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L. J. 1, 67 (1984) ("The absence of secure foundations or decision procedures for belief should be experienced not as a void but as an opportunity.").

[110] *See, e.g.*, Harris, *supra* note 109, at 743 (describing "the ways in which CRT is the heir to both CLS and traditional civil rights scholarship").

[111] *See, e.g.*, Leiter & Coleman, *supra* note 12, at 549 (describing CLS as an external attack on jurisprudence).

jurisprudence has been historically preoccupied.[112] But perhaps the broader issue is that in a canon of legal philosophy organized around positions on the relationship between law and morality, there is little place for Law and Economics and CLS. They are theories of law, with much to say about it, but comparatively little to say about the necessary relationship between law and morality, or the conceptual grounds of legality. So long as those are the organizing question of general jurisprudence, jurisprudes won't be able to engage with these doctrines on their own terms.

Finally, although the Hart-Dworkin debate, and the relationship between law and morality, retains intellectual pride of place in jurisprudence, there is growing dissatisfaction with this taxonomy of philosophy of law—growing recognition that there are more "degrees of freedom here" than the traditional boxes of natural law or inclusive or exclusive positivism.[113] As Jeffrey Pojanowski has put it, "there has *got* to be more to general jurisprudence,"[114] observing that "a motley coalition of consequentialists, natural lawyers, and others defying standard labels seek to fling open the doors, windows, and drawbridges of analytic jurisprudence to let in . . . fresh air and light."[115]

In short, the field of jurisprudence over the past century—alongside theorists working outside its self-conscious bounds—has given us many thorough and important theories of the nature of law and related questions. Within jurisprudence, these theories are traditionally taxonomized as adopting positions on the relationship between law and morality—"positivist" theories hold that morality is not (necessarily) a criterion for legal validity; "natural law" accounts that it is. But as even the brief summary of the intellectual history here should illustrate, that is hardly all these competing theories are about, or their only relevant axis of disagreement.

II. THEORIES OF MEANING

[112] *See, e.g.*, K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. U. L. REV. 1141, 1152 (1985) (describing traditional academic legal discourse as "reified, ideological shit"); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishes of Commodities*, 34 AM. U. L. REV. 939, 969 (1985) (describing discourse in commercial law as grounded in the "mind fucks of capitalism").; *see also* RICHARD POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 3 (1996) ("*[S]omething* ought to turn on the answer to the question 'What is law?' if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it.").

[113] Plunkett & Shapiro, *supra* note 5, at 58–59.

[114] Pojanowski, *supra* note 56, at 1024.

[115] *Id.*, at 1023 (collecting citations).

The standard framing of debates in jurisprudence is that they are about the relationship between law and morality. But in some ways, that is the least of what really divides the disputants—they may be comparatively close in their theories of the relationship of law and morality, but really disagreeing about other things, such as the nature of legal language, the things to which it refers (if anything), and the substance of morality.[116]

To have a theory of "law," you must have a theory of the kind of thing the word "law" *could* refer to—what the nature of the concept to which it refers is, how it determinate it is, and how truths associated with it, if any, are to be learned.[117] Moreover, the law is, pre-philosophically, a linguistic and peculiarly conceptual enterprise.[118] A theory of law at least presumptively must also have a theory of what courts and lawyers mean when they speak in the language of the law.[119] What is a "promise"? To what does that word refer? How does it exist, if at all?[120]

Answering these kinds of questions—and theorizing about law—demands positions in metaphysics, epistemology, the philosophy of language, and the philosophy of concepts in legal language—collectively what I'm referring to as a legal *theory of meaning*.[121] Specifically, as I use the phrase, a theory of meaning is composed of some combination of theories, and a theory of the relations between (1) an account of metaphysics, of what exists; (2) an epistemic theory of whether and how we can know; and (3) a philosophy of language—of the relationship between

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[116] *See, e.g.*, Plunkett & Shapiro, *supra* note 5, at 40; 58 ("[T]he positivism/antipositivsm debate depends on philosophically substantive commitments about the nature of metaphysics and explanation").

[117] *See, e.g.*, Coleman, *Truth and Objectivity*, *supra* note 16, at 33 (describing "issues regarding the semantics and metaphysics of legal discourse" as "invit[ing] various worries about the legitimacy of legal authority").

[118] *See, e.g.*, Halpin, *supra* note 29, at 177 ("[L]aw is, among other things, a practice of using words."); MARMOR, *supra* note 14, at 136 ("Authorities communicate, of course, in a natural language.").

[119] *See, e.g.*, Himma, *supra* note 55, at 1160 ("The most fundamental problem in conceptual legal theory is to provide an analysis of those concepts that figure essentially in legal practice . . . ."); Green, *supra* note 18, at 1950 ("Authoritative sources of law . . . invariably contain language . . . .").

[120] *See, e.g.*, Michael Steven Greene, *Halpin on Dworkin's Fallacy: A Surreply*, 91 VA. L. REV. 187, 195 (2005) ("[P]hilosophy of language is very relevant to the questions of jurisprudential method."); Plunkett & Shapiro, *supra* note 5, at 58–59 ("[T]here are certain broad kinds of issues that will be crucial to resolve when pursuing a comprehensive account of this explanandum, namely those in metaphysics, philosophy of mind, philosophy of language, and epistemology.").

[121] *See, e.g.*, Leiter & Coleman, *supra* note 12, at 555 ("A philosophy of language provides an account of the conceptual and theoretical commitments of our linguistic practices, the central aspect of which is the ascription of meaning.").

our words and our world, if any.[122] A theory of legal meaning is a theory of legal metaphysics, epistemology, and language.

There are countless possible theories of legal meaning, and almost any imaginable position is somewhere to be found in the annals of philosophy with respect to some domain of discourse. In this Part, to sketch the domain of plausible theories of meaning for our purposes, however, I will set the stage by outlining the opposite poles in debates about theory of meaning, which we'll call Thoroughgoing Realism and Thoroughgoing Skepticism, with respect to abstractions in general and legal abstractions in particular. I'll then sketch a range of moderate positions on meaning between these poles that are particularly relevant to understanding twentieth-century jurisprudence and the current debates.

A. Thoroughgoing Realism

Let's start our examination of theories of meaning with what is often thought to be the most naïve—Thoroughgoing Realism.[123] The Thoroughgoing Realist starts with the metaphysical claim that in fact there exist many sorts of abstract entities as part of the "furniture" or "fabric" of the universe.[124] In other words, the Thoroughgoing Realist will hold that abstract conceptual categories—numbers, natural kinds, and, as most relevant here, legal categories—exist just as do such less controversial constituents of our universe as fundamental particles.[125] At their most extreme, the Thoroughgoing Realist might hold, with Plato, that abstract conceptual Forms exist in some world parallel to, or somehow intertwined

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[122] *See, e.g.*, Coleman, *Truth and Objectivity*, *supra* note 16, at 41 ("Meaningful sentences presuppose differentiation, and differentiation requires the concept of an object."); *see also* Jerrold J. Katz, *Where Things Now Stand With the Analytic-Synthetic Distinction*, 28 SYNTHESE 283, 283 (1974) ("The philosophy of language can be viewed as a branch of the theory of knowledge.");.

[123] *See, e.g.*, Gideon Rosen, *The Refutation of Nominalism (?)*, 21 PHIL. TOPICS 149, 152 (1993) ("Platonism is arguably our natural standpoint, in the sense that a commitment to a vast catalog of abstract objects is apparently implied by what we take for granted before we get to philosophy."); Mark Balaguer, *A Platonist Epistemology*, 103 SYNTHESE 303 (1995) (defending a Platonic-realist epistemology); CRISPIN WRIGHT, FREGE'S CONCEPTION OF NUMBERS AS OBJECTS (1984) (same).

[124] *See, e.g.*, Barry Smith, *Ontology*, THE FURNITURE OF THE WORLD 47 (Guillermo Hurtado & Oscar Nudler, eds., 2012) (discussing ontology as an account of the "furniture" of the universe); *see also* Northrup, *supra* note 15, at 1024 ("Realism is the linguistic theory that words do not require the particular observer or evaluator to be specified, for any descriptive or evaluative statement to be meaningful.").

[125] *See, e.g.*, Moore, *Metaphysics, Epistemology & Legal Theory*, *supra* note 86, at 459 (describing the "realist's account, that it is reality that causes us to develop concepts adequate to describe it").

with, our own.[126]

This view strikes many, particularly in contemporary legal theory, as a bizarre, retrograde non-starter,[127] because of course such abstract entities themselves cannot be seen or felt.[128] But it's worth taking seriously how someone could hold such a view without, say, partisan theological commitment, perhaps best illustrated with mathematical or logical concepts.[129] Numbers are abstractions—we cannot directly perceive them, they leave no direct impressions.[130] We can count objects, but those objects are not the *concept of number*, which is an abstraction exportable to any combination of things—or no concrete things at all.[131]

Moreover, most people find that reasoning about mathematics has a peculiar *a priori* character—it *feels* that when we reach the conclusion that, say, 1 + 1 = 2, we have *discovered* something; that we have struck on something universal, necessary, profound, and entirely beyond our control.[132] And indeed, upon reflection you might find it remarkable that "1 + 1 = 2" doesn't just apply to your fingers, or whatever context you struck upon this revelation, but *everything*, *everywhere*. Perhaps this is simply because—as our Thoroughgoing Realist would have it—numbers exist as abstract but real entities.[133] Obviously no one believes that such things exist

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[126] Plato, *Phaedrus*, in THE COLLECTED DIALOGUES OF PLATO 475, 511 (Edith Hamilton & Huntington Cairns eds., R. Hackforth trans., 1961) (describing the theory of the Forms).

[127] *See, e.g.*, Moore, *Interpretive Turn*, *supra* note 34, at 872 ("[T]he Legal Realists have so thoroughly applied their brand of philosophical antirealism to legal entities and quantities that it is difficult for us post-Realist generations even to understand what a metaphysical realist about law could believe.").

[128] *See, e.g.*, Rappaport, *supra* note 45, at 83 ("Theorists, in this way, embraced a striking ontology, at least to modern ears."); Plunkett & Shapiro, *supra* note 5, at 38 ("[M]any philosophers in this area harbor deep suspicions about metaphysics and don't spend much (if any) time working on it."); *see also* Gottlob Frege, *Grundgesetze der Arithmetick, Volume I*, in THE FREGE READER 194, 200 (Michael Beaney, ed., 1997) ("What cannot be so perceived one tries to deny or else ignore.").

[129] *See, e.g.*, Jerry Samet, *The Historical Controversies Surrounding Innateness*, STAN. ENCYC. PHIL. (Edward N. Zalta & Uri Nodelman, eds., 2023) (observing that conceptual realists have historically "focus[ed] on mathematical knowledge and concepts").

[130] *See generally, e.g.*, Gottlob Frege, *Review of Dr. E. Husserl's Philosophy of Arithmetic*, 81 MIND 321 (E.W. Kluge, trans., 1972) (arguing that numbers are objective abstract objects).

[131] *See, e.g.*, Donna M. Summerfield, *Modest a priori knowledge*, 51 PHIL. & PHENOM. RES. 39, 39 (1991) (distinguishing the phenomenology of reasoning about presumptively *a priori* mathematical concepts from learned propositional knowledge).

[132] *See, e.g.*, Plato, *Meno* (W.K.C. Guthrie, trans.) in 353 PLATO: THE COLLECTED DIALOGUES (Edith Hamilton & Huntington Cairnes, eds., 1973)

[133] *See, e.g.*, Bernard Linsky & Edward N. Zalta, *Naturalized Platonism versus platonized naturalism*, 92 J. PHIL. 525 (1995) (defending a version of mathematical Platonism); MARK BALAGUER, PLATONISM AND ANTI-PLATONISM IN MATHEMATICS (1998)

like objects do, insofar as they are causally inert and cannot be perceived, but perhaps they exist in some different but equally real way.[134]

Realism about abstract entities need not be limited to axiomatic fundamentals like mathematics and logic.[135] If numbers exist, perhaps other abstractions could too—at least, some argument other than that they *are* abstract would be required. So, for example, many philosophers believe that so-called "natural kinds" are *real*, natural abstract entities.[136] Consider the concept of "gold." "Gold" refers to a physical substance, and we can be as confident as we can be about anything that the physical substance exists. But the *concept* of "gold" is *not* the physical substance—it is an abstraction that delimits instances of the physical substance. This particular concept at least arguably bounds a precisely defined, pre-existing distinctive feature of our universe—an abstraction about a natural *kind* of a substance, with an atomic number of 79, a shiny color, and relative malleability.[137]

This kind of metaphysical realism about any given abstraction is, in principle, distinct from realism about any other.[138] But legal concepts—from, say, "law" to "right," are irreducibly abstract, and a Thoroughgoing Realist for jurisprudential purposes would hold that what goes for other abstract entities goes for law and legal concepts—legal concepts, from this perspective, exist as abstract and immaterial, but nevertheless real and objective, entities.[139]

The first step in Thoroughgoing Realism, in short, is a metaphysical commitment to the realism of abstract entities—in law to the metaphysical realism about legal concepts. Moreover, the Thoroughgoing Realist has further intertwined commitments philosophy of language and epistemology.

(same).

[134] *See, e.g.*, Linsky & Zalta, *supra* note 133, at 533 (arguing that alternative Platonic theories of mathematics err in "conceiv[ing] of abstract objects on the model of physical objects"); Gottlob Frege, *Thought*, in THE FREGE READER *supra* note 128, at 325, 337 (positing a "third realm" of abstract objects distinct from physical objects and ideas); Rosen, *supra* note 123, at 152 ("There is thus on the platonist's view a radical distinction between to fundamentally different kinds of thing.").

[135] *See, e.g.*, Green, *supra* note 18, at 1949–50 (noting "general doubts about abstract objects.").

[136] *See generally, e.g.*, Alexander Bird & Emma Tobin, *Natural Kinds*, STAN. ENCYC. PHIL. (2023) (summarizing philosophical positions on the existence of natural kinds).

[137] *See generally, e.g.*, Katherine Hawley & Alexander Bird, *What Are Natural Kinds?*, 25 PHIL. PERSPECTIVES 205 (2011) (defending natural kinds as existent entities); BRIAN ELLIS, SCIENTIFIC ESSENTIALISM (2001) (same).

[138] *See, e.g.*, Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2432 (1992) ("[T]he metaphysical realist . . . about some class of entities need not be a realist about all other classes.").

[139] *See, e.g.*, Moore, *Interpretive Turn*, *supra* note 34, at 878 (defending metaphysical realism about legal concepts).

For instance, our realist has both a *direct reference theory* of the meaning of legal words and a *correspondence theory* of the truth of legal propositions.[140] Under a reference theory, words (and concepts) refer to things that actually exist in the world.[141] So, straightforwardly enough, the word "one," for a mathematical realist, refers to the actually-existent abstract entity 1; and, to the legal realist, the word "promise" refers to the abstract entity of promise.

And a correspondence theory of truth holds that the truth-value of a proposition is a matter of whether it in fact corresponds to reality—if it does, it is true, if it does not, it is false.[142] So if I say "one plus one equals two," this is true if the real operation of addition, performed on a real 1 with another real 1, in fact gives rise to 2, and false otherwise.[143] If I say "'I will hold it until such time as I want my money' is not a promise," this is true if the sentence "I will hold it until such time as I want my money" does not in fact fall into the bounds of the abstract entity of promise.[144] Taken together, these commitments in legal metaphysics, reference, and epistemology give rise to a strongly realistic theory of legal discourse—the concepts to which legal concept-words refer exist as abstract entities, they are directly referenced by the appropriate concept-word, and they can be used in propositional sentences made true by their correspondence to reality.

Finally, we'll attribute two more subsidiary positions to the Thoroughgoing Realist. First, the Thoroughgoing Realist holds the epistemic claim that—in addition to existing—these real abstractions are *discoverable*; we can and do learn about their entailments or characteristics in some way or another.[145] Second, our Thoroughgoing Realist holds a

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[140] *See, e.g.*, Coleman, *Truth and Objectivity*, *supra* note 16, at 38–39 (discussing correspondence theories of reference and truth).

[141] *See, e.g.*, Michael Devitt, *Meaning and Use*, 65 PHIL. & PHENOM. RES. 106, 106 (2002) ("Probably the most popular view of meaning has been a *truth-referential* one according to which the meaning of a sentence is explained in terms of its truth conditions and the meaning of a word is explained in terms of its referential properties.").

[142] *See, e.g.*, PATRICIA HANNA & BERNARD HARRISON, WORD AND WORLD: PRACTICES AND THE FOUNDATION OF LANGUAGE 21 (2004) (defining a Correspondence Theory as committed to the proposition that "[t]he assessment of truth and falsity is made possible by the existence of semantically mediated correlations between the members of some class of linguistic entities possessing assertoric force . . . and the members of some class of extralinguistic entities . . . ."); Coleman, *Truth and Objectivity*, *supra* note 16, at 38 ("The basic idea behind the correspondence theory of truth is this: sentences in cognitive discourse are *representations*.").

[143] *See, e.g.*, Moore, *Metaphysics, Epistemology & Legal Theory*, *supra* note 86, at 455 ("A realist must deny . . . any identification of her theory of justification with her theory of truth.").

[144] STRONG V. SHEFFIELD, 39 N.E. 330, 331 (N.Y. 1895).

[145] *See generally, e.g.*, John Bengson, *The Intellectual Given*, 124 MIND 707 (2015)

relatively strong view of the determinacy of concepts, perhaps the "*classical theory of concepts*" under which concepts are fully determinate and constituted by a clear set of necessary and sufficient criteria regarding their application.[146]

In other words, the Thoroughgoing Realist will hold that there is a determinate, discoverable answer as to whether any thing in the universe qualifies as, say, a "promise," as there for "law," "one," or "gold."[147] A realist about some domain could have, in practice, a range of views about how determinate particular concepts are without threatening their realism. But if *all* of the concepts in a particular domain were *radically* indeterminate, that would make strong realism impossible.[148] And so for the sake of the polar sketch, we will provisionally attribute to the Thoroughgoing Realist the Platonic view that for every abstract entity that exists and is referred to by our language and conceptual schemes, there is an answer as to whether a particular states of affairs falls within or outside of it.

In short, Thoroughgoing Realism about the law—the metaphysical position that legal abstractions exist and are determinate, the view in philosophy of language that legal words refer to concepts that capture their boundaries, and epistemic views that make the truth value of legal propositions turn on their correspondence to mind-independent reality and offer us some path towards learning about law's mind-independent abstractions.

B. Thoroughgoing Skepticism

At the opposite pole from Thoroughgoing Realism, we have Thoroughgoing Skepticism as a theory of meaning. As we did with Realism, we'll start with metaphysics. A Thoroughgoing Skeptic—a *really* Thoroughgoing Skeptic—might believe that nothing exists at all—a radical solipsism of the brain-in-a-vat or it's-all-a-dream variety.[149] Such people do exist, and Thoroughgoing Skepticism about reality generally has proven persistently difficult to dis*prove*, though never particularly popular in

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(defending the discovery of truths by *a priori* reasoning); ELIJAH CHUDNOFF, INTUITION (2013) (same).

[146] *See, e.g.*, Eric Margolis & Stephan Laurence, *Concepts*, STAN. ENCYC. PHIL. (Edward N. Zalta & Uri Nodelman, eds., 2022) (defining the classical theory of concepts).

[147] *See, e.g.*, Gottlob Frege, *Foundations of Arithmetic: A logico-mathematical investigation into the concept of number*, in THE FREGE READER, *supra* note 128, at 84, 87 (describing the "fixed and determinate" nature of concepts).

[148] *See infra* Part III.B.

[149] *See, e.g.*, Stephen P. Thornton, "Solipsism and the Problem of Other Minds," INTERNET ENCYCLOPEDIA OF PHILOSOPHY, available at https://iep.utm.edu/solipsis/.

philosophy.[150] Obviously, if this sort of radical solipsism is true, nothing matters or means anything, so we may set it aside for now.[151]

Being a more-or-less Thoroughgoing Skeptic about *legal* reality, however, need not require *so* extreme a commitment. Instead, the Skeptic must ultimately be committed to the position that abstract legal entities do not exist.[152] This could be for a variety of reasons, but a common one might be that, like the Thoroughgoing Realist, the Skeptic's position is connected with the broader position that abstract entities generally—numbers, natural kinds, the so-called laws of mathematics and physics—do not exist. A Skeptic in this vein (a not uncommon position) may concede that there is some external, mind-independent reality constituted (at least) of matter and (maybe) of energy, but their universe is at best a sea of particles—uncategorized, unconstrained by law, governed by rough probability, maybe nothing in the last analysis.[153] Where Realists paradigmatically rely on the philosophy of mathematics,[154] where abstractions seem real and *a priori*, or perhaps the philosophy of biology, where abstract entities like "information" and "function" are essential,[155] Skeptics are likely to rely on quantum mechanics, and its perceived implications for the possibility of law-governed reality and true knowledge.[156]

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[150] *See, e.g.*, ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 197 (1981) ("The continuing felt need to refute skepticism, and the difficulty in doing so, attests to the power of the skeptic's position, the depth of his worries.").

[151] *See, e.g.*, James Toomey, *Reinach's Darwin*, in REINACH AND THE FOUNDATIONS OF PRIVATE LAW (Marietta Auer, Paul B. Miller, Henry E. Smith & James Toomey, eds., forthcoming) (describing Frege and Husserl's efforts to stipulate metaphysical realism against nihilism).

[152] *See, e.g.*, Hatry Field, *Conventionalism about mathematics and logic*, NOUS (forthcoming 2023) (discussing views of mathematics and logic under which they are fictional or a matter of social convention); PAUL ERNEST, SOCIAL CONSTRUCTIVISM AS A PHILOSOPHY OF MATHEMATICS (1998) (discussing a view in which mathematical concepts do not exist but are human social and linguistic constructions).

[153] *See, e.g.*, Karen Bennett, *Composition, Colocation, and Metaontology*, in METAMETAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY 38, 44 (David J. Chalmers, David Manley & Ryan Wasserman, eds., 2009) ("[S]ome people argue that there are no such things—not because they do not believe in the external world, but rather because they think that composition never occurs."); Herbert Feigl, *The "mental" and the "physical"*, in MINNESOTA STUDIES IN PHIL. OF SCI. (H. Feigl, M. Scriven & G. Maxwell, eds., 1958) (defending a reductionist physicalism in which the all that exists is physical matter).

[154] *See, e.g.*, Samet, *supra* note 129 (observing a "focus on mathematical knowledge and concepts" in realist arguments throughout history).

[155] *See, e.g.*, RUTH GARRETT MILLIKAN, LANGUAGE, THOUGHT AND OTHER BIOLOGICAL CATEGORIES (1984) (defending an account of metaphysical realism grounded in philosophy of biology).

[156] *See generally, e.g.*, CHRISTOPHER NORRIS, QUANTUM THEORY AND THE FLIGHT FROM REALISM: PHILOSOPHICAL RESPONSES TO QUANTUM MECHANICS (2002) (describing

A Skeptic about metaphysical reality in general, then, might hold that there are no such things as abstractions like the concept of gold—at best there are just parts of the web of matter that are, probabilistically, "heavier," or "shinier," or "more malleable" than others.[157] "One," a skeptic might say, is a human invention.[158] If abstract entities—even mathematical, logical, or otherwise natural ones, do not exist, certainly *legal* concepts do not.[159] So let us take the Thoroughgoing Skeptic's legal metaphysics to be based on a general view of metaphysics under which abstraction is a human invention, ultimately arbitrary. That is how the Thoroughgoing Skeptic sees legal concepts, at least.

With no abstract entities to which to refer, the Skeptic's theory of the reference of words must be very different than the Realist's. Quite simply, the Skeptic cannot believe that the words of legal language (just as other linguistic abstractions) refer to anything that exists "out there." Legal words—up to and including the word "law"—have no really existing referents.[160] The Thoroughgoing Skeptic is, in other words, not a referentialist about the meaning of language. At best, a Skeptic might say that words are defined, to the extent that they are defined at all, by *other words*, but the words in a language's lexicon are a closed set—the words by which a word is defined themselves have no external referent, and are defined only in terms of other words[161]—words defined by other words all the way down.[162] If it's words all the way down, and if the "referents" of

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the influence of quantum mechanics on anti-realism in philosophy); Sam Page, *Carving Nature at its Inherent Joints: The Problem of Independent Criterion*, 29 AUSLEGUNG 1, 2 (2007) ("The primary problem with the direct approach is that the closer individual objects are examined, the blurrier their boundaries appear, and the bizarre entities at the quantum level might not even be individuable.").

[157] *See, e.g.*, Robin Findlay Hendry & Paul Needham, *Le Poidevin on the Reduction of Chemistry*, 58 BRITISH J. PHIL. SCI. 339, 339 (2007) (describing the ontological theory under which truths of chemistry are reducible to physics).

[158] *See, e.g.*, MARY LENG, MATHEMATICS AND REALITY (2010) (arguing that the apparent connection between mathematical concepts and reality is a "happy coincidence"); HATRY FIELD, SCIENCE WITHOUT NUMBERS (1980) (same).

[159] *See, e.g.*, S. PAC. CO. V. JENSEN, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky.").

[160] *See, e.g.*, W.V.O. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV. 20, 40 (1951) ("The totality of our so-called knowledge or beliefs . . . is a man-made fabric which impinges on experience only at the edges."); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 2 (1953) (arguing that words only have meanings within the context of particular "language games," not as denoting external referents).

[161] *See, e.g.*, L. Gumpel, *The Essence of "Reality" as a Construct of Language*, 11 FOUNDATIONS OF LANGUAGE 167, 172 (1974) (arguing that language is constitutive of reality").

[162] *See, e.g.*, J. HILLIS MILLER, THE J. HILLIS MILLER READER 82 (Julian Wolfreys, ed., 2005).

words are merely social constructions, then the meaning of words is a social construction, a web of imposed meaning that, rather than referencing "reality," "creates" it.[163]

With this theory of the meaning of words, the Thoroughgoing Skeptic will believe that propositions, at least ultimately, in the last analysis, have no truth value.[164] If words can't have external meaning, then the propositions that they make up can't either accurately or inaccurately reflect reality, and whatever it is we are doing when we articulate in language, we are not asserting propositions that can be true or false—at least not in the traditional, correspondence sense.[165]

Finally, although the Thoroughgoing Skeptic denies the existence of abstract entities, in the event they were to be convinced that some human concept tracks reality in some sense (perhaps as a generalization of some sometimes-useful pattern), they would hold to two further claims. First, they'll argue that, as an epistemic matter, we have no way to access external truths about our concepts even if they exist.[166] And then the Skeptic will further argue that our concepts are not determinate. Indeed, they'll maintain that concepts, even if they exist "in some sense," are *radically* indeterminate.[167] It will be always, or at least often, simply impossible to determine whether a particular thing or set of circumstances falls within a concept's domain. *Is* "I will hold it until such time as I want my money" a "promise"? Why would it be? What does the question even mean?

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[163] *See generally, e.g.*, MARK CURRIE, THE INVENTION OF DECONSTRUCTION (2013) (describing the rise of "deconstruction" in literary theory, holding language to be constitutive of reality); SEAN HOMER, JACQUES LACAN (2005) (summarizing Jacques Lacan's contributions to this project); MARC REDFIELD, ED., LEGACIES OF PAUL DE MAN (2007) (same for Paul de Man).

[164] *See, e.g.*, BERNARD E. HARCOURT, CRITIQUE & PRAXIS 107 (2020) ("[Foucault] was not interested in truth-value . . . but in the history of who has been able to speak truth, how, and with what effect."); *see also* Jacques Derrida, *White Mythology*, 6 NEW LITERARY HIST. 12, 12 (1974) ("What then is truth? a mobile army of metaphors, metonymies, anthropomorphisms . . . illusions which have forgotten that they are illusions.").

[165] *See, e.g.*, Ernest D. Mason, *Deconstruction in the Philosophy of Alain Locke*, 24 TRANS. CHARLES S. PEIRCE SOC. 85, 91 (1988) ("In place of secure and stable truths, deconstruction posits the notion that all meaning is open and subject to multiple interpretations and perspectives."); *see also* Leiter & Coleman, *supra* note 12, at 565–66 ("The semantic skeptic denies that there are objective facts of a suitable sort that constitute or determine a word's or sentences meaning.").

[166] *See generally, e.g.*, PETER BORNEDAL, NIETZSCHE'S NATURALIST DECONSTRUCTION OF TRUTH: A WORLD FRAGMENTED IN LATE NINETEENTH-CENTURY EPISTEMOLOGY (2020) (describing Nietzsche's Nihilism as a largely epistemological commitment).

[167] *See generally, e.g.*, Xin Sheen Liu, *Kripkenstein: Rule and Indeterminacy*, 32 PAIDEIA 67 (1998) (summarizing Twentieth Century theories of conceptual and linguistic indeterminacy).

Contrary to Thoroughgoing Realism of legal meaning, we have Thoroughgoing Skepticism—legal concepts are human linguistic inventions, not pre-existing entities, defined only in terms of other words; they refer to nothing true or false about reality "out there;" are indeterminate, and in any event epistemically inaccessible.

C. Moderate Positions

In the logical space between the poles of Thoroughgoing Realism and Thoroughgoing Skepticism there is wide spectrum—literally, infinite variations—of theories of meaning.[168] Of course, for a variety of logical and historical reasons, realist views about abstract entities have tended to travel with direct theories of reference—and realism about abstract entities in domains such as mathematics seems to make more plausible realism in other areas.[169] But these things are not entailed by one another—one could believe, and some do, in an ontology built of fundamental abstract entities that our minds and language can never access.[170] And, moreover, it is entirely coherent (and quite common) to have a more realist view of some things (say, logic) but be more skeptical in other domains (perhaps ethical or legal discourse).[171]

Theories of meaning, ultimately, are limited only by the imagination and whatever role (itself controverted) concepts like plausibility, coherence, and parsimony might play in this domain.[172] To make sense of debates in jurisprudence, however, we need only briefly sketch the story of a few alternatives that have had an outsize role on the philosophy of the twentieth century and the interchange between philosophy and legal theory (in, of course, a stylized and reductive way, as with our discussion of jurisprudential theories above).

In the increasingly philosophically materialist intellectual climate at the

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[168] You could, for instance, be a Realist about discourse having to do with chocolate ice-cream, and a Skeptic about everything else. And so on. *See, e.g.*, David J. Chalmers, *Ontological Anti-Realism*, in METAMETAPHYSICS, *supra* note 153, at 77, 93 & 111 (describing ways in which metaphysical views might be combined).

[169] *See, e.g.*, Plunkett & Shapiro, *supra* note 5, at 44 ("The plausibility of a given thesis . . . can be evaluated in part based on whether it can be integrated into a plausible package deal in metaethics.").

[170] *See, e.g.*, IMMANUEL KANT, CRITIQUE OF PURE REASON (Marcus Weigelt & Max Muller, trans. & eds., 2008) (defending something like this position).

[171] *See, e.g.*, Bennett, *supra* note 153, at 43 ("[T]here is no obvious reason to think that all metaphysical debates must be on a par.").

[172] *See, e.g.*, Himma, *supra* note 55, at 1127 (defending a broadly descriptive approach to conceptual analysis that relies on epistemic values such as parsimony and coherence); Jules L. Coleman, *Incorporationism, Conventionalism, and the Practical Difference Thesis*, 4 LEGAL THEORY 381, 393 (1988) (same).

turn of the twentieth century, the debate between realism and antirealism about abstractions became particularly acute.[173] Darwin had, for the first time, made plausible a thoroughgoing philosophical materialism—an account of the universe that invoked not only no higher agency but didn't seem to require abstract entities at all.[174] At the same time, developments in physics such as Einsteinian relativity and the beginnings of quantum mechanics were demonstrating the extent to which our apparently *a priori* intuitions are disconnected from even *physical* fundamental ontology.[175]

Philosophers felt the need to offer new accounts of the fundamentals—whether and how mathematical abstractions could be compatible with the new science; what thoroughgoing materialism might mean for philosophy.[176] One approach, by realistically-inclined philosophers like Gottlob Frege and G.E. Moore, was simply to stipulate the real existence of basic abstractions—the alternative, to them, was unacceptable nihilism.[177]

A more skeptical, but more immediately influential alternative, path was taken by the so-called Classical Pragmatists and Logical Positivists, distinct but interrelated philosophical movements in the United States and Europe.[178] These philosophers attempted to ground a theory of meaning—not ultimately a realist one, but not Thoroughgoing Skepticism either—in the methods of empirical science.[179] Science, of course, posits abstract

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[173] *See, e.g.*, Gregory H. Moore, *Logic in the early 20th Century*, in ROUTLEDGE ENCYC. PHIL. (1998) (summarizing renewed interest in logical realism at the turn of the 20th century); John T. Driscoll, *Philosophy and Science at the Dawn of the Twentieth Century*, 176 N. AM. REV. 422, 422 (1902) (discussing contemporaneous efforts to ground philosophy in a new basis).

[174] *See, e.g.*, James Toomey, *"Religion," Before Darwin*, 101 WASH. U. L. REV. 661, 664 (2024) ("For the first time in human history, the theory of evolution by natural selection offered a plausible (indeed, compelling) explanation for the *obvious design* of biology that was consistent with philosophical materialism.").

[175] *See, e.g.*, ERNST MACH, THE PRINCIPLES OF PHYSICAL OPTICS: AN HISTORICAL AND PHILOSOPHICAL TREATMENT (J. Anderson & A. Young, trans., 1953) (discussing Einsteinian relativity's implications for philosophy).

[176] *See generally, e.g.*, MICHAEL RUSE, ED., PHILOSOPHY AFTER DARWIN: CLASSIC AND CONTEMPORARY READINGS (2010) (discussing the influence of Darwin's theory of evolution on philosophy).

[177] *See, e.g.*, Gottlob Frege, *Grundgesetze der Arithmetik, Volume I*, in THE FREGE READER, *supra* note 128, at 194, 206 ("If we want to emerge from the subjective at all, then we must conceive of knowledge as an activity that does not create what is known but grasps what already exists.").

[178] *See, e.g.*, Northrup, *supra* note 15, at 1018 (describing as the fundamental commitment of "philosophical positivism" that "[t]o say that c is a meaningful word is equivalent to affirming that c refers for its entire meaning to a datum given directly through the senses or is definable in terms of such data.").

[179] *See, e.g.*, Herbert Keuth, *Logical Positivism and Logical Empiricism*, in INT'L ENCYC. SOC. & BEHAV. SCI. (2d ed. 2015) (describing the rise of Logical Positivism as an

concepts like "potential energy" and "genetic information," but only insofar as they actually work to explain reality as far as we understand it.[180] The Positivists and Classical Pragmatists—including Rudolph Carnap, John Dewey, William James, and the "early" Wittgenstein—sought to do something similar with the abstract concepts of math and logic.[181] In place of the correspondence theory of truth of traditional realism, they posited a *verificationist* theory of truth—some proposition is true to the extent it can be verified or confirmed.[182]

Thus, the Positivists and Pragmatists were realists about the physical world of matter and energy—they believed that there existed a world around us, the same world for all of us, and one that is more or less discoverable.[183] They were not, in other words, the maximally Thoroughgoing Skeptics described above. But they did not believe that world contained abstract entities such as numbers and normative concepts.[184] Instead, they were *nominalists* about concepts—the concept words we use do not refer to any actually-existing abstract entity, but may

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effort to ground logic in a "scientific" world conception); Susan Haack, *The Pragmatist Tradition: Lessons for Legal Theorists*, 95 WASH. U. L. REV. 1049, 1055 (2018) (same for American Pragmatism).

[180] *See, e.g.*, PETER ZACHAR, A METAPHYSICS OF PSYCHOPATHOLOGY (2014) (describing the Pragmatist view of concepts as "instrumental nominalism" based on an analogy to scientific concepts).

[181] *See, e.g.*, CLARENCE IRVING LEWIS, COLLECTED PAPERS OF CLARENCE IRVING LEWIS 91, 99 (John D. Goheen & John I. Mothershead Jr., eds., 1970) ("Both pragmatism and logical positivism . . . look[] to science as the exemplar of knowledge in general."); WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OF THE OLD WAYS OF THINKING 200–222 (1907) (defending a theory of truth-as-usefulness).

[182] *See, e.g.*, John Dewey, *Propositions, Warranted Assertibility, and Truth*, 38 J. PHIL. 169, 170 (1941) ("[A] meaning entertained as a *possible significance* in some actual case, is demanded, if there is to be *warranted* assertibility in the case of a particular matter of fact."); *see also* Coleman, *Truth and Objectivity*, *supra* note 16, at 42 ("According to this view, to say that a sentence is true is to claim that someone would be warranted in asserting it.").

[183] *See, e.g.*, Cleo H. Cherryholmes, *Notes on Pragmatism and Scientific Realism*, 21 EDUC. RES. 13, 14 (1992) ("Pragmatists agree that there is an external world independent of our minds; no disagreement there.").

[184] *See, e.g.*, James Ward Smith, *Pragmatism, Realism and Positivism in the United States*, 61 MIND 190, 193 (1952) (observing that under William James's theory of concepts and truth, "if a concept literally means what you do with it, its truth must lie in a successful doing"); Paul Artin Boghossian, *Analyticity*, in A COMPANION TO THE PHILOSOPHY OF LANGUAGE 578, 583 (Bob Hale, Crispin Wright & Alexander Miller 2017) ("Guided by the fear that objective, language-independent, necessary connections would be metaphysically odd, [logical positivists] attempted to show that all necessities could be understood to consist in linguistic necessities . . . ."); *see also* Barzun, *supra* note 31, at 4 (describing a mid-century "generation of intellectuals and social scientists who were skeptical about value claims but optimistic about scientific or factual knowledge").

generalize in a helpful way from underlying phenomena, and make sense insofar as they help us understand reality in an efficient way.[185] In so doing, however, these theorists jettisoned realism about morality and normative concepts, which they took as the price of their qualified realism about logical fundamentals.[186] To them, a concept like "promise" didn't have real or meaningful external reference. This philosophical view was highly influential on Pragmatists' and Positivists' contemporary Legal Realists.[187]

Things would take a more skeptical turn after the Second World War.[188] In the posthumously published *Philosophical Investigations* (1953), Ludwig Wittgenstein argued that the meaning of language doesn't have to do with its reference *at all*, but lies in its *use*—the meaning of concept words is just the ever-shifting boundaries of social acceptability and actual use.[189] Similarly, in his highly-influential 1951 paper "Two Dogmas of Empiricism," W.V.O. Quine argued that even the highly-qualified realism of Logical Positivism presupposed a determinacy of concept words that he found indefensible—whatever meaning we ascribe to a word rather depends on the meanings of every other word in the language.[190]

In place of the verificationist theory of truth of the Positivists, these philosophers endorsed a *coherence* theory of truth, or "meaning holism"—to say a statement in a particular language is "true" is not to say *anything* about reality but to make a semantic claim about the language itself; a claim about whether within the context of a language a competent user of the language could assert the statement, coherent with the other sentences taken to be true by users of the language.[191] From this perspective, not only do concept words have no *external* validity, but *any* validity they have internal

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[185] *See, e.g.*, DAVID L. HILDEBRAND, BEYOND REALISM AND ANTIREALISM: JOHN DEWEY AND THE NEOPRAGMATISTS 40 (2003) (describing Dewey's nominalism about concepts); *see also* Gillian Russell, *The Analytic/Synthetic Distinction*, 2 PHIL. COMPASS 712, 721 (2007) ("Carnap and Quine disagreed over the analytic/synthetic distinction, but they also shared some fundamental commitments: a respect for the empirical and formal sciences and a suspicion of metaphysics . . . .").

[186] *See, e.g.*, A.J. AYER, LANGUAGE, TRUTH & LOGIC (2d ed. 1952) (defending a view of moral propositions as non-verifiable and lacking in truth value); WILLIAM JAMES, THE WILL TO BELIEVE (1896) (arguing that there is no standard for morality beyond human experience).

[187] *See, e.g.*, Haack, *supra* note 179, at 1066 (discussing the influence of philosophical pragmatism on Legal Realism).

[188] *See, e.g.*, Barzun, *supra* note 31, at 48 ("such philosophers as W.V. Quine and Morton White were attacking the assumptions of logical positivism").

[189] WITTGENSTEIN, *supra* note 160, at 43 ("[T]he meaning of a word is its use in the language.").

[190] Quine, *supra* note 160, at 22.

[191] *Id.* at 39 (making this argument); WITTGENSTEIN, *supra* note 160, at 7–23 (understanding truth as coherence within a language game).

to the language itself is highly qualified—subject to revision, context sensitive, and sensitive to the arbitrary composition of the lexicon in which the sentence is being used.[192]

The arguments of Quine, Wittgenstein, and their fellow travelers towards skepticism are notoriously oblique, evolved over time, and can be—and have been—subject to at least three interpretations, ranging from a kind of moderate realism to something much more like Thoroughgoing Skepticism.[193]

First, it might be that these arguments against external criteria of truth defeat abstract metaphysics but not the possibility of internal observational science—with "truth" not meaningless but a concept "internal" to the language in which it appears.[194] Call this *Descriptive Holism*—if meaning is use, and we presuppose a broad consistency in the use of language, that doesn't mean that words don't mean anything, it just means that investigating their meaning is an empirical question about how people use words, and what *counts* as "true" or "coherent."[195] From this perspective, conceptual philosophy reduces to a kind of descriptive sociology; epistemology to psychology.[196] This was the theory of meaning of the "ordinary language philosophers" of the "linguistic turn" in philosophy of the 1950s and 1960s—including H.L.A. Hart, and perhaps most prominently J.L. Austin—largely as an interpretation of late-Wittgenstein.[197]

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[192] *See, e.g.*, Quine, *supra* note 160, at 40 ("Revision even of the logical law of the excluded middle has been proposed as a means of simplifying quantum mechanics . . . .").

[193] *See, e.g.*, Leiter & Coleman, *supra* note 12, at 565–66 ("There are a variety of considerations normally associated with Wittgenstein's Private Language Argument that we can capture under the rubric of *semantic skepticism*.").

[194] *See, e.g.*, Matti Eklund, *Carnap and Ontological Pluralism*, in METAMETAPHYSICS, *supra* note 153, at 130, 135 (ascribing a view like this to Carnap and endorsing it); Himma, *supra* note 55, at 1127 (arguing that this "methodology is largely descriptive in the following sense: The only norms that are necessary to analyze admittedly normative concepts like law are *epistemic* norms . . . .").

[195] *See, e.g.*, David Hommen, *Wittgenstein, Ordinary Language, and Poeticity*, 35 KRITERION—J. PHIL. 313 (2021) (summarizing the descriptive approach of ordinary language philosophy and its roots in late-Wittgenstein).

[196] *See, e.g.*, W.V.O. Quine, *Epistemology Naturalized* in ONTOLOGICAL RELATIVITY AND OTHER ESSAYS 69–90 (1969) (arguing that epistemology reduces to psychology).

[197] *See, e.g.*, Nat Hansen & Emmanuel Chemla, *Linguistic Experiments and Ordinary Language Philosophy*, 28 RATIO 422, 422 (2015) ("Austin's method of demonstrating fine distinctions between words or phrases with similar meanings involves constructing a type of linguistic experiment . . . ."); Jason Xenakis, *Ordinary-Language Philosophy: Language, Logic, and Philosophy*, 11 SYNTHESE 294, 295–96 (1959) ("The most concise way of expressing what ordinary-language philosophy is about is by saying, not of course that it is about expressions (words, phrases or sentences), but about the jobs they perform, the roles they play."); *see also* Barzun, *supra* note 31, at 52 ("H.L.A. Hart's debt to

Second, you might think that Wittgenstein and Quine went further, and if they have shown us anything, it is the slipperiness and ultimate indefinability of any abstract conceptual term—subject as they all are to continuous revision and dependent on adjustments anywhere in the lexicon. How plausible, you might ask, is the project of Descriptive Holism?[198] If there are no external criteria by which to describe the meaning a term within a particular language, a descriptive account of the use of a term might always be elusive—contested and contestable.[199] You might ask, further, what could be the *point* of such a descriptive project, if our conclusions tell us nothing about *truth*, in the traditional, external sense?[200]

Without any external referents for concepts—goes the argument of a group of philosophers we'll call the *Normative Holists*—the way to think about the meanings of words and concepts is necessarily *normative*.[201] Meaning is use, use can be adjusted—*should* we be using words in this way?[202] How can we define or redefine them to make lives better, to solve injustices, and so on? From this perspective, you might then see our linguistic history as a project of value and meaning *creation*, a teleology towards some more just world—as Dworkin, Lon Fuller, the Legal Process Theorists, and the Continental Existentialists arguably saw things.[203] Or,

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Wittgenstein and Winch has been well-documented.").

[198] *See, e.g.*, Donelson, *supra* note 6, at 2 ("The methodological anti-positivists contend that one needs to engage in moral inquiry in order to answer the jurisprudential question.").

[199] *See, e.g.*, Coleman, *Incorporationism*, *supra* note 172, at 389 ("The majority of arguments against descriptive jurisprudence are of the 'descriptive-jurisprudents-are-themselves-really-normative-jurisprudents-but-they-don't-realize-what-they-are-up-to' type."); Quine, *supra* note 160, at 22 ("[Meanings] are so elusive, not to say debatable, that there seems little hope of erecting a fruitful science about them.").

[200] *See, e.g.*, Alan Wertheimer, *Is Ordinary Language Analysis Conservative?*, 4 POLITICAL THEORY 405, 405 (1976) (noting the criticism that "ordinary language analysis is conservative."); *see also* HERBERT MARCUSE, ONE-DIMENSIONAL MAN 195 (1964) (arguing that ordinary language philosophy leaves us stuck with the "totalitarian scope of the established universe of discourse").

[201] *See, e.g.*, JACQUES DERRIDA, POSITIONS 6 (1981) ("To 'deconstruct' philosophy, thus, would be . . . to determine . . . a history by means of this somewhere motivated repression."); Benno Herzog, *Discourse analysis as immanent critique: Possibilities and limits of normative critique in empirical discourse studies*, 27 DISCOURSE & SOC. 278, 279 (2016) (describing the field of discourse analysis as social critique).

[202] *See, e.g.*, Stephen R. Perry, *The Varieties of Legal Positivism*, 9 CAN. J. L. & JURIS. 361, 372 (1996) (arguing that disagreeing about the nature of law is a normative question like disagreeing about the purpose of nuclear weapons); *see also* David Manley, *Introduction: A Guided Tour of Metametaphysics*, in METAMETAPHYSICS, *supra* note 153, at 1, 15 ("Early on in the twentieth century, it was popular to claim that neither side in a metaphysical dispute is really making any assertions. Instead, the function of their language is somehow *prescriptive*.").

[203] *See generally, e.g.*, MARTIN HEIDEGGER, BEING AND TIME (J. Macquarrie & E.

with a more dire view of our past and our fate, you might posit a normatively perverse organizing principle that has governed the use of words thus far and seek to liberate us from it—power, the patriarchy, racism, etc.—as Critical Theory and Critical Legal Studies.[204]

Finally, if you were convinced by the Normative Holists' critique of the possibility and desirability of descriptive analysis of concept terms, you might wonder on what grounds they are able to posit any sort of normative criteria for evaluating language use.[205] After all, if there exists nothing outside of the web of socially constructed language, how can we assert that Use of Language A is "better" or "more just" than Use B, where the meaning of "better" and "more just" is themselves just conventional?[206] In other words, if we're relativists about the meaning of words, why aren't we relativists about the use of *moral* words (and morality)?[207] One response is some kind of vague aspirational teleology, often described more poetically than precisely, as you'll find in Dworkin, Fuller and the Existentialists, or the Critical Theorists' apparent dogma that it can't get any worse.[208]

But reflections such as these have led some philosophers following Quine and Wittgenstein to a position much more like Thoroughgoing Skepticism—general nihilism about meaning and the possibility of ethics.[209]

Robinson, trans., 1962) (defending the possibility of value creation); JEAN PAUL SATRE, BEING AND NOTHINGNESS (H. Barnes, trans., 1956) (same).

[204] *See, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan, trans., 1995) (arguing that relations of power are constitutive of language and the social construction of reality); EDWARD W. SAID, ORIENTALISM (1979) (same for post-Colonialism); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) (same for racism); JUDITH BUTLER, GENDER TROUBLE (2d ed. 1999) (same for gender).

[205] *See, e.g.*, RAYMOND A. BELLIOTTI, JUSTIFYING LAW: THE DEBATE OVER FOUNDATIONS, GOALS, AND METHODS 169 (1994) ("CLS's critical attack seems to cut the heart from all efforts to provide non-question-begging adjudication of epistemological and moral truth claims."); *see also, e.g.*, BRIAN COSGROVE, JAMES JOYCE'S NEGATIONS: IRONY, INDETERMINACY, AND NIHILISM IN ULYSSES AND OTHER WRITINGS (2007) ("Indeterminacy . . . ushers in the possibility of nihilism.").

[206] *See, e.g.*, Jerry Fodor, *Having Concepts: A Brief Refutation of the Twentieth Century*, 19 MIND & LANGUAGE 29, 35 (2004) ("[P]eople who are holists about concept possession are often hard to distinguish from people who are eliminativists about concept possession.").

[207] One response to this challenge has been to vaguely posit some moral destiny, outside the moral epistemology of ordinary humans. *See, e.g.*, Barzun, *supra* note 31, at 44 ("It is for this reason that Fuller at times seems to have felt compelled to ground his views on a faith in a human purpose or *telos* . . . .").

[208] *See id*.; *see also infra* Part III.C–D.

[209] *See, e.g.*, Sanjit Chakraborty, *Quine's Meaning Nihilism: Revisiting Naturalism and Confirmation Method*, 3 PHIL. READINGS 222, 222 (2017) (arguing that Quine's late work embraces a kind of meaning-nihilism); Himma, *supra* note 55, at 1215 ("After all, Quine is a skeptic about the very project of conceptual epistemology . . . ."); Halpin, *supra* note 29, at 184 ("Since [Wittgenstein's methodology] can be used to relate any meaning of 'law' to

That is our third interpretation of mid-century meaning-skepticism. And many among both its proponents and detractors agree that the skepticism of meaning in Quine and Wittgenstein may indeed entail the deep nihilism of something approaching Thoroughgoing Skepticism.[210]

On the more skeptical side of the spectrum of theories of meaning, this survey takes us, more or less, to the present—with variations of Critical Theory that vary in the normatively perverse organizing principle they posit, alongside more "mainstream" views that resemble the metaphysically oblique moral faith of Dworkin.[211] But in parallel to these views, throughout the second half of the twentieth century, particularly in the "analytical" philosophy camp, there has been a resurgence in something closer to realism, influenced by developments in linguistics, evolutionary biology, and cognitive science.[212]

Whether or not meaning holism, either descriptive or normative, entails nihilism, it seems to entail strong linguistic relativism—if the meaning of any given proposition depends on the totality of other propositions in a language, and languages differ, meanings differ.[213] Indeed, for this reason, Quine (like many contemporary Critical Theorists) thought that translation was meaningfully impossible—there being no objective, language-independent criteria by which to evaluate whether a translation is good or bad.[214] For much of the first two-thirds of the twentieth-century, this kind of linguistic and cultural relativism was widely believed and apparently plausible—Margaret Mead had told us that Samoan culture was

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a corresponding understanding of law, it furnishes no help . . . .").

[210] *See, e.g.*, Green, *supra* note 18, at 1938 ("If the rule skeptic is right, we are nothing but automata, moving our limbs randomly and barking out gibberish."); Manley, *supra* note 202, at 16 ("In part because no plausible [prescriptive] semantics . . . has been offered, prescriptivist deflationism has fallen out of favor.").

[211] *See supra* 109 & accompanying text; Barzun, *supra* note 31, at 2–3 (describing this view as "mainstream").

[212] *See, e.g.*, Drew Khlentzos, *Challenges to Metaphysical Realism*, STAN. ENCYC. PHIL. (Edward N. Zalta, ed., 2021) (describing "renewed interest in realism"); Katz, *supra* note 122, at 285 ("Where do we stand? Hopefully, on the verge of a rebirth of rationalist semantics."); Russell, *supra* note 185, at 722 ("The rapid development of the science of linguistics has led some, foremost amongst them Jerrold Katz, to argue that our best scientific theories postulate the existence of intensional meanings."); *see also* Green, *supra* note 18, at 1903 ("Since the 1970s, there has been a strong movement . . . in favor of theories that can be called 'realist.'").

[213] *See, e.g.*, Jan Willem Wieland, *Carving the World as We Please*, 84 PHILOSOPHICA 7, 10 (2012) (arguing that one of the main arguments for the view that "we make facts (rather than merely find them) is "*the argument from disagreement*").

[214] *See* W.V.O. QUINE, WORD AND OBJECT (1960); *see also* Katz, *supra* note 122, at 290 ([T]he arguments for semantic skepticism are not sound. They turn out to be based on the Bloomfeldian, taxonomic theory of grammars, and this theory has been shown to be false by transformational linguistics.").

unrecognizable sexual utopia,[215] and Benjamin Whorf that the Hopi have no concept of time.[216]

In 1965, however, Noam Chomsky outlined a theory of universal grammar.[217] He argued—*contra* linguistic relativism—that in fact the basic structure of language is a universal, innate, biologically-grounded feature of human cognition.[218] Chomskian linguistics inaugurated a frenzy of interest in human universalism and (perhaps) concomitant realism.[219] If Chomsky, or something like his view, was right, it could be that there *is* something like a universal *a priori*—at least a universal way in which the human mind functions.[220] Maybe that is because there *is* something real behind our collective talk and thought.[221] And at roughly the same time, H.P. Grice, against Quine, resurrected the much maligned concept of intentional meaning, arguing that many of the philosophical puzzles of indeterminacy of language were illusory—in conversational contexts, our natural languages do mean things, and communication of intentional meanings between speakers is ubiquitous.[222]

Various forms of realism have experienced a dramatic resurgence in analytical philosophy, and realism about a wide range of abstract entities is once again a philosophically serious position.[223] At a minimum, analytical

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[215] MARGARET MEAD, COMING OF AGE IN SAMOA (1928).

[216] BENJAMIN WHORF, LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF (John B. Carroll, ed., 1956); *see also* Priel, *supra* note 47, at 1010 ("[I]t is fair to conclude that Hart, like many cultural anthropologists of his day, believed that the world of human practices was relatively unconstrained by the physical world . . . .").

[217] *See generally* NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (1965).

[218] *Id.*

[219] *See, e.g.*, Theodor Sider, *Ontological Realism*, in METAMETAPHYSICS, *supra* note 153, at 384, 402 (describing "Chomsky's focus on native speakers' nonprescriptive judgments of grammaticality" as a "conceptual choice[] that led to progress where before there had been stagnation); George A. Martinez, *On Law and Truth*, 72 NOTRE DAME L. REV. 883, 903–04 (1997) (noting a "recent revival of realism in other areas of philosophy such as the philosophy of science and ethics"); Richard N. Boyd, *How to Be a Moral Realist*, in ESSAYS ON MORAL REALISM 181 (Geoffrey Sayre-McCord, ed., 1988) (defending moral realism).

[220] *See, e.g.*, James Toomey, *Evolutionary Anamnesis*, 37 BIO. & PHIL. 55, 56 (2022) (defending an evolutionary view of *a priori* knowledge); Boghossian, *supra* note 184, at 591 (arguing that "most contemporary philosophers" have rejected the epistemological coherentism of Quine).

[221] *See supra* note 219.

[222] *See, e.g.*, H.P. Grice, *Logic and Conversation*, in SYNTAX AND SEMANTICS 3: SPEECH ACTS 41, 43 (Peter Cole & Jerry L. Morgan 1975).

[223] *See, e.g.*, Manley, *supra* note 202, at 1 (describing metaphysical realism about collections and abstracts as "*mainstream metaphysics*, with the caveat that it has only come to ascendency lately, and is still widely challenged"); David J. Chalmers, *Ontological Anti-Realism*, in METAMETAPHYSICS, *supra* note 153, at 77, 77 ("In recent years, the practice of

philosophers has tended back towards the realism about ontology and language generally—with the Pragmatists and Positivists and against the Holists and Critical Theorists—holding squarely that there exists a world outside of us, we all inhabit the same one, and language is meant to, and does, reference reality in some way.[224] Virtually all contemporary analytical philosophers accept that.[225] Some contemporary philosophers have gone so far as to defend various forms of Platonism about abstract entities.[226]

The full-blooded Platonism of Thoroughgoing Realism, however, remains difficult—no one wants to posit a World of Forms if they can avoid it.[227] And it is clearly unnecessary to accepting something very much like realism for practical purposes—Aristotle was not that far from Thoroughgoing Realism, at least about logic and biological kinds, but he aimed a great deal of rhetorical effort against Plato's picture, taken literally, of freestanding, causally-inert abstract objects.[228] More compatible with Aristotle, a significant thread in contemporary philosophy might be called Realist Nominalism—the position that abstract entities do not exist in their own (mysterious) right, but that our concept-words aspire to, and at least roughly do, carve reality at genuinely meaningful joints.[229]

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ontology has often presupposed an ever-stronger ontological realism . . . .").

[224] *See, e.g.*, Manley, *supra* note 202, at 1, 3 ("Most contemporary metaphysicians think of themselves as concerned, not primarily with the representations of language and thoughts, but with the reality that is represented."); *see also* DANIEL C. DENNETT, DARWIN'S DANGEROUS IDEA: EVOLUTION AND THE MEANINGS OF LIFE (1996) (offering a metaphysically realist account of the evolution of the universe and basic laws and constituents); Ruth Garrett Millikan, *Metaphysical Anti-Realism?*, 95 MIND 417 (1986) (defending realism about external reality generally).

[225] *See, e.g.*, Sider, *supra* note 219, at 399 (David J. Chalmers, David Manley & Ryan Wasserman, eds., 2009) ("A certain core realism is, as much as anything, the shared dogma of analytical philosophers, and rightly so.").

[226] *See, e.g.*, Rosen, *supra* note 123, at 150 ("The nominalist alternative collapses on itself. This leaves Platonism; and whether we like it or not, we had better learn to live with it."). Herbert Hochberg, *Nominalism, General Terms, and Predication*, 61 THE MONIST 460, 460 (1978) (criticizing attempts to avoid Platonism).

[227] *See, e.g.*, Rosen, *supra* note 123, at 151 (describing Platonism as "just too much like the religious and mystical pictures that so many of us are committed to opposing for reasons that have little to do with philosophy"); *see also* Herbert Hochberg, *Nominalism, Platonism and "Being True Of"*, 1 NOŬS 413, 413 (1967) (describing attempts to avoid Platonism); Sider, *supra* note 219, at 408 (offering nominalistic alternatives assuming "we are reluctant to reify quantifier meanings").

[228] *See generally* ARISTOTLE, THE METAPHYSICS (Hugh Lawson-Tancred, trans., 1998).

[229] *See, e.g.*, Sider, *supra* note 219, at 397 ("The world has an objective structure; truth-seekers must discern that structure; they must carve at the joints; communities that choose the wrong groupings may get at the truth, but they nevertheless fail badly in their attempt to understand the world."); David Lewis, *New Work for a Theory of Universals*, 61 AUSTRALASIAN J. PHIL. 346, 346 (1983) (arguing that ontologically privileged "natural"

From this perspective, there might not exist an abstract entity of gold in some mind-independent way, but there really is a distinctive kind of thing with the atomic number 79, worth our carving out with a distinctive word.[230] Note how different this perspective is from a more skeptical theory like Descriptive Holism—for a Descriptive Holist about gold, the boundaries of the concept run out with the boundaries of the word "gold;" but for a Realist Nominalist, truths about gold are determined by the truths about a distinctive phenomenon referred to by that word.[231] This position can thus salvage something like a reference theory of language.[232]

Contemporary philosophers broadly in this school differ in their theories of the origins of abstract concepts—whether innate and evolved[233] or social constructions but *non-arbitrary* ones[234]—the extent to which concepts can meaningfully carve up our social or ethical worlds, as opposed to the natural

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properties distinguish classes of things along genuinely real lines); Tristram McPherson, *Authoritatively Normative Concepts*, 13 OXFORD STUDS. METAPHYSICS 253 (2018) ("I favor a picture where the presupposed privileging is metaphysical: where we take the arbitrary/non-arbitrary distinction to be part of the genuine structure of the world.").

[230] *See, e.g.*, SAUL KRIPKE, NAMING AND NECESSITY 118–19 (1981) ("[W]e use 'gold' as a term for a certain *kind* of thing, Others have discovered this kind of thing. We thus as part of a community of speakers have a certain connection between ourselves and a certain kind of thing."); FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENSE OF CONCEPTUAL ANALYSIS 15 (1998) ("[I]f a predicate applies to one thing and not another, this is because of something about how the two things are over and above the fact that the predicate applies to one and not the other.").

[231] *Compare* HART, *supra* note 2, at 126–29 (arguing that because of the "open texture" of language, conceptual meaning "runs out" with the meaning of words) *with* KRIPKE, *supra* note 230, at 119 ("[W]e would say that in spite of the optical illusion which had deceived the explorers, tigers in fact have three legs."); JACKSON, *supra* note 230, at 33 ("[O]ur focus is on getting clear about the cases covered rather than on what does the covering, the word *per se*.").

[232] *See, e.g.*, Sider, *supra* note 219, at 406 ("Even if quantifier meanings are not entities, we may speak of the naturalness of quantifiers in some nominalistic way."); *see also* KRIPKE, *supra* note 230, at 127 ("According to the view I advocate, then, terms for natural kinds are much closer to proper names than is ordinarily supposed.").

[233] *See generally, e.g.*, RUTH GARRETT MILLIKAN, BEYOND CONCEPTS: UNICEPTS, LANGUAGE, AND NATURAL INFORMATION (2017) (defending an evolutionary account of concept development as a means of packaging information in an informationally "clumpy" world); *see also* Kevan Edwards, *What concepts do*, 170 SYNTHESE 289, 308 (2009) ("But why is it implausible that Mother Nature (or God) has settled on a design strategy whereby the cognitive mind is populated with basic units that reflect the particular joints of nature most appropriate to human interests and worldly interactions?"); Katz, *supra* note 122, at 310 ("[I]f we can assume the existence of a language independent set of concepts and propositions, then we can assume further that all intelligent creatures draw the elements of their cognitive systems from this set . . . ").

[234] *See, e.g.*, Coleman, *Objectivity*, *supra* note 16, at 42 ("*[T]he best conception of an object is the one that illuminates best the claims we make about objects*.").

one,[235] and the extent to which English concept words *do* properly refer to distinctive phenomena.[236] But what is distinctive about Realist Nominalism, against Holism and its coherence theory of truth, is that all of these views hold that linguistic concepts are answerable in some way to non-linguistic reality—correspondence or verificationist theories of truth.[237] In realistically-inclined analytical philosophy, these views have largely superseded more modest positions like the Descriptive Holism of the mid-century, and allowed for a broad resurgence of interest even in moral realism, over the moral skepticism of the Pragmatists and Positivists.[238] These developments have influenced jurisprudes influenced by analytical philosophy (though perhaps less widely than prior philosophical movements),[239] and many contemporary analytical jurisprudes fall within this general approach to meaning.[240]

In any event, the details of these various views aside, the point is that a range of theories of meaning remain available in philosophy, and that many more (such as the Descriptive Holism) were popular at some point, and influenced contemporaneous work in jurisprudence. To make sense of any purported theory of law, we must understand the theory of meaning it presumes. And to have one of your own, you must be able to articulate and defend a theory of meaning—of what the word "law" could mean, how we might know, and what the law does with the concepts on which it relies and the words with which it references them.

III. THEORIES OF MEANING IN JURISPRUDENCE

Theories of meaning, I argue, offer an alternative lens through which to

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[235] *See generally, e.g.*, Amie L. Thomasson, *Realism and Human Kinds*, 67 PHIL. & PHENOMENOLOGICAL RES. 580, 580 (2007) ("[R]ealist views in ontology, epistemology, and semantics that were developed with natural scientific kinds in mind cannot fully apply to the kinds of the social and human sciences."); JOHN L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG (1977) (arguing that moral concept words do not refer to anything objective and external); *see also* Rebecca Mason, *Against Social Kind Anti-Realism*, 3 METAPHYSICS 55, 55 (2020) ("[T]here is no reason to endorse social kind anti-realism.").

[236] *See, e.g.*, DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED (1992) (arguing against qualia and many presumed concepts and phenomena of thought).

[237] *See, e.g.*, JACKSON, *supra* note 230, at 34–35 ("[I]t is an implicit part of a serious classificatory practice that we seek to mark the divisions worth marking . . . .").

[238] *See generally, e.g.*, Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1063–64 (defending moral realism); DAVID OWEN BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS (1989) (same).

[239] *See, e.g.*, Chalmers, *supra* note 223, at 78 ("Outside of the field of ontology, deflationary views are widespread, with non-ontologists being skeptical of the heavyweight realism that has become common in the field.").

[240] *See infra* Part III.E.

make sense of the most important theories of jurisprudence—an axis of disagreement other than that between "positivists" and "natural law theorists," and one perhaps more promising as a point of entry. This Part puts the pieces together, and discusses the theories of meaning on which prominent theories of law rely, and where and how they disagree. The discussion here is illustrative—we will only closely analyze the theories of meaning of a handful of paradigmatic jurisprudential doctrines. The same could be done to fit many more theories into the puzzle. But hopefully the selection of examples here illustrates the logical space of theories of legal meaning, and their relationships to theories of law, and helps reinterpret some of the core debates of jurisprudence.

First, we will take Traditional Natural Law theory, recast not primarily as an account of the relationship between law and morality, but as a position among theories of meaning. We'll then turn to H.L.A. Hart's theory of meaning, and contrast it with Dworkin's. In closing, I'll analyze the theories of meaning of Critical Legal Theorists alongside those of contemporary analytical jurisprudes.

A. Traditional Natural Law Theory

As mentioned above, let us stipulate as a "Traditional Natural Law theory" as any theory that accepts that (1) there exists, metaphysically, such a thing as "law" or "true law;" (2) that positive law ought discover, emulate, and apply, and that (3) positive "law" that purports to deviate from "true law" is, in some sense, not properly so-called.[241] There is, of course, a way of understanding this as a theory about the relationship between "law" and "morality"—after all, that is one question that a holder of these views would be able to answer. But it also demands a set of commitments in metaphysics and philosophy of language—and, indeed, might more fruitfully be more thought of as a position among theories of meaning.[242]

The Traditional Natural Law theorist is a metaphysical realist about the abstract entity "law" and its subsidiary concepts—"ownership," "claim," "agreement," etc. That is, they hold that these entities exist in the fabric of the universe—perhaps like numbers or the basic canons of logic—mind-independently real; as real for any comparably intelligent species as our own. Moreover, like the Thoroughgoing Realist about metaphysics generally, they will also hold that truths about these entities are epistemically accessible to rational intelligence. In short, though we call it "law," the Spanish "*ley*," the Chinese 法律 and some hypothetical alien

[241] *See supra* Part I.A.

[242] *See, e.g.*, Pojanowski, *supra* note 56, at 1024–25 ("Rather, the dividing line between natural law and classical positivism is metaphysical.").

species refer to it with a particular circumscribed dance, it is the same entity, with its truths out there to be discovered—that there is simply such a thing as a "promise," just as there is a such a thing as "1," with two of which you have "2."

Moreover, the Traditional Natural Law theorist is also a metaphysical realist about moral concepts, and holds legal concepts to *be* a kind of moral concept—that is, the concept of law does not merely exist in some normatively inert way (as perhaps numbers do), but in a manner that generates moral obligations on any intelligent, rational species.[243] And like the Thoroughgoing Realist, the Traditional Natural Law theorist holds a referential theory of legal language.[244] They hold that the entity of law exists, and the word "law" refers to it. Of course, not even the strongest realists about reference think that something about the entity of law ineluctably requires it to be referred to with the English word "law"—not even Plato embraced that rather silly notion.[245] The choice of the sound "law" to refer to the abstract entity of law—or *ley* or 法律, or "one" or *deux*—is obviously conventional, but once that choice has been made within a particular linguistic community, the sign comes to refer to the entity.[246]

This is the sense in which the Traditional Natural Law theorist holds that certain kinds of social arrangements are not properly law so-called without merely making a semantic claim. By convention, the English word "law" refers to the abstract entity of law. The normatively-laden entity of law excludes certain kinds of depraved social arrangements. Thus, the Traditional Natural Law theorist can coherently claim that the laws of the Third Reich were not law in a more-than-semantic sense. What they mean is that Nazi law does not fall within the metaphysically real, morally-inflected concept to which we've chosen the word "law" to refer—just as we can say that the English phrase "two plus two equals five" is not merely a semantic error, because the fact that the abstract entity we refer to with "five" is not made of two of the entities we refer to as "two" is *true*, not definitional.

From this perspective, we can understand Traditional Natural Law theory as a position among theories of meaning, one quite close to a

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[243] *See, e.g.*, Coleman, *Truth and Objectivity*, *supra* note 16, at 36 ("Natural lawyers are typically committed to the objectivity of morality . . . .).

[244] *See supra* Part I.A.

[245] Plato, *Cratylus* (trans. Benjamin Jowett), in PLATO: THE COLLECTED DIALOGUES 421, 473–74 (Edith Hamilton & Huntington Cairns, eds., 1961) (dismissing this theory); *see also* Rosen, *supra* note 123, at 159 ("I really can say 'Let '*P*' abbreviate the Nicene Creed' or '2 + 3 = 7' or whatever I want.").

[246] *See, e.g.*, KRIPKE, *supra* note 230, at 95 (outlining a "causal-historical" theory of naming, by which the proper reference of a name is whatever the linguistic community has previously resolved to use a name for).

Thoroughgoing Realism about legal concepts—there exist normative legal entities to which our language refers. And, for two reasons, this may be a *better* way of understanding the suite of commitments that constitute Traditional Natural Law theory as compared to framing it as a position on the relationship between law and morality.

First, understanding Traditional Natural Law theory as a commitment to certain theories of meaning seems to better capture what its proponents would think is different about their position compared to their interlocutors. Traditional Natural Law theorists, for instance, are perfectly capable of recognizing that actual positive law often falls short of the ideal—distinguishing between "true" and "positive" law.[247] But if that's true, the distinction on the relationship between law and morality between Traditional Natural Law theories and some of their disparagers seems to disappear, or at least soften, on closer inspection.[248] Take the so-called "Classical Positivists," Jeremy Bentham and John Austin. They were moral realists—utilitarians, who believed that there exists such a thing as "the good" which reduces to human pleasure—but who believed that positive law fell short of promoting it as it should.[249] Could we not say they are just Traditional Natural Law theorists, for whom the concept of "true law" is the dictates of utility, and "positive law" has fallen into sin?

Perhaps we could, but at the risk of conflating what are obviously very different theories of law. Bentham and Blackstone had very different accounts of the nature of law. But it turns out it may not be, strictly speaking, their respective views of the relationship between law and morality that distinguishes them. It is more helpfully understood to be their different theories of meaning. For these Classical "positivists" (as distinct from twentieth century positivists) pleasure and pain exist in normatively significant ways, but nothing else normative does; certainly not the complex abstract concepts on which the law relies. Indeed, Bentham saw the conceptual language of the law as some kind of subterfuge—purporting to refer but failing.[250]

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[247] *See supra* notes 47-51 & accompanying text.

[248] *See, e.g.*, Plunkett & Shapiro, *supra* note 5, at 38 ("If general jurisprudence were about 'the nature of law,' one would expect the positivism/antipositivism debate to be squarely about this topic. But that is not so.").

[249] *See, e.g.*, Martin Stone, *Legal Positivism as an Idea About Morality*, 61 U. TORONTO L.J. 313, 321 (2011) (arguing that what was distinctive about classical positivism was its view of a fully determined morality entirely distinct from law); Jiménez, *supra* note 13, at 68 (same); Priel, *supra* note 47, at 992 ("[T]he philosophers nowadays considered the founders of legal positivism [saw] theorizing about law as part of . . . theorizing about morals and politics . . . .").

[250] *See, e.g.*, JEREMY BENTHAM, THEORY OF LEGISLATION 113 (1864) (arguing that the concept "property" is a metaphysically arbitrary legal construction); Priel, *supra* note 47, at

This is where the Traditional Natural Law theorist disagrees—in holding an ontology populated with normatively significant abstract entities at least largely referred to by legal language.[251] The logical space between Austin and Cicero, then, is arguably not about the *relationship* between "morality and law"—both accept there is an entity out there to which the positive law should aspire; both accept that it often has failed—but about the *nature of morality*—a question of metaphysics between a unitary, reductionist, utilitarian conception of the good and a more pluralist moral ontology. And both are distinct from *contemporary* positivists in this regard, at least some of whom are skeptics about morality writ large.[252]

Second, understanding Traditional Natural Law theory as a position in theories of meaning helps us situate it near related but distinguishable accounts. For instance, there is a long strand of self-described "natural law" theorizing that grounds quasi-timeless truths of the concept of law not in external metaphysics, but in generalizations about human nature.[253] This is not Traditional Natural Law theory, as we've stipulated here, because it draws on partly contingent facts about human biology—the concept of true law for *homo sapiens* might be quite different than true law for some other intelligent species. But in the grand scheme of things it is quite close—much like post-Chompskian evolutionary accounts of language can come close, for practical purposes, to metaphysical realism, while painting a more parsimonious ontological picture.[254]

In short, viewing Traditional Natural Law theory through the lens of theories of meaning offers a novel perspective on the theory—natural law theory—that most prominent jurisprudes have positioned themselves as arguing against. And it is a perspective that helps make sense of where other theories—including the intellectual origins of positivism in Austin and Bentham—actually disagree.

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987 (arguing that Bentham's analysis of language was "concerned . . . with exposing the extent to which language obscured reality").

[251] *See, e.g.*, Coleman, *Architecture*, *supra* note 9, at 60–61 ("It is clear that the core claim of exclusive legal positivism is a claim about the metaphysics of legal content, and not a claim about the relationship of law to morality . . . .").

[252] *See, e.g.*, Priel, *supra* note 47, at 998 (distinguishing Bentham's moral views from "the views of some contemporary legal positivists who were drawn to legal positivism exactly because they thought there was no right answer to" moral questions).

[253] *See, e.g.*, David Gordon, *New But Not Improved*, 5 Mises Rev. (1999) (reviewing ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (1999)) ("When most people speak of natural law, what they have in mind is the contention that morality can be derived from human nature.").

[254] *See supra* notes 220–22 & accompanying text.

B. Hart

Hart, of course, was not a Traditional Natural Law theorist. And he did disagree with Traditional Natural Law theory about the relationship between law and morality. But that is not the only way in which he disagreed, and perhaps not the most illuminating.

H.L.A. Hart was an enthusiastic participant in the ordinary language philosophy movement of the mid-twentieth century—a largely historically-bounded kind of Descriptive Holism.[255] After the (at least perceived) failure of logical positivism and Wittgenstein's critiques, and long after Bentham, Austin, and the Legal Realists, Hart disagreed with Traditional Natural Law theorists that abstract concepts like law or contract do or even could exist as entities in some a mind-independent way.[256] But for Hart this did not mean that words or the concepts to which they refer are meaningless as relevant to members of a linguistic community—they may be social constructions, describable only in terms of other social constructions, with truth only coherence, but they nevertheless may have descriptive content *real enough* for us.[257] Hence, where a Traditional Natural Law theorist, in doing jurisprudence, is at once doing metaphysics and moral philosophy, it makes sense that Hart's project in *The Concept of Law* was "descriptive sociology"—an account of how "law" is used by convention.[258]

This perspective helps make sense of Hart's jurisprudence, including some of its more puzzling aspects. For example, though Hart was most interested in the concept of law in an abstract sense, he offered some thoughts on adjudication in *The Concept of Law*. Specifically, he critiqued the Legal Realists for their view of the strong indeterminacy of legal language—much of the time, within the "core," Hart has it, legal language

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[255] *See supra* notes 194–197 & accompanying text; Sally Parker-Ryan, *Ordinary language philosophy*, THE INTERNET ENCY. PHIL. (2012) (describing the history and theoretical commitments of ordinary language philosophy); *see also* Priel, *supra* note 47, at 1009 ("Hart's positive ideas on law . . . are premised on the view that the world of practices is a world created by words, and as such it was a world that needed to be understood by careful attention to words.").

[256] *See, e.g.*, LACEY, *supra* note 76, at 188 (cataloguing Wittgenstein's influence on Hart); Northrup, *supra* note 15, at 1017 (attributing to Hart "the influence of British radically empirical moral and linguistic theory . . . ").

[257] *See, e.g.*, HART, *supra* note 2, at 124 ("If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when the occasion arose, nothing that we now recognize as law could exist.").

[258] *See, e.g.*, HART, *supra* note 2, at vi (describing his project as one of "descriptive sociology"); *see also* Green, *supra* note 18, at 1928–29 ("Hart could, and probably did, accept that his conventionalist theory of the law was the result of critical reflection upon the practice of using the word 'law' (or the concept of law).").

is perfectly determinate, and the outcome of concrete cases easy as a matter of interpreting authoritative sources.[259] But because of the "open texture of language," all linguistically-conveyed legal principles run out at the "penumbra," where judges necessarily have discretion.[260]

This account of adjudication follows directly from Hart's theory of meaning.[261] Hart did not believe that words are meaningless to other speakers of the language—often competent speakers of the language know exactly how to use and interpret their use appropriately, and those are the easy cases.[262] But because Hart did not think that language referred to mind-independent entities, where the conventional meaning of legal terms runs out there is nothing left to analyze.[263] Conventional meaning—ad hoc conclusions about actual use—necessarily runs out.[264] From Hart's perspective, at that point, there is nothing left to interpret—but cases have to be decided, and so judges have discretion.[265]

This passage in *The Concept of Law* is one of its most famous, and is an important part of Hart's system—at least, Dworkin thought it was when he launched what would become the Hart-Dworkin debate on this very point.[266] But note that, strictly speaking, Hart's theory of adjudication has nothing to do with his theory of the relationship between law and morality.[267] It could be that judges have discretion in hard cases in order to discern true morality, or that true morality requires that judges have discretion in hard cases, or that judges' having discretion in hard cases *is* a

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[259] *See, e.g.*, HART, *supra* note 2, at 126–29.

[260] *Id.*.

[261] *See, e.g.*, Bix, *supra* note 9, at 908 (framing Hart's view of the open-texture of language as "a conceptual/analytical point (that certain things follow given the nature of language and rules and the limits on their ability to offer guidance)").

[262] *See* HART, *supra* note 2, at 126 ("There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable ('If anything is a vehicle a motor-car is one') . . . ."); *see also* MARMOR, *supra* note [MARMOR], at 136 ("The important role that philosophy of language plays in certain aspects of law has been well recognized by H.L.A. Hart.").

[263] *See id.*, at 126 ("Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances. In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide.").

[264] *Id.*

[265] *Id.* at 132 ("In these cases it is clear that the rule-making authority must exercise a discretion . . . .")

[266] *See, e.g.*, Dworkin, *The Model of Rules*, *supra* note 78, at 22 ("I want to make a general attack on positivism, and I shall use H.L.A. Hart's version as a target, when a particular target is needed.").

[267] *See, e.g.*, Leiter, *Positivism*, *supra* note [LEITER1999], at 1150 ("If positivism is one's theory of law, nothing substantial follows about one's theory of adjudication.").

kind of political morality. Or the opposite. This view of Hart's is, in principle, orthogonal to his "positivism." What it is not orthogonal to, and is tightly bound up with, is his theory of meaning.

Moreover, reading Hart through the lens of his Descriptive Holist theory of meaning helps make sense of what Hart *meant* when he wrote about the relationship between law and morality. Where early positivists like Austin and Bentham were clearly moral realists with a utilitarian account of the true substance of morality, Hart was notoriously oblique about what he took morality to be.[268] And indeed, he largely appeared to use the word "morality" in a different sense than Traditional Natural Law theorists or the early positivists.

When Traditional Natural Law theorists or utilitarians say "morality," they typically mean "*true* morality." But Hart often uses the word in the sense the word has in, say, "conventional morality"—*these people think* these rules and principles are timelessly and universally true.[269] Thus, where the Traditional Natural lawyer might give us a theory of the relationship between law and *true* morality, Hart was for the most part offering a theory of that between law and *conventional* morality.[270] These aren't even the same *sort* of theory, but it is only by understanding the respective theories of meaning that we can make sense of why.[271]

Indeed, Hart's apparent perspective on morality is consistent with his theory of meaning. It is logically possible to be a Descriptive Holist about the law but a realist about morality, but it is presumably not very common. After all, if you don't think abstract entities like "zero" exist independently

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[268] *See, e.g.*, H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 175 (1955) ("I shall advance the thesis that *if there are any moral rights at all*, it follows that there is at least one natural right, the equal right of all men to be free." (emphasis added)); HART, *supra* note 2, at 205 ("Does the morality, with which law must conform if it is to be good, mean the accepted morality of the group whose law it is, even though this may rest on superstition or may withhold its benefits and protection from slaves or subject classes?"); H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1, 1 (1968) (describing a "specific conception of morality as a uniquely true or correct set of principles"); *see also* Northrup, *supra* note 15, at 1039–46 (arguing that Hart and many fellow positivists were ultimately relativists about morals); Shapiro, *supra* note 4, at 99 ("[A]ccording to Hart, there are no normative facts at all," and describing Hart as an "expressivist" about morality).

[269] *See, e.g.*, HART, *supra* note 2, at 200 ("Though the law of some societies has occasionally been in advance of the accepted morality, normally law follows morality . . . .").

[270] *See, e.g.*, HART, *supra* note 2, at 193 (describing law and "conventional morality" as "forms of social control").

[271] *Cf., e.g.*, Plunkett & Shapiro, *supra* note 5, at 58 ("[T]he positivism/antipositivism debate assumes that morality is an important normative category. Again, this is a substantive position: we might object that this concept of 'morality' is a messy folk concept that isn't helpful for doing philosophical inquiry.").

of our minds, the reality of concepts like the "good" is typically thought to be a heavier lift.[272] And indeed, in the annals of philosophy, you are more likely to find realists about matter and maybe logic and mathematics who are antirealists about morality than vice versa.[273]

So we might expect Hart—Descriptive Holist about legal concepts—to be a Descriptive Holist about morality too, and believe that our moral words, just like our legal words, are not *meaningless*, but are social conventions ontologically untethered.[274] In other words, moral words may capture something about how we relate to one another, but bear no necessary relationship to "true" morality—which at least purports to be external to language.[275] Although Hart was never entirely clear on his substantive moral views, and (like many quasi-skeptics in this vein) may have personally endorsed a light utilitarianism,[276] or the view that, though ultimately arbitrary, there is such a thing as a more universal, reflective, enlightened morality,[277] Hart's theory of the relationship between law and morality is a different sort of thing as that a Traditional Natural Law theorist might offer, and their respective theories of meaning help to make sense of why.[278]

C. Dworkin

We are now in a position to see what Hart and Dworkin really disagreed about. It is not most helpfully thought of as that Dworkin was more like a

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[272] *See, e.g.*, MACKIE, *supra* note 235, at 38 ("If there were objective values, then they would be entities or qualities or relations of a very strange sort, utterly different from anything else in the universe.").

[273] *See, e.g.*, AYER, *supra* note 186 (defending this position); *see also* Sharon Street, *A Darwinian Dilemma for Realist Theories of Value*, 127 PHIL. STUD. 109 (2006) (defending a similar view on evolutionary grounds).

[274] *See, e.g.*, Hart, *Natural Rights*, *supra* note 268, at 175 ("Perhaps few would now deny, as some have, that there are moral rights; for the point of that denial was usually to object to some philosophical claim as to the 'ontological status' of rights, and this objection is now expressed not as a denial that there are any moral rights but as a denial of some assumed logical similarity between sentences used to assert the existence of rights and other kinds of sentences.").

[275] *See, e.g.*, HART, *supra* note 2, at 193 (arguing that some basic, but contingent, realities of the human condition give rise to a thin kind of universal "morality").

[276] *See, e.g.*, Priel, *supra* note 47, at 987 (arguing that Hart's jurisprudential views grew out of an oblique commitment to utilitarianism).

[277] *See, e.g.*, HART, *supra* note 2, at 206 ("If so, the enlightened morality which recognizes these rights has special credentials as the true morality, and is not just one among many possible moralities.").

[278] *See, e.g.*, HART, *supra* note 2, at 207 ("[I]f this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity.").

Traditional Natural Law theorist, or that he agreed with such theorists that there is a necessary connection between law and morality where Hart did not. Dworkin was very little like a Traditional Natural Law theorist.[279] He *agreed* with Hart, against Traditional Natural Law theorists, that legal concepts are not grounded in mind-independent, timeless moral entities, and both deny that there are such things as mind-independent, timeless, morally-inflected legal entities.[280] Indeed, in some ways, Dworkin's main objection to Hart was that his skepticism didn't go far enough.

In one of his most famous arguments, Dworkin dismissed the entire Hartian project as a futile exercise in semantics.[281] To the extent that Hart—the Descriptive Holist—sought to describe the proper, coherent use-conditions of the word "law" in the Anglo-American linguistic community, Dworkin suggests that it can ultimately only be a semantic, definitional theory.[282] (Granted, Hart took himself to be describing the *concept* of law, not the word "law," but for a Descriptive Holist who rejects the metaphysical reality of abstract entities the boundaries of which our conceptual schemes track, or a reference theory of language, it is fair to ask whether there really is, at bottom, all that much to this distinction).[283]

And, Dworkin noticed, it is not true that all competent English speakers agree on the use-criteria of "law," or even agree on a *theory* of its appropriate use or grounds.[284] Instead, people have profound theoretical disagreements about what constitutes the "law," and is properly called "law."[285] For Dworkin, because we do not share linguistic criteria for the use of "law," describing those criteria as Hart was purportedly attempting to do is an exercise in futility.[286] Rather, to argue about the law is to offer a contestable *interpretation* of our social practice of law thus far—

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[279] *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 3, at 35–36 (arguing against natural law theories); RAZ, *supra* note 13, at vii (describing it as "odd and misleading to regard Dworkin as a natural lawyer").

[280] DWORKIN, LAW'S EMPIRE, *supra* note 3, at 81 ("How could quaverings or noumenal entities provide any argument for moral convictions?").

[281] *Id.* at 45.

[282] *Id.* at 32 (describing as "semantic theories of law" those that "insist that lawyers all follow certain linguistic criteria for judging propositions of law").

[283] *Id.* at 32–33 ("When philosophers of language . . . said, instead, that they were describing the 'use' of legal concepts . . . . This was little more than a change in packaging . . . .").

[284] *See id.* at 15–30 (discussing instances of disagreement about the use criteria of the concept LAW).

[285] *Id.*; *see also* Himma, *supra* note 55, at 1199 ("Dworkin rejects the possibility of purely descriptive *conceptual* legal theory because this methodology cannot be squared with the inevitably contested character of legal concepts.").

[286] *Id.* at 31 ("Incredibly, our jurisprudence has no plausible theory of theoretical disagreement in law. . . .").

"impo[sing] *meaning* on the institution—to see it in its best light—and then to restructure it in the light of that meaning."[287] Dworkin was a *Normative* Holist about law and legal meaning—if the content of the concept of law is ultimately up to us, it is up to us to make it what it ought to be, with the boundaries of coherence.[288]

Importantly to making sense of his work, Dworkin was something of a *moderate* Normative Holist.[289] Where, in the hands of Critical Legal Studies, Normative Holism has tended towards a general nihilism about meaning, Dworkin was clear that he is not going that far towards skepticism. Indeed, while he appeared to believe that all normative concepts are "interpretive"—like "law," "courtesy," "justice," "dignity," and so on—he did apparently believe there *are* shared, determinable linguistic criteria for descriptive concepts like "book."[290] And he obviously believed that certain logical concepts like "coherence" have real content, demanding that interpretations, while normatively inflected somehow, must be coherent with past practice.[291] So he chides more extreme skeptics of legal meaning like the Legal Realists and CLS proponents for going too far.[292]

But Dworkin *was* a Normative Holist about both legal and moral concepts—indeed, in the end, he took these to collapse into one another, some ongoing social project of slouching towards a better world in contesting the conceptual content of our constructed notions of "law" and "morality."[293] Now, of course, on this account, it is true that there is a "necessary connection" (at least as far as anything can be "necessary" in

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[287] *Id.* at 47.

[288] *Id.* at 52 ("[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong.").

[289] *See, e.g.*, Ken Kress, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, 95 MICH. L. REV. 1871, 1897 (1997) ("Dworkin is also infamous for simultaneously maintaining some form of modest objectivity with the right answer thesis, while attempting to squirm out of any metaphysical commitments.").

[290] *See* DWORKIN, LAW'S EMPIRE, *supra* note 3, at 74 ("They cannot develop semantic theories that provide rules for 'justice' like the rules we contemplated for 'book.'"); *see also* Himma, *supra* note 55, at 1197 ("Dworkin . . . argue[s] that, regardless of whether other concepts admit of a purely descriptive analysis, the normative concept law cannot be adequately understood without recourse to substantive norms of political morality").

[291] DWORKIN, LAW'S EMPIRE, *supra* note 3, at 225 ("The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified, expressing a coherent conception of justice and fairness.").

[292] *Id.* at 288 ("We have much to learn from [Critical Legal Studies], from its failures as well as its successes."); *id.* at 153; 162 ("[Legal] Realism is now out of fashion, in large part as a consequence of those silly semantic claims. . . . .").

[293] *See, e.g.*, DWORKIN, HEDGEHOGS, *supra* note 3, at 405 (advocating a "one-system" view of law as a branch of morality).

this theory of meaning) between law and morality,[294] but this is hardly all that distinguishes it from alternative jurisprudential theories. "Morality" for Dworkin and the Traditional Natural Law theorist are *radically* different sorts of things (as, incidentally, is "law").[295] And it seems to miss the point in a dramatic way to say that these two theories are connected by a shared agreement that there is a necessary connection between law and morality, where the theories disagree on the referents of the terms purportedly connected.

From the perspective of theories of meaning, in some ways, Dworkin and Hart are closer to one another than *either* are to Traditional Natural Law theory—agreeing on modestly skeptical assumptions about metaphysics and language, and disagreeing only on the relatively narrow theoretical point of whether purely descriptive analysis of the use of legal concepts is possible and fruitful.[296] And seeing that point of theoretical disagreement clearly can help make sense of the ways in which Dworkin and Hart talk past each other about aspects of each other's systems. To return to the example of Hart's view about discretion in hard cases, Dworkin disagreed and maintained that there are "right" answers in hard cases[297]—but what he means by "right" looks very different from what a Traditional Natural Law theorist would think, and frankly looks a lot more like Hartian discretion.[298]

Moreover, just as Dworkin's theory of meaning was built on the

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[294] *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 3, at 80–81 ("We use the language of objectivity, not to give our ordinary moral or interpretive claims a bizarre metaphysical base, but to *repeat* them, perhaps in a more precise way, to emphasize or qualify their *content*.").

[295] *See, e.g.*, *id.* at 71 (observing that "interpretive" claims are not "timeless: it holds in virtue of a pattern of agreement and disagreement that might . . . disappear tomorrow").

[296] *See, e.g.*, Himma, *supra* note 55, at 1197 (arguing that Hart's assumption that analysis of normative concepts can and should be "purely descriptive" has "become increasingly controversial in recent years").

[297] *See, e.g.*, Dworkin, *Model of Rules*, *supra* note 78, at 22 (arguing that there are "right" answers in hard cases and that this is a problem for "positivism").

[298] *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 3, at 313–14 ("[Hercules] must rely on his own judgment in answering these questions, of course, not because he thinks his opinions are automatically right, but because no one can properly answer any question except by relying at the deepest level on what he himself believes."); Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME L. REV. 553, 558 n.46 (1992) (observing the tension between Dworkin's view that "[d]ifferent people will reach different interpretive judgments . . . partly because they disagree about what is morally and politically right," and his view that there is "one right answer"); Lloyd L. Weinreb, *Law's Quest for Objectivity*, 55 CATH. U. L. REV. 711, 728 (2006) ("Dworkin, who sets himself firmly against ontological solutions, affirms that there is a right answer; but, it turns out, he means only that we ought to and do apply our capacity to reason, fallibly, to legal problems.").

apparent instability of Hart's[299]—accepting the lack of external reference of concept terms, but not seeing the freedom, and perhaps the obligation, this gives us to revise them to our ends—we might wonder whether Dworkin's attempt to thread the needle between Realism and Skepticism really works.[300] After all, if concepts, including moral concepts, are ontologically untethered, how do we know we are "interpreting" them in the right direction? How can we interpret the concept of law in its morally best light, when morality itself is a question of interpretation? Is it really coherent to insist that we have made moral progress—as Dworkin clearly wants to—while eschewing timeless universal moral criteria?

Indeed, just as we've seen in philosophy generally, the theories of meaning in jurisprudence have drifted even further into Thoroughgoing Skepticism on the one hand, or back towards some more robust realism since Dworkin started writing.

D. Critical Legal Studies

Critical Legal Studies has taken things in a more skeptical direction—indeed, at least rhetorically, rather towards Thoroughgoing Skepticism. Like many of these jurisprudential theories—say, the Pragmatism on which Legal Realism drew, or the ordinary language philosophy of Hart—CLS draws on a broader movement across the humanities towards a theory of meaning commonly referred to as "Critical Theory" (and in many literature departments, believe it or not, just "Theory, as though it's the only one").[301] It offers a unique, provocative, and influential account of what the law is that must be reckoned with in jurisprudence.

The starting point of Critical Legal Studies is deep skepticism about any form of metaphysical realism and reference—it rests on the theory of meaning that gave us "there is no outside text,"[302] "language thinks man and his 'world,'"[303] and so on.[304] And where Dworkin saw the contested

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[299] *See, e.g.*, SHAPIRO, *supra* note 4, at 308 (conceding that Dworkin's argument from theoretical disagreement is an effective one that positivists have not successfully addressed).

[300] *See, e.g.*, Moore, *Metaphysics, Epistemology, & Legal Theory*, *supra* note 86, at 453 (criticizing Dworkin's theory on these grounds)

[301] *See generally, e.g.*, DAVID HELD, INTRODUCTION TO CRITICAL THEORY (1980) (offering a historical overview of the development of "critical theory"); TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION (3d ed. 2008) (surveying alternative contemporary approaches to literary interpretation, mostly on skeptical premises).

[302] JACQUES DERRIDA, OF GRAMMATOLOGY 200 (Gayatri Chakavorty Spivak, trans., 1976).

[303] J. HILLIS MILLER, THE J. HILLIS MILLER READER 82 (Julian Wolfreys, ed., 2005).

[304] *See, e.g.*, Leiter & Coleman, *supra* note 12, at 551–52 ("[C]iting Rorty, Kuhn, and

construction of our concepts over time with some vaguely Whiggish sense that we are heading in the right direction, better today than yesterday, the CLS proponents couple skepticism about meaning with a theory of the pervasive influence of power borrowed from Foucault,[305] originally understood in broadly economic terms with debts to Marx.[306] Thus, CLS takes our language and conceptual apparatus writ large to be an ontologically arbitrary construction of power, preserving the hegemony of the ruling class.[307]

From this perspective, the concept of law is certainly not, as Traditional Natural Law theorists would have it, something metaphysically real, but nor is it, as Hart would have it, something that can be meaningfully described—there is no external, objective vantage point; it is language all the way down.[308] And unlike Dworkin, it is not a concept we can fairly and reasonably interpret towards some better world—it is in some sense corrupt, an artifact of oppression.[309] This argument is frequently heard in CLS circles—the very concepts of "law," "lawfulness" and "legality" are instruments of subjugation.[310] No wonder CLS theorists have so little patience for analytical jurisprudence in the vein of Hart or Dworkin. And for CLS theorists, what goes for the concept of law goes for its subsidiary concepts—"consideration," "promise, "waiver;" arbitrary conceptual design to preserve the economic status quo.[311]

Wittgenstein as if they were citing a holding in an unanimous Supreme Court decision, critics are satisfied to reject foundationalism, the possibility of objective epistemology, and liberalism in one fell swoop.").

[305] *See generally, e.g.*, MICHEL FOUCAULT, DISCIPLINE AND PUNISH (1975).

[306] *See generally, e.g.*, KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, Vol I. (trans. Ben Fowkes, 1977).

[307] *See generally, e.g.*, ANNABELLE MOONEY & BETSY EVANS, LANGUAGE, SOCIETY AND POWER: AN INTRODUCTION (2018) (giving an overview of critical theories of language generally); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1990) (giving an overview in the context of legal language).

[308] *See, e.g.*, Singer, *supra* note 109, at 8 ("Law and morality have no rational foundation that once and for all compels all persons to prefer certain institutions above all others.").

[309] *See supra* note 204.

[310] *See, e.g.*, Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1629 (1986) ("Between the idea and the reality of common meaning falls the shadow of the violence of law, itself."); Aparna Poloavarapu, *Expanding Standing to Develop Democracy: Third-Party Public Interest Standing as a Tool for Emerging Democracies*, 41 YALE J. INT'L L. 105, 145 (2016) ("Yet because third-party representatives embrace the Western language of law, the language of the colonizer, to speak on behalf of the disempowered, they mimic a form of oppression."); Karen J. Sneddon, *Not Your Mother's Will: Gender, Language, and Wills*, 98 MARQ. L. REV. 1535, 1573–74 (2015) ("[T]he language of the law itself is male.").

[311] *See, e.g.*, Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151,

It is on the normative upshot of all this that CLS is perhaps the most challenging. The theory of meaning on which CLS draws is a deeply skeptical one, quite close to Thoroughgoing Skepticism—after all, its proponents hold radially antirealist views of metaphysics (or at least epistemically skeptical ones), and views of meaning holism that often verge on or openly embrace total denial of stable meaning.[312] This might suggest that CLS proponents are indeed Thoroughgoing Skeptics. But for *Thoroughgoing* Skeptics, what goes for the "deconstruction" of concepts like "law" and "consideration" goes equally for concepts like "power," "oppression," "liberation," and so on.[313] Thoroughgoing Skepticism would seem to entail antirealism about morality, and, plausibly, some form of bona fide nihilism.[314]

Many CLS proponents do embrace, at least rhetorically, nihilism.[315] Many have argued that traditional moral frameworks like utilitarianism or deontology are just as ontologically arbitrary and shot through with power as the law, and they can be just as dismissive of ethical philosophy as they are of metaphysical.[316] Power and oppression are often described as inescapable.[317] At the same time, CLS theorists by and large reserve the

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1152 (1985) ("Ever since the realists debunked 'formalism' in legal reasoning, the received learning has been that legal analysis cannot be neutral and determinate . . . .").

[312] *See generally, e.g.*, CRITICAL LEGAL STUDIES (Allan C. Hutchinson, ed., 1989) (collecting foundational papers in critical legal studies).

[313] *See supra* note 201.

[314] *See, e.g.*, Moore, *Moral Reality*, *supra* note 238, 1063–64 (arguing that strong skepticism entails nihilism); *see also* Daniel C.K. Chow, *Trashing Nihilism*, 65 TUL. L. REV. 221, 223 n. 4 (1990) ("Nihilism is a difficult position to maintain because it leads to an extreme skepticism and the total rejection of reason, law, and ethics as a means of settling disputes.").

[315] *See, e.g.*, Singer, *supra* note 109, at 3 n.5 ("What they consider an insult, you consider a compliment."); John Stick, *Can Nihilism Be Pragmatic*, 100 HARV. L. REV. 332, 332 (1986) ("A group of scholars identified with critical legal studies who are often called 'irrationalists' or 'nihilists,' either by themselves or their opponents, argue that law is indeterminate, contradictory, nonobjective, historically and socially contingent.").

[316] *See, e.g.*, VIRGINIA HELD, THE ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL (2006) (criticizing utilitarian impartiality on care ethics grounds); EVA F. KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY (1999) (arguing that utilitarianism privileges a racially and gender-coded kind of public moral agency); Seyla Benhabib, *Critical Theory and Postmodernism: On the Interplay of Ethics, Aesthetics, and Utopia in Critical Theory*, 11 CARDOZO L. REV. 1435, 1435–36 (1990) (criticizing Kantianism on Critical grounds).

[317] *See, e.g.*, WILL LEGGETT, POLITICS AND SOCIAL THEORY (2017) (describing the inevitable ubiquity of social power); *see also* Leslie Paul Thiele, *The Agony of Politics: The Nietzchean Roots of Foucault's Thought*, 84 AM. POL. SCI. REV. 907, 907 (1990) ("Foucault's understanding of power as ubiquitous, inescapable, stemming from below, and productive of our very identity, is, I believe, the key concept of postmodern political thought.").

right to make normative statements that at least purport to have truth value.[318] They clearly think the status quo is normatively undesirable and that little moral progress has been made, or at least not nearly quickly enough.[319] It's not always clear the society they envision, though somehow radically different than our own, with the general attitude apparently along the lines "well, it can't get any worse."[320] Whether this position—of denying moral truth while making moral claims—is coherent (just as when Dworkin made a similar move) is philosophically controversial, but it is indeed embraced by CLS theorists. [321]

Traditional CLS, which takes the axis of power to be some economic hierarchy, has become somewhat passé (though similar theories are now proffered under the label "Law and Political Economy"), but its follow-on theories remain highly influential.[322] Critical Race Theory is perhaps the best known.[323] Critical Race Theory largely adopts the theory of meaning on which CLS relies, particularly its theory of language, but posits race rather than class as the primary axis of oppression.[324] And theories in this vein have proliferated, from theories of law and its language as constructed around gender hierarchies[325] to hierarchies of national power,[326] and

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[318] *See, e.g.*, Singer, *supra* note 109, at 67 ("We should prevent cruelty."); Duncan Kennedy, *First Year Law Teaching as Political Action*, J.L & SOC. PROBS. 47, 57 (1980) (describing liberal political theory as "wrong and corrupt").

[319] *See, e.g.*, Harris, *supra* note 109, at 743 ("CRT seems confident that crafting the correct theory of race and racism can help lead to enlightenment, empowerment, and finally to emancipation: that, indeed, the truth shall set you free.").

[320] *See, e.g.*, *id.* at 745 ("The task is to live in the tension itself."); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1746 (1976) ("[W]e attain the goal only when we surmount our alienation from one another and share ends to such an extent that contingency provides occasions for ingenuity but never for dispute.").

[321] *See, e.g.*, Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 23 (1995) (describing the "fashionable" but "mistaken" view that "one can engage in substantive normative ethics while remaining agnostic on meta-ethical issues"); Moore, *Metaphysics, Epistemology & Legal Theory*, *supra* note 86, at 505 (arguing that Dworkin's moral theory was fundamentally confused).

[322] *See, e.g.*, Jedidah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-And-Political Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1600 (2020) (outlining a theory of law and political economy).

[323] *See, e.g.*, Harris, *supra* note 109, at 743 (describing "the ways in which CRT is the heir to both CLS and traditional civil rights scholarship"); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

[324] *See generally, e.g.*, KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019).

[325] *See generally, e.g.*, KATHERINE BARTLETT & ROSANNE KENNEDY, EDS, FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (1991).

[326] *See generally, e.g.*, James T. Gathii, *TWAIL: A Brief History of Its Origins, Its*

"intersectional" scholarship, suggesting an interaction of a variety of modes of power.[327]

In short, although often intellectually banished from the field of "general jurisprudence," CLS and its sequelae offer an important and provocative set of theories of what the law is—an ontologically arbitrary, thoroughly linguistic concept constructed of oppression, which irreducibly facilitates it and it irreducibly facilitates. But CLS is not best approached as offering a theory of the relationship between law and morality; indeed, it is oblique on morality. Rather, it can be understood more clearly as built on a controversial, self-consciously flirting-with-nihilism theory of meaning.

E. Contemporary Analytic Legal Philosophy

In "analytical jurisprudence," in the meantime, things have taken a more realistic turn. Recall that for Hart—Descriptive Holist about meaning—the question in analyzing the concept of law is not fundamentally a question of the relationship between the word "law" and some genuinely circumscribed external referent in real social practice, but of analyzing the way in which the word is ordinarily used.[328] Many (but not all) contemporary analytical legal philosophers have quietly rejected Hart's theory of meaning and moved in a more realistic direction, often relying on something more like Realist Nominalism.[329] These scholars hold that—whatever its ultimate ontological status—the concept of law aspires to, and largely does, carve our social reality at genuinely significant joints, picking out an importantly distinctive kind of social practice.[330]

Take Scott Shapiro's work. Shapiro strenuously denies that exploring the concept of law is merely an exercise in definitions (which, again, *might* be a fair charge against Hart, albeit complex accounts of linguistic use

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Decentralized Network, and a Tentative Bibliography, 3 TRADE L. & DEV. 26 (2011).

[327] *See generally, e.g.*, KIMBERLÉ CRENSHAW, ON INTERSECTIONALITY (2014).

[328] HART, *supra* note 2, at vi.

[329] *See, e.g.*, RAZ, *supra* note 13, at 41 ("[W]e do not want to be slaves of words. Our aim is to understand society and its institutions."); SHAPIRO, *supra* note 4, at 23 ("[A]nalytical jurisprudence is *not* primarily a linguistic inquiry; it is an attempt to uncover the basic principles that structure a highly significant part of our social world."); *see also*, JOHN R. SEARLE, EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS ix (1979) ("Illocutionary acts are, so to speak, natural conceptual kinds, and we should no more suppose that our ordinary language verbs carve the conceptual field of illocutions at its semantic joints than we would suppose that our ordinary language expressions for naming and describing plants and animals correspond exactly to the natural biological kinds.").

[330] *See* SHAPIRO, *supra* note 4, at 8 ("One obvious reason why legal philosophy is not solely concerned with the definition of 'law' is that 'law' is an English word and non-English speakers can and do engage in legal philosophy.").

rather than the sort of definition you might find in a dictionary),[331] but rather that concepts like "law" and "plan" reflect *real* patterns of social reality, amenable to clarificatory analysis that captures truths about the *phenomena*, not the words.[332] Similarly, *contra* Hart's view of the open texture of language, many of today's analytical jurisprudes disagree, and hold that there can be *conceptual* answers to questions even where linguistic use-criteria have run out.[333]

This movement towards Realist Nominalisḿ about legal concepts is perhaps nowhere clearer than in contemporary private law theory, a burgeoning area of "special," as opposed to "general" jurisprudence.[334] In tort, Ernest Weinrib and others argue that the law operationalizes a concept of corrective justice genuinely constituent of our relationships with one another.[335] At the same time, theorists like Margaret Gilbert and Charles Fried have defended realistic accounts of the core concept of promise in contract law,[336] and Henry Smith and Thomas Merrill suggest that many of property's concepts legal constructions, but non-arbitrary ones, that track real distinctions and pursue policy goals in ways circumscribed by reality.[337]

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[331] *See, e.g.*, Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of its Usefulness*, 104 U. PA. L. REV. 1080, 1081 (1956) ("Judging from his example, the novelty of Professor Hart's approach appears to consist in a plea to replace *definitions* by (more elaborate) *explanations*, *i.e.*, to describe legal terms in three or four sentences rather than one brief phrase.").

[332] *See, e.g.*, SHAPIRO, *supra* note 4, at 80–81 ("Hart's identification of social rules with social practice is not only incorrect but confused. Rules and practices occupy different metaphysical realms and hence one can never be reduced to the other."); *see also* JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 298 (2012) ("To have translated 'law' as '*droit*' or '*recht*' or anything else, one must already have mapped word to idea; one must already know that there is a common something to which these diverse words and their cognates refer.").

[333] *See, e.g.*, Himma, *supra* note 55, at 1126 ("[T]hese questions about law are conceptual, not definitional.").

[334] *See, e.g.*, Helmreich, *supra* note 1, at 336 ("Today, philosophers study law with a sharper focus (writing on specific, local practices, such as torts, evidence and criminal punishment), and with a more specialized lens—that of ethicists, for example, or epistemologists, or philosophers of action."); *see also* Tarunabh Kaitan & Sandy Steel, *Areas of Law: Three Questions in Special Jurisprudence*, 43 OXFORD J. LEGAL STUDS. 76, 77 (2023) (theorizing "areas of law").

[335] *See, e.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 5 (1995) ("If we *must* express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law."); ARTHUR RIPSTEIN, PRIVATE WRONGS (2016) (defending a similar account).

[336] *See generally* MARGARET GILBERT, JOINT COMMITMENT: HOW WE MAKE THE SOCIAL WORLD (2015); CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (rev. ed. 1982).

[337] *See, e.g.*, Henry E. Smith & Thomas W. Merrill, *Optimal Standardization in the*

Of course, not all contemporary legal philosophers rely on a Realist Nominalist theory of meaning, even if it is a big tent. On the more skeptical side, Brian Leiter follows a Quinean theory of meaning and defends the more skeptical nominalism of the Legal Realists, seeking to reduce purported legal facts to more fundamental social facts.[338] On the more realistic side, there has been something of a resurgence of claims about the metaphysical reality of legal concepts as abstract entities by self-described natural law theorists Michael Moore and John Finnis, but it's debatable whether their non-Platonic realisms are really more than semantically different from Realist Nominalism.[339] And other theorists allow for a range of possible theories of meaning that could account for some quasi-realism about law and legal concepts, while excluding theories of meaning that deny this possibility.[340]

Finally, viewing debates in jurisprudence through the lens of theories of meaning can illuminate but not eliminate another growing debate in analytical jurisprudence—the question of methodology.[341] On the one hand, many contemporary theorists align themselves with Hart methodologically, aspiring to offer a descriptive account of the concept of law.[342] Others, following Dworkin, argue that jurisprudence is better understood as a debate about what the concept law *should* be—an exercise in "conceptual engineering."[343]

Law of Property: The Numerus Clausus Principle, 110 YALE L. J. 1 (2000) (arguing that property law must offer a set template of ownership forms, as opposed to permit limitless customization, to serve its purposes).

[338] *See generally, e.g.*, LEITER, NATURALIZING JURISPRUDENCE, *supra* note 13.

[339] *See, e.g.*, Moore, *Metaphysics, Epistemology & Legal Theory*, *supra* note 86, at 462 ("Although there have been moral realists (even some named Moore) who conceived of moral reality in this fantastic way, I and most other contemporary moral realists with whom I am familiar do not."); *see also* Andrew Graham, *Does Ontology Matter?*, 6 DISPUTATIO 67, 84–85 (2013) (arguing that the disagreement between Platonists and realistically-inclined nominalists is not significant).

[340] *See, e.g.*, GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 46–48 (2018) (arguing for a kind of reality of a range of morally-inflected legal concepts that could be nominalist generalizations based in rule utilitarianism, or something more); James Toomey, *Property's Boundaries*, 109 VA. L. REV. 154–167 (2023) (surveying alternative ways in which the concept of ownership might exist outside of the law).

[341] *See* Watson, *Natural Law*, *supra* note 35, at 181 (summarizing methodological debates in analytical jurisprudence); MARMOR, *supra* note 14, at 7 ("This methodological debate about the nature of legal philosophy has become one of the most central themes in contemporary philosophy of law.").

[342] *See, e.g.*, SHAPIRO, *supra* note 4, at 13–18; JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 17–24 (2004); Dickson, *supra* note 14, at 117.

[343] *See, e.g.*, Hershovitz, *supra* note 6, at 1173; Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL

Theories of meaning suggest methodologies for jurisprudence—a Realist Nominalist might believe that descriptive conceptual analysis is possible and worthwhile, where Dworkinian Normative Holism holds that jurisprudence is at bottom normative political philosophy.[344] Similarly, theories of meaning can *exclude* methodologies—Normative Holists do not take descriptive analysis of normative concepts to be meaningfully possible.[345]

But the methodological debate in analytical jurisprudence does not reduce to theories of meaning, and positions in this debate do not map one-to-one to positions in theories of meaning. You might defend descriptive conceptual analysis because you are a Realist Nominalist (as many contemporary positivists), or because you are a Thoroughgoing Realist, or a Descriptive Holist (as Hart himself); or seek to engineer the best concept of law because you are a Normative Holist, as Dworkin, or a Realist Nominalist and think that we have not delineated the right set of practices with the word "law" so far. The relationship between subtle differences in theories of meaning and subtle differences in jurisprudential methodology is worth further exploring.

In short, much like analytical philosophy generally, analytical jurisprudence, and particularly private law theory, has moved broadly in a more realistic direction in the past several decades, though not without exception.[346] In making sense of this work, critical debates within it, and their relationship to alternatives, taxonomizing contributions by the theory of meaning on which they rely may be a fruitful place to start.

CONCLUSION

For at least seventy-five years, the field of jurisprudence has produced a great deal of writing on a relatively narrow question—what is the

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PHILOSOPHY 97, 123 (Andrei Marmor, ed., 1995); *see also* Herman Cappelen & David Plunkett, *Introduction: A Guided Tour of Conceptual Engineering and Conceptual Ethics*, in CONCEPTUAL ENGINEERING AND CONCEPTUAL ETHICS 1 (Alexis Burgess, Herman Cappelen & David Plunkett eds., 2020).

[344] *See, e.g.*, Coleman, *Truth and Objectivity*, *supra* note 16, at 55 (1995) ("Dworkin has made no effort to establish the impossibility of a substantive account of objectivity, nor has he argued that deflationist accounts answer to all our epistemic concerns regarding the law's objectivity."); Himma, *supra* note 55, at 1127 ("[T]he only norms necessary to analyze admittedly normative concepts are *epistemic* norms governing concept formation and theory construction; moral or political norms need not play any role in the methodology of conceptual analysis.").

[345] *See* notes 201–04 & accompanying text; *see also* Green, *supra* note 18, at 1949–50 (discussing ways in which positions in philosophy of language can "block" certain methodological approaches in jurisprudence).

[346] *See supra* notes 218–40 & accompanying text.

relationship between law and morality, assuming a tight range of moderate views on what "law" and "morality" could be and are. At times, it has seemed like this debate—notwithstanding its growing confusion and scholastic partisanship, the obscurity of its premises, and recourse to strawmen—is all there is to jurisprudence.

But of course that's not true. Jurisprudence is a field offering *theories of law*, and theories of law are not the sort of thing that exist in immaculate analytic isolation. They demand theories of legal meaning—of language and reference. When jurisprudence is reconceived in this way, we can once again take stock of its breadth. There is far more to the logical space of jurisprudence than the debate between Dworkin and Hart, or between inclusive and exclusive legal positivists. Indeed, there are infinite theories of meaning, infinite theories of law. Whatever you believe about law is jurisprudence. It's time for jurisprudence to recognize that.