What is the 'is' in 'What is law'? Eliminativism in Legal Philosophy

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Note to readers: I apologise for the length of the paper! If you want to read but have limited time, the core of the argument is in Sections 4 and 5, and I set out the Eliminativist view in Section 9.

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

1. Introduction

What is law? This foundational question in legal philosophy has been understood in a variety of ways. Most recently, it has begun to be interpreted as a question about the nature of law, answerable via conceptual analysis. I will argue here that that approach is a mistake. It presupposes that we can have a 'god's eye view' of things; that we can step outside of our human perspective and discuss what law *really is*, irrespective of our varied experiences of the actions of the legislative, executive, and judicial branches. I will argue against that view, and in favour of what has come to be known as 'eliminativism' about law.

2. Legal Philosophy: An Overview

a. The Aim of Legal Philosophy

To the extent that legal philosophers reflect on their aims, they tend to give one (or more) of three accounts of their projects. First, it is suggested that we want to know about the nature of

[1] Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," *Harvard Law Review* 71, no. 4 (1958): 631.

law just because truth and knowledge are important for their own sakes. We want to deepen our understanding of an important social institution.[2] Second, it is argued that we require a clear understanding of what law is in order to assess the moral value of particular laws, and decide whether they merit our obedience.[3] Third, we need to know what *law* in an abstract sense is in order to answer pressing practical questions about what *the law* is.[4] I will argue against the possibility of finding true, general answers about the nature of law. The aim of seeking knowledge about law's nature is futile.[5] If the quest is to understand law for the sake of contributing to knowledge, then we should not hesitate to abandon a debate that is incapable of producing such knowledge. But what about the second and third reasons for pursuing the debate? These seem to give us more pressing reasons to continue with the project. Since they rely on an answer that would satisfy the first aim, I will focus on the search for knowledge about the law's nature for its own sake. But I will return to these arguments at the end, and argue that there is a way of understanding these other aims even if, as I argue, we should give up on searching for the

[2] See, e.g. Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001) 144.; Kenneth Einar Himma, "Substance and Method in Conceptual Jurisprudence and Legal Theory: Book Review of 'the Practice of Principle' by Jules Coleman," *Virginia Law Review* 88 (2002): 1221.; Brian Bix, "Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate," *Canadian Journal of Law and Jurisprudence* 12, no. 1 (1999): 24.: "There is (or, at least, there need be) no point to [analytical jurisprudence] other than knowledge."; Andrei Marmor, "Legal Positivism: Still Descriptive and Morally Neutral," *Oxford Journal of Legal Studies* 26, no. 4 (2006): 692.; Andrei Marmor and Alexander Sarch, "The Nature of Law," in *Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/entries/lawphil-nature/ (2015).: "First, there is the sheer intellectual interest in understanding such a complex social phenomenon which is, after all, one of the most intricate aspects of human culture."

[3] Dickson, *Evaluation and Legal Theory* 144.; H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71, no. 4 (1958): 597-98.; H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994) 240.: "My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law, though a clear understanding of these is, I think an important preliminary to any useful moral criticism of law."; John Gardner, "Legal Positivism: 5 1/2 Myths," *The American Journal of Jurisprudence* 46 (2001): 226-27.

[4] Liam Murphy, *What Makes Law* (Cambridge: Cambridge University Press, 2014) 77.; Scott J. Shapiro, *Legality* (Cambridge: Belknap Press, 2011) 25.

[5] To the extent that there can be progress in legal philosophy, I will argue that it requires *positing* an account of law. Once we have established what we mean by law, we can then go on to clear up confusions about, or discuss features of, that concept. But there can be no debate about whether that concept properly tracks *what law is*.

nature of law.

b. Positivism and Nonpositivism[6]

The divide which is usually considered central in legal philosophy is between positivism and nonpositivism. Put very simply, positivism and nonpositivism disagree about whether there is a necessary connection between law and morality, with positivists denying this and nonpositivists asserting it. This is, of course, an oversimplification—positivists have recognized a number of necessary connections between law and morality.[7] My concern here will be less with the specific connections that are asserted or denied, and more with the mode in which these assertions are made: as claims of necessary truth.

c. Grounds of Law and Systems of Law

Questions about law fall into two distinct categories: those concerned with what has been called the 'grounds of law,' and those concerned with legal systems.[8] The grounds of law problem, as it was christened by Dworkin, refers to the question of what materials are appropriately taken into consideration in determining the content of law. Propositions of law are statements about what the law allows or prohibits. The grounds of law are other kinds of

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[6] I follow Murphy in using the term 'nonpositivism' rather than either 'natural law', which he argues is misleading, or 'law as integrity', which captures only the Dworkinian subset of nonpositivist views. See Murphy, *What Makes Law* 21-22.

[7] Gardner counts the "no necessary connection" thesis as one of his 'myths' about legal positivism. See Gardner, "Legal Positivism: 5 1/2 Myths," 222-23. See also Martin J. Stone, "Positivism as Opposed to What? Law and the Moral Idea of Right," *Cardozo Legal Studies Research Paper* No. 290, http://ssrn.com/abstract=1554500 (2010): 13., arguing that there are many necessary connections that it would be absurd to deny. But much of what Hart says suggests that he held some version of the 'no necessary connection' thesis: see H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 6., referring to "my denial that there are any important necessary connections between law and morality," as one of his main claims in the famous 1958 essay.

[8] This maps onto Dworkin's idea of the doctrinal concept of law and the sociological (see Ronald Dworkin, *Justice in Robes* (Cambridge: Belknap Press, 2006) 2-5.), but I want to avoid introducing the idea of multiple concepts of law at this stage, Further, I don't think that 'sociological' is the best designation for the systems problem: we could take a sociological look at the systems or grounds problem, and we can take a philosophical look at both. Lastly, Dworkin's terminology is not widely embraced, so using 'systems' and 'grounds' seems to me better.

propositions in virtue of which propositions of law are true.[9] The grounds of law are what make it the case that, for example, murder is illegal.

The systemic question is about the existence conditions of a legal system: what features have to be present for there to be a system of law at all? More generally, it encompasses inquiries about the values a system of law aims to instantiate, or traits it typically has.[10]

While it may seem like the grounds of law question is a concern for the practicing lawyer, and the systemic question is the more natural area for philosophical inquiry, in fact the grounds of law question consumes much of the attention of legal philosophers. Indeed, John Gardner states that the only claim properly associated with legal positivism is one about what makes a norm legally valid.[11] Positivism as he understands it is not concerned with the features of legal systems.[12]

3. Analytic Methodology in Legal Philosophy[13]

So, legal philosophers want to know what law is. That can be understood as a question about systems of law or the grounds of law. On either question, one of the core puzzles is whether and how law is connected to morality. Many people understand this as a question about the nature of law. The next sections examine how theorists proceed to answer such a question.

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[9] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) 4.
[10] See Lon L. Fuller, *The Morality of Law*, Revised 2nd ed. (New Haven: Yale University Press, 1969).
[11] Gardner, "Legal Positivism: 5 1/2 Myths," 199.
[12] However, it is worth noting that in later work Gardner seems to see the importance of the systemic question much more clearly: see John Gardner, "Law in General," in *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012), 270-71., where he argues that the two questions are deeply interconnected. Nevertheless, it seems right to say that the debates in legal philosophy have been heavily weighted towards the grounds of law question.
[13] In this section, I focus on conceptual arguments, leaving to the side what Murphy terms 'The Instrumental Approach'. This is an approach to resolving the grounds of law problem that entails defending an account of the grounds of law on the basis that that position would have better instrumental effects. I leave it aside because it is not a widely embraced approach, and also because Murphy himself, once an advocate of it (see Liam Murphy, "The Political Question of the Concept of Law," in *Hart's Postscript*, ed. Jules Coleman (Oxford: Oxford University Press, 2001).), now argues convincingly against it: see Liam Murphy, "Better to See Law This Way," *New York University Law Review* 83 (2008)., and Murphy, *What Makes Law* 73-76. Hence my focus here is on conceptual approaches to the grounds of law problem.

a. Theory, Concept, Nature, and Necessity

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

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

For Raz, the aim of a theory of law is to get at the nature of law.[14] He states that "legal philosophy is an inquiry into the nature of law, and the fundamental features of legal institutions and practices."[15] For Raz, "a theory of law is successful if it meets two criteria: first, it consists of propositions about the law which are *necessarily* true, and second, they *explain* what the law is."[16] "Concepts are how we conceive aspects of the world, and lie between words and their meanings, in which they are expressed, on the one side, and the nature of things to which they apply, on the other."[17] "Broadly speaking, the explanation of a concept is the explanation of that

[14] Joseph Raz, "Can There Be a Theory of Law?," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. M. P. Golding and W. A. Edmundson (Oxford: Blackwell Publishing Ltd., 2005), 324.: "[A]s here understood a theory of law provides an account of the nature of law."
[15] Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison," *Legal Theory* 4 (1998): 251.
[16] Raz, "Can There Be a Theory of Law?," 324.
[17] Ibid., 325.

which it is a concept of."[18] The nature and the concept of law are not identical, but an understanding of the concept of law can be useful in understanding its nature.[19]

Julie Dickson follows Raz in her statement of methodology: "A successful theory of law of this type is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law."[20] Much of her book is devoted to defending the Razian method as she understands it: as a project that does not require us to morally evaluate the law to properly describe it.

Scott Shapiro also holds that analyzing concepts can provide insight into the thing itself. Conceptual analysis "denotes a process that uses a concept to analyze the nature of the entities that fall under it."[21] He says:

> [W]hen one inquires into the nature of an object, one might be asking either of two possible questions. One might be asking about the identity of the object—what makes it the thing that it is? Or one might be asking about the necessary implications of its identity—what necessarily follows (or does not follow) from the fact that it is what it is and not something else?[22]

Jules Coleman says:

> On the classic understanding of it, the aim of conceptual analysis is to identify an interesting set of analytic truths about the concept that are discernable a priori. These truths enable us to identify necessary or essential features of instances of the concept; these features in turn orient the analysis of the concept.[23]

And he continues: "The aim of conceptual analysis is to retrieve, determine, or capture the content of a concept in the hopes that by doing so, we will learn something interesting,

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[18] Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison," 255.
[19] Ibid.
[20] Dickson, *Evaluation and Legal Theory* 17.
[21] Shapiro, *Legality* 405 fn 9.
[22] Ibid., 10.
[23] Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 179. Himma, in discussing Coleman's book, says "The work represents the state of the art in conceptual jurisprudence and exemplifies the virtues of analytic philosophy at its best." Himma, "Substance and Method in Conceptual Jurisprudence and Legal Theory: Book Review of 'the Practice of Principle' by Jules Coleman," 1227.

important, or essential about the nature of the thing the concept denotes."[24]

I cannot spell out the methodology of every legal philosopher here, but this provides a sampling of the current widespread approach that sees legal philosophy as an investigation into the nature of the thing, and holds that the nature of the thing is understood in terms of its necessary features, which we can understand via our intuitions, and sometimes through conceptual analysis.[25] There are many others who write along the same lines, though they don't always talk explicitly about methodology. And lest it appear that this approach is limited to positivists, there are examples of nonpositivists adhering to it as well.[26]

It might have been noticed that the list did not include two of the biggest names in 20th century jurisprudence: Hart and Dworkin. In my view it is controversial whether they are engaged in the same 'nature of law via conceptual analysis' project as Raz, although both have been *interpreted* as engaged in that project. For an argument that Dworkin is not properly interpreted in this way, see Hillary Nye, 'The One-System View and Dworkin's Anti-Archimedean Eliminativism.'[27] I make the argument that Hart is better understood as engaged in a different project in an unpublished draft.[28] I don't have the space to defend my interpretation of

[24] Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* 179. He also says that the most fundamental question in legal philosophy is metaphysical; that is, he interprets the grounds of law debate (what makes it the case that something is law) as a metaphysical question. Jules L. Coleman, "The Architecture of Jurisprudence," *Yale Law Journal* 121, no. 1 (2011): 61-62.

[25] It is worth noting that Marmor denies that conceptual analysis is the relevant methodology. Andrei Marmor, "Farewell to Conceptual Analysis (in Jurisprudence)," in *Philosophical Foundations of the Nature of Law*, ed. Wil Waluchow and Stefan Sciaraffa (Oxford: Oxford University Press, 2013). But I will argue below that he relies on intuitions in the same way as those who do embrace conceptual analysis, and his quest to illuminate the nature of law puts him in the same category as these theorists. See 2.5.1 below.

[26] Michael Moore, for example, endorses a strong metaphysical realism about law. See Michael S. Moore, "Metaphysics, Epistemology and Legal Theory: Review Essay of 'a Matter of Principle' by Ronald Dworkin," *Southern California Law Review* 60 (1987).; Michael S. Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?," *Stanford Law Review* 41, no. 4 (1989).. See also David O. Brink, "Legal Positivism and Natural Law Reconsidered," *The Monist* 68, no. 3 (1985).; David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review," *Philosophy & Public Affairs* 17, no. 2 (1988).

[27] Forthcoming, *Law and Philosophy*

[28] Nye, On Law for Crabs, Angels, and Aliens – manuscript on file with the author.

Hart and Dworkin here, but at any rate, the standard view in the field is they are engaged in the metaphysical project.[29] So the dominance of this methodology seems clear, even if, as I argue, it is not the right interpretation of some of these figures. The idea that what we care about is the nature of law, and conceptual analysis is the way to get at it, is pervasive in modern legal philosophy.

b. Conceptual Analysis

What, then, is the method of conceptual analysis? It is typically understood as the search for necessary and illuminating, if not sufficient, conditions for the correct application of a concept. It "depend[s] on intuitions about the proper application of the concept in particular cases."[30] We start by gathering our pre-theoretical data, our 'folk' intuitions about what law is. We then develop a theory that makes sense of most of these intuitions. According to Jackson, a prominent defender of conceptual analysis, we start with our 'ordinary conception', or 'folk theory' of the thing in question, which we identify according to "what seems to us most obvious and central" about it.[31] We then think through hypothetical examples that may lead us to reject or rethink the suggested account. For Jackson, conceptual analysis is the project of "addressing when and whether a story told in one vocabulary is made true by one told in some allegedly more fundamental vocabulary."[32] This story is then supposed to be tested against (and hopefully survive) the method of possible cases, whereby we try to see whether the cases our account captures fit with our intuitions about what should be captured.[33] In other words, we use our

[29] See, e.g., Scott Shapiro, who says that Hart "seemed to have assumed that the nature of law could be determined exclusively by conceptual analysis."[29] Cite examples of D being interpreted in this way.
[30] Murphy, *What Makes Law* 78.
[31] Frank Jackson, *From Metaphysics to Ethics: A Defense of Conceptual Analysis* (Oxford: Clarendon Press, 1998) 31.
[32] Ibid., 28.
[33] Ibid.

intuitions to determine whether aspects of the folk theory should be discarded or reformed, depending on whether we think the examples properly fit in the category.[34]

To put this in terms of law, following Shapiro, it involves gathering a set of "truisms" about law—these are propositions that are "*self-evidently*" true.[35] The idea of truisms, I take it, is supposed to map onto the role of intuitions generally in conceptual analysis. The next step is to develop a theory of law that, while it need not account for every truism about law, makes sense of as many as possible.[36] A theory of law, then, would require us to describe law in some allegedly more fundamental language, such as talk of rules or authority. This picture is then tested against intuitions.

It should be noted that a project of this sort—one of accounting for the truisms about a thing—need not be done under the banner of conceptual analysis. We might just think that we are capturing our intuitions about the thing. Andrei Marmor, for example, holds that analytic jurisprudence aims to explain the nature of law, but not through conceptual analysis. Rather, it seeks to explain law's nature in terms of what is foundational.[37] He understands his project as one of 'metaphysical reduction'.[38] Liam Murphy notes that it doesn't matter whether we understand the disputes in legal philosophy to be about the nature of law or the concept of law. This is because "all the arguments philosophers have made about how we should figure out the content of the concept of law can be rephrased as arguments about what the most fundamental facts about law are."[39] Both approaches, in the end, depend on intuitions, and face the same

[34] Ibid., Chapter 2, especially 31-42.
[35] Shapiro, *Legality* 13. Shapiro has been more explicit about the role of conceptual analysis in his theory than many legal philosophers, and so I rely on his model to some extent in my discussion here.
[36] Ibid., 14.
[37] Marmor, "Farewell to Conceptual Analysis (in Jurisprudence)," 214.
[38] Ibid., 216.
[39] Murphy, *What Makes Law* 78.

problems.[40] So, although we may not have to talk in terms of concepts, I focus on them here because most theorists I am dealing with do talk in those terms. But those who just want to talk about the fundamental facts about the nature of law will still be vulnerable to my arguments if they rely on intuitions in the same way. I address problems with intuitions in the following sections.

4. Disagreement about Law

Legal philosophers disagree about what the nature of law is. The process of conceptual analysis just set out produces different accounts of the nature of law because it depends on intuitions about the correct application of the concept. But our intuitions conflict. This clash of intuitions has led to an impasse. Murphy argues that the intuitions driving people's views about law are so deeply held that we should not be optimistic about the future of the debate.[41] For the question of the grounds of law, "there will be no convergence at the level of criteria, because there will be no convergence at the level of example."[42] Disagreement between positivists and nonpositivists is intractable. All our accounts of concepts ultimately depend on intuitions about correct usage, or considered judgments about law's nature.[43] These are bound to conflict.[44]

I think Murphy is right to be skeptical about the prospects for progress. Theorists tend to gloss over the problem of disagreement, assuming that conceptual analysis, if done honestly for a

[40] Ibid., 85. See my argument in 'A Critique of the Concept-Nature Nexus in Joseph Raz's Methodology' for a criticism of this approach. I argue that talking directly about the nature of the thing, as opposed to talking about the concept, is vulnerable to the same objections as the concept-based approach, because it still fundamentally relies on intuitions. Pp 24-26

[41] See Murphy, *What Makes Law* 102-03.: "I am in the end inclined to think that our two camps are unlikely ever to be moved by argument – no other considerations are going to strike them as more compelling than their initial pictures of the nature of law."

[42] Ibid., 82.

[43] Ibid., 85.

[44] "Each side thinks that the other is fundamentally and hopelessly mistaken about what law is. For the reasons given, I am skeptical about the availability of substantive argument that might have the power to move either side closer to the other. All the arguments I have seen inevitably include some premise or methodological commitment that is sure to seem less compelling to one of the sides than their initial fundamental convictions about the kind of thing law is." Ibid., 88.

long enough period, will resolve disagreement or uncertainty. But it is mysterious how we are supposed to decide which intuition to discard, or whose intuitions to trust. The next section examines an example of how this disagreement manifests, and why it seems intractable.

a. The Priority of Theory

When theorists make claims about the nature of law, these claims lead them to draw certain conclusions about dimensions of our practice. For example, when Raz claims that law necessarily has certain features, this has implications for what counts as law. Let me spell this out more fully. Raz defends what he calls the 'sources thesis': "A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument."[45] On this view, when judges appeal to moral sources, they must be understood as going outside the law and exercising discretion to make new law.[46] The sources thesis, Raz argues, does not settle the question of what the proper rules of interpretation are.[47] He makes it clear that he considers the question of proper adjudication to be a separate one from that of the nature of law:

> First, none of the above bears on what judges should do, how they should decide cases. The issue addressed is that of the nature and limits of law. If the argument here advanced is sound then it follows that the function of courts to apply and enforce the law coexists with others. One is authoritatively to settle disputes, whether or not their solution is determined by law. Another additional function the courts have is to supervise the working of the law and revise it interstitially when the need arises.[48]

Raz thus argues that "legal gaps are not only possible but, according to the sources thesis, inescapable."[49] In such cases, judges have discretion to develop new law through appeal to moral

[45] Raz, "Authority, Law and Morality," 296.
[46] "The sources thesis leads to the conclusion that courts often exercise discretion and participate in the law-making process." Ibid., 319.
[47] Ibid., 317.
[48] Ibid., 318.
[49] Joseph Raz, "Legal Reasons, Sources, and Gaps," in *The Authority of Law* (Oxford: Oxford University Press, 2009), 77. He has an interesting discussion of the way people talk about gaps: sometimes when the law is unsettled

and other extra-legal sources. Shapiro also acknowledges that social facts cannot resolve all possible scenarios that will arise, and that therefore there will be a certain area left undetermined, in which judges can and should engage in moral deliberation. On his view, too, they have to be understood as exercising discretion.[50] In hard cases "judges are simply *under a legal obligation to apply extra-legal standards.*"[51] Of course, almost everyone would agree that judges sometimes exercise discretion. My point here is just that, if we take the view that Raz and Shapiro do, we will have to say that judges are exercising discretion *every time* they appeal to morality, even when that appeal was demanded by the relevant statute. In other words, the proffered account of the nature of law is determinative of what we should say about other phenomena. Because the account of the nature of law says that law cannot be a matter of moral deliberation, but only of social fact, this claim drives what we have to say about what judges are doing.

This conflicts with the way many judges and other officials talk and think about their practices; even when a statute includes a moral term, they often think there is law there, and not just a gap where discretion is called for. But my point is methodological, not substantive. I am not arguing that Raz is wrong because we can look at what judges do and see that, in fact, they *are* applying law. I am making the point that the very structure of this disagreement doesn't allow for that sort of appeal to experience. If I point out that judges do seem to think they are applying law, Raz can simply say that they (and I) are mistaken: judges are actually exercising discretion.

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people say that we don't know what the law is, which might seem to suggest that there is an answer, not a gap. But Raz thinks this is just a careless way of putting the point, and that in fact the more accurate way to describe this is as a case where there is no law to settle the matter. Joseph Raz, "Legal Positivism and the Sources of Law," in *The Authority of Law* (Oxford: Oxford University Press, 2009), 49.

[50] Shapiro, *Legality* 251.

[51] Ibid., 272. (emphasis in original.)

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

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

It is a disagreement about who has the correct description of the true nature of law, not the correct description of any observable facts. It is hard to see why this should matter. Interestingly, Shapiro seems to recognize this:

> No doubt, those whose fortunes lie in the balance will find little comfort in this more accurate description of their predicament. It does not matter to them whether their anxieties are about the present state of the law or its looming future. For them, the issue is purely semantic.[52]

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

[52] Ibid., 256.

b. Theory of Law and Theory of Adjudication

As the previous section noted, the question of the nature of law is independent of the question of what makes for good *adjudication.* This is an important point to emphasize. The theory of adjudication does not flow from the theory of the nature of law;[53] indeed, on the adjudicative question there might be substantial agreement between those who disagree about the grounds of law. Both positivists and nonpositivists agree that moral factors are appropriately taken into account when judging. The difference centers on what we should think is going on when judges appeal to morality.

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

> When a conscientious judge appropriately appeals to moral considerations to reach a decision, has he in so doing gone beyond the mere application of existing law and in part also made new law? One side says yes, its opponents no. The dispute about the grounds of law is not about what judges should do, but you could say it is about the correct description of what they do.[54]

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

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[53] As Murphy makes clear, judges need only a theory of adjudication to do their job; they may not have a theory of the grounds of law at all: "A judge's theory of adjudication may be sketchy and perhaps only implicitly believed, but she must have one…It is not essential, by contrast, that judges have a theory of the grounds of law". Murphy, *What Makes Law* 8.

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

c. Clashing Intuitions

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

This disagreement is not just taken to be a matter of different people holding different concepts that serve different purposes. Rather, we are supposed to be disagreeing about law's *true nature*. There is a fact of the matter about that nature, which may not track the views of most ordinary people. People are commonly confused about what law *really* is. As Julie Dickson argues, "[s]ome self-understandings of the participants will be confused, insufficiently focused, or vague. Moreover, some self-understandings will be more important and significant than others in explaining the concept of law."[55] In seeking to build a unified theory of the law's nature, it is justified to minimize, discard, or recategorize some aspect of our pre-theoretical intuitions. This is what the method of conceptual analysis requires—we clarify and refine our position, and this necessitates rethinking some of our folk intuitions.[56]

On Shapiro's similar model, where we begin by collecting 'truisms,' which I take to be basically the same thing as intuitions, it is hard to square the idea of discarding one of these initially held truisms (which he is clear that we must be prepared to do),[57] with his view that the denial of a truism should result in bafflement.[58] Wouldn't we then be baffled by our own considered position? But let us give him the benefit of the doubt and suggest that sufficient

[55] Julie Dickson, "Methodology in Jurisprudence: A Critical Survey," *Legal Theory* 10 (2004): 138.
[56] Jackson, *From Metaphysics to Ethics: A Defense of Conceptual Analysis*. On the role of intuitions, see 31-32.
[57] Shapiro, *Legality* 17.
[58] ibid., 405 fn 11.

reflection will allow us to see that it wasn't a truism after all, and thus the puzzlement will disappear. Then, conceptual analysis might be capable of getting the legal philosopher to a coherent, settled view that she can endorse. Of course, at that point, we would have to wonder about our process for selecting 'truisms' in the first place—if some can be discarded, how can we have certainty about the truistic character of the others? There seems to be no satisfactory account of the basis for rejecting one of our intuitions.

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

d. This Problem Distinguished from Empirical Inquiry

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

If you and I disagree about what flavors of ice-cream are offered at our local ice-cream parlor, there is a way to resolve this disagreement: we can go there and see for ourselves. There is the prospect of resolution, and an agreed-upon method for it. But if we disagree about whether

ice-cream can ever *really* be a meal or only a snack or a treat, there will be no way to resolve this problem. I will say "Listen, I ate it for lunch yesterday—it was a meal." And you will respond: "You might have eaten it at noon, but all that means is that you skipped lunch and had a treat instead. Ice-cream can never be a meal." There is nothing in the ice-cream shop, or anywhere else, to which we can point to resolve this dispute.

As trivial as this example is, my point here is a serious one: The very structure of the methodology employed makes resolving disagreement impossible. It makes intuitions about the nature of things primary, which leaves nothing we could point our interlocutor towards as a counterexample. If your intuitions about the nature of the world determine how to categorize the world, then it doesn't make a difference if I provide an example that seems to go against your view: your view is in charge, and you can just deny that that example is really an instance of the thing in question.

Murphy says that his argument about disagreement hasn't "proved that this standoff is permanent", and he isn't claiming that progress couldn't be made or we couldn't ultimately converge on a view.[59] Think of physics, where there are numerous competing versions of string theory, and seemingly no prospect of convergence on a single, unified theory.[60] If we can say about physics that further experience may yield an answer, why cannot the grounds of law theorist say the same? In other words, what is the difference, if there is one, between the standoff in legal philosophy and the standoff in string theory (or in physics more generally)?

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[59] Murphy, *What Makes Law* 102.

[60] There are five string theories, and a sixth theory that counts them all as parts of a single whole: M-theory. See Brian Greene, *The Elegant Universe: Superstrings, Hidden Dimensions, and the Quest for the Ultimate Theory* (New York: W. W. Norton & Co., 2003) 284-87. But these five or six generate approximately 10^{500} different solutions—different ways of accounting for the extra dimensions in string theory—and each solution would correspond to a different universe. See Rob Knoops, "Can String Theory Predict Stuff?," http://www.quantumdiaries.org/2013/08/20/can-string-theory-predict-stuff/ (2013)., accessed Apr 17, 2016. This vast number of solutions makes it very hard to test string theory to see if it does in fact predict things about our universe, and should therefore be accepted.

The answer is that there is a significant difference between conceptual analysis and the sciences: When string theory is charged with being untestable and therefore unfalsifiable, proponents of it do not respond by saying that it is nevertheless true because it seems intuitively like the right account of the world.[61] Rather, their response is to seek ways to show that it *is* falsifiable. There are certain calculations or observations that physicists agree would invalidate a given theory if they were to occur, and there is agreement about what it would look like for such observations to be made. So the way forward is to develop experiments that would provide indications that one view is right.[62] They emphasize that even if there is *as yet* no evidence, the right project is to seek to develop tests that could provide the relevant evidence. We should be striving to rule out theories, to find predictions and experiments that will allow us to figure out what is right.[63] That attitude is the appropriate one, not the attitude that tries to insulate a theory from falsification.

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[61] There is an important distinction between the claim that scientists sometimes do make, that intuitive appeal and theoretical beauty and coherence are important factors in theory choice, and the claim that that is all that is needed to determine what theory is true. See Ronald Dworkin, *Religion without God* (Cambridge: Harvard University Press, 2013) 53-65., for an illuminating discussion of this.

[62] See John Horgan, "Physics Titan Still Thinks String Theory Is "on the Right Track"," http://blogs.scientificamerican.com/cross-check/2014/09/22/physics-titan-edward-witten-still-thinks-string-theory-on-the-right-track/ (2014)., accessed Apr 17, 2016, where physicist Edward Witten is quoted as saying: "If the landscape interpretation is correct, can we get additional clues that would make this more believable? One obvious possibility involves the outcome of Large Hadron Collider experiments…The literature is filled with other suggestions about how we might conceivably get more clues about a landscape interpretation if that is correct". In other words, the project is to push on and search for genuinely falsifiable ways of resolving the problem, not to appeal to intuitions about the nature of the world. And see Matt Strassler, "Did the Lhc Just Rule out String Theory?!," http://profmattstrassler.com/2013/09/17/did-the-lhc-just-rule-out-string-theory/ (2013)., accessed Apr 17, 2016, for discussion of the Large Hadron Collider and the testability of string theory. Strassler points out that many people object to string theory for being untestable, but that that misses an important distinction: the theory itself does make predictions, and the issue is whether we can test them with the technology we have. "There's only one problem: although these predictions would allow definitive test of the theory, the tests can't be carried out with current or currently imaginable technology…The problem is practical, not one of principle."

[63] See, for example, Brian Greene's claim that falsifiability is what we should be striving for: "Let me emphasize too that if we could rule out supersymmetry and rule out string theory I'd be thrilled… I'm not wedded to any one theory, I'm wedded to making progress toward the truth. And ruling out ideas is surely progress. On the other hand, I'd also be thrilled if we could find evidence for supersymmetry and for string theory." Ria Misra, "Brian Greene Is Here to Answer Your Questions About String Theory!," http://io9.com/brian-greene-is-here-to-answer-questions-about-superstr-1541336914/all (2014)., accessed Apr 17, 2016.

The worry with the methodology of legal philosophy, whereby we use intuitions about a concept to tell us about the nature of the thing, is that *whatever* experience or evidence is presented can—in principle—be recategorized according to each theory.[64] We simply can't do that in the case of physics. We could have infinite experiential data that wouldn't settle the grounds of law question, because both theories can bite the bullet on certain elements of our experience. In science, we can't 'bite the bullet'—if a theory fails to explain the data, the theory is out, whereas in the case of conceptual analysis, if the theory fails to explain a piece of data, we can discard, or recategorize, that piece of data. There is no experiential evidence that a theory of law has to account for in a particular way. Thus, there is no data that we can look to as a shared source of knowledge. Our intuitions drive the answer, and so any possible convergence is dependent on intuitions. This means resolution doesn't rest on some reliable process of discovery or argument that we could follow, but on happenstance and luck.

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

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

resolving the problem, because of a methodology that allows us to discount experience that doesn't fit the theory. Such implicit assumptions render the problem insoluble altogether.

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

5. Spurious Questions and Legal Philosophy

I argued above that the search for the nature of law looks like it has reached a dead end. Indeed, it appears to be a spurious and irresolvable disagreement. Recall that the grounds of law question is that of what materials can be appealed to in figuring out the content of the law. Specifically, theorists debate whether moral principles are ever included. How should we answer this question? We might think we could look to the familiar sources, such as statutes, cases, and so on. Let us look at an example from statute law that might appear helpful. In the California Civil Code, in the Part dealing with Contracts (Division 3, Pt 2) Section 1667 states:

> That is not lawful which is:
>
> 1. Contrary to an express provision of law;
>
> 2. Contrary to the policy of express law, though not expressly prohibited; or,

3. Otherwise contrary to good morals.[65]

Subsection 3 is the crucial one for our purposes. The facts on the ground are clear: this statute states that immoral contracts cannot be law. Different theorists will all agree on its wording, agree that it is a valid statute, and agree that it directs a judge to use moral reasoning. And they agree that statutes are part of what is properly appealed to in figuring out the law—part of the grounds of law. But in the face of this factual scenario, we could have three different descriptions of what subsection 1667(3) 'really' does. For the nonpositivist, it demonstrates the intertwined nature of law and morality: law is full of principles, some of them express, like this one, and others implicit, and this is an example of this general truth. For the inclusive positivist, this shows that morality can be incorporated into law via a social fact like a statute. And lastly, for the exclusive positivist, this is an example of a gap in the law, directing a judge to exercise discretion.[66]

Theorists agree on the experiential evidence, but still disagree about the truth. What drives the different theories is not the observable world, but intuitions. This makes it clear that theorists are engaged in a metaphysical project, not a sociological or descriptive one that would take account of evidence.[67] They endorse a methodology according to which the truth about the nature of law is accessible via our intuitions. In adopting such a methodology, theorists make their accounts unresponsive to experience.

When an exclusive positivist such as Raz says that social facts are the only source of law,

[65] Cal. Civ. Code, § 1667.
[66] Shapiro, *Legality* 251.; Raz, "Authority, Law and Morality," 319.
[67] They are also not doing a normative project. The question is not about what materials it is morally proper to appeal to—they might well agree on this, as I just pointed out—but only about what materials are properly categorized as legal: when is the judge applying law and when is he going outside of established law to create new norms?

he does not base this on observation. Raz is making an argument about the nature of law, drawing on claims about the concept of law.[68] Something *cannot be* law if it does not meet his criteria. His concern is about how to correctly draw the boundaries of the phenomenon. Because of his views about authority and the role of law in mediating between people and the reasons that apply to them, Raz is committed to the view that *on the correct account of the nature of reality*, the judge is creating a legal norm, and not applying an existing legal norm.

On this methodology, theoretical disagreement cannot be resolved by appeal to experience: any ostensible evidence can be explained away. We might think we could appeal to things in the world, such as the above statute, but the methodology permits ignoring data points that don't fit the theory. So the worry is that theories of this sort permit a methodological move according to which we can discard parts of our experience because intuitions take precedence over experience.

Imagine that a judge applying subsection 3 says he is bound by law to invalidate a contract. Even that data point can't settle the question of whether law really includes morality for theorists adopting this methodology, because it is open to them to say that the judge is mistaken. Everyone will accept the fact that the judge appealed to moral reasons, and yet they will insist that the further question remains: "When judges exhibit this morally engaged behavior, are they *really* finding a right answer or are they *really* exercising discretion?" This 'really' suggests that we need a perspective that goes beyond experience. This brings us to the impasse mentioned above. It is no temporary impasse awaiting further data points. It is a permanent impasse because any potential data points can be explained differently by the theories in contention.

[68] Recall the discussion of this in Chapter 2.

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

As long as the methodology permits claims about the way things really are that float free of any experiential evidence, we will never have the ability to assess these claims, and there can be no hope of transcending the disagreement.[69] We can have competing descriptions of agreed-upon facts, and no way to identify which way of carving up those facts is 'really' true. Empirical evidence is unable to count in favor of one of the views, because the positions in contention are not about *what there is,* but about *how to describe* some already agreed-upon fact. Murphy makes this point:

> [T]he dispute about the boundary of law is a dispute that cannot be resolved by looking at the world; we can't discover the boundary of law by doing legal sociology. The issue is which is the right way to conceive of law and its boundary, and, as I've said, an answer to that question will leave legal practice more or less untouched.[70]

[69] See Misak, *Truth, Politics, Morality: Pragmatism and Deliberation* 55.
[70] Murphy, "Concepts of Law," 7.

6. No Difference in Practice

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

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

Recall that Raz recognizes that the appeal to morality is a fundamental part of *judicial decision-making*. He has no problem with judges appealing to morality in the course of resolving a case.[71] Indeed, he even thinks they have a *duty* to appeal to morality.[72] According to exclusive positivism, a judge could agree with, say, Dworkin's views about what sorts of principles ought to be appealed to,[73] and could employ moral reasoning in the exact same way. The Razian judge could make the same decision, rely on the same moral principles, and take precisely the same actions. The only difference would be the point at which the exclusive positivist would draw the

[71] His only point, as I have been arguing, is that we must understand this appeal in a particular way: for the exclusive positivist, law's validity can never depend on moral facts, and so judges, in appealing to moral sources, have to be understood as going beyond the established law and exercising discretion.

[72] See Raz, "Incorporation by Law.", where Raz argues that the default position is that the judge decides morally, and so deciding according to moral principles is not outside the judicial duty, but outside the law, properly so-called. It is the judge's moral duty to decide according to morality. Raz's claim is that when they do so it cannot be considered an appeal to pre-existing law.

[73] See generally Dworkin, *Law's Empire* Chapters 6 and 7.

line and say that the judge had crossed over into the territory of making law.[74] Then we have a situation in which the facts on the ground, about how the judge made her decision, are the same, and the only difference would be the description of her actions as 'lawmaking' or 'law-applying'.

It seems clear that the chosen description could not matter to the citizen. Whether we call the answers judges give in hard cases 'finding law' or 'making law', they involve appealing to the same moral ideas, and the upshot for the citizen, the decision itself, is the same.[75] Nothing turns on it. It is a spurious question, and should be rejected.

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

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

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

[75] Shapiro recognizes this: "No doubt, those whose fortunes lie in the balance will find little comfort in this more accurate description of their predicament. It does not matter to them whether their anxieties are about the present state of the law or its looming future. For them, the issue is purely semantic." Shapiro, *Legality* 256.

that we should be concerned with.[76] But if we ask: "When the judge appeals to moral principles to find in favor of B, is he really finding law or really making law?" there is *in principle* no way to decide between these two views. There is no experiential upshot, as evidenced by the fact that various theorists describe it differently, though they agree on the experiential facts. The question of how *Brown v Board of Education*[77] should be decided is one to which human experience, from statistical information about the harms of segregation, to moral experience that informs our views about what ought to be done, is obviously relevant. But when we step outside of those sociological or moral questions to ask what law *really is*, beyond our experience of it, we enter the realm of the spurious.

This suggests that the grounds of law question is spurious. It asks: Does law, properly understood, include moral principles or not? This is different from the normative question: What materials are properly appealed to when making a judicial decision? I have argued that the former question simply *can't* be answered.

7. Chalmers' Subscript Gambit

In this next section I will try to come at the problem in a different way, by applying Chalmers' method of the subscript gambit.[78] Imagine that I say that morality is never part of the grounds of law, and you say that it is. We bar the term 'law' and introduce 'Law_1' and 'Law_2'. Law_1 says law is understood as only source-based norms. Law_2 says law is source-based norms plus some set of justified principles. Now, it is clear that if we both accept Law_1 as our starting point, we will agree that morality is never part of the grounds of law, and that therefore when

[76] I will argue below that the problem is best understood as a normative one, once we drop the metaphysical question.
[77] 347 U.S. 483 (1954)
[78] Chalmers suggests that the classic "what is X?" form of question is "particularly liable to involve verbal disputes." Chalmers, "Verbal Disputes," 532. And he explicitly includes "what is law?" as an example. Ibid., 531.

judges appeal to it, as we also agree that they do, they are making new law. We will agree that the statute in question directs judges to make law to fill a gap. And, conversely, if we start from Law_2, we will agree that those principles do incorporate morality into the grounds of law, and so judges need not be understood as exercising discretion *every time* they appeal to morality (though they may still sometimes exercise it). We will agree that the statute can be understood as straightforwardly incorporating a moral demand.

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

8. Objections

I have tried to show that the grounds of law problem, as it is approached by many of the core thinkers in modern legal philosophy, is a spurious question that is by its very structure unresponsive to experience. But before moving on, I will answer some objections.

a. Better Descriptions

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

But the very question of which description is more compelling is exactly what is at stake, and it is this that I have argued is methodologically insulated from any evidence that might settle

the disagreement. That is, those with different starting points will actually see what is a 'revision' and what is an 'accurate description' differently. So, for some positivists, showing that judges have the power to change the law is an important commitment of their view, and so they will claim that theirs is actually a better description, not a sacrifice.[79] But this will not convince those who start with the view that judges do not make law. The problem, then, is that both descriptions are on par, not because they are equally compelling as a descriptive matter (the point is that they may compel you or me differently), but because of the structure of this particular methodology, which gives intuitions priority over experience. This puts the different views *methodologically* on par. The kind of evidence we would need to appeal to to establish which is a more accurate description is methodologically ruled out, and our intuitions about which is the right description take its place.

b. Convergence

What if we *do* come to agree on a description? If we could agree that one view is right, there would seem not to be a problem. In other words, perhaps we haven't resolved this now, but why not think we could come to a view about the nature of law eventually?

This might be an available move if the disputants were open to experience in the right way. But the very structure of the disagreement about the grounds of law is such that it is insulated from inquiry. It is not just that we don't yet know the answer, but that we could inquire forever and never resolve it, because it is not open to resolution through experience. The disagreement is about where to correctly draw the boundary around this phenomenon. Disagreement about this cannot be resolved by experience, because that experience is understood differently depending on whether you believe the boundary is drawn in one way or another.

[79] This is, in fact, one of Murphy's key points: "It is an important aim of positivists to bring to the surface (what they regard as) the fact that judges have the authority to change the law." Murphy, *What Makes Law* 93.

So imagine disagreement did eventually dissolve: this would not be because experience had shown one view to be wrong, because experience is barred from influencing the result here. If we all happened to come to the same view about the nature of law, this would not mean it was truth-apt. Instead, we would have to say that all the participants were holding shared beliefs about a nonetheless spurious question. The question is not about something we can actually look to, but about the boundaries of a phenomenon, and a question about where to correctly draw those boundaries is unresponsive to experience, no matter whether or not we happen to agree about it.

c. Intuitions and Law

Next, why not say here that the relevant experiential evidence would be our most basic convictions, our deep commitments, about what law is like? Why can't our intuitions tell us about law? Law is not a phenomenon in the physical world. It is a social one, so why aren't intuitions relevant?

We have to be clear on what is being claimed. Even if law is a social phenomenon, the objective is to correctly describe it. I don't see why my intuitions about what something is like would have any claim to correctness. Intuitions just aren't relevant to descriptive matters. Intuitions can tell us many things about what is important or valuable about our institutions—but that too is normative. But when theorists claim, as they do, to be accessing the 'true nature' of law, this is a matter of description of reality that intuitions cannot access. Our intuitions can tell us about what we should do, and about what *we think* about law, but not about 'what it is'.

d. Not Metaphysics

The final objection is this: the reader might be left with the sense that I have interpreted the 'what is law' question in some mysterious metaphysical way only to reject it, when there is a

simpler and more plausible interpretation that I avoid. Even if I am right that Raz is engaged in a metaphysical inquiry, aren't there others who just want to answer the reasonable question of what the law is? Surely, the objection goes, there is a straightforward question that asks 'What is the law around here?' Is such a question spurious? I respond to this question below, when I discuss 'eliminativism', and examine in depth what exactly is eliminated.[80]

9. Eliminativism

I have argued that the grounds of law question is spurious and should be rejected. I argue next that that leads to 'eliminativism'. There are a number of people who have recently put forward views that could be called eliminativist. I will focus here on the views of Lewis Kornhauser[81] and Scott Hershovitz, who explicitly adopt eliminativism, Mark Greenberg and Brian Leiter, who might be thought of as eliminativists, as well as Liam Murphy, who sets out the position but does not in the end endorse it.[82]

a. Existing Eliminativist Views

Kornhauser identifies a number of separate questions which each rely on a concept of law, which need not be the same concept of law. The first is: "What makes a proposition of law

[80] See 4.5 below.

[81] Murphy locates the beginnings of Kornhauser's eliminativist argument in Lewis A. Kornhauser, "Governance Structures, Legal Systems, and the Concept of Law," *Chicago-Kent Law Review* 79 (2004)., published before Murphy, *What Makes Law*., and before Kornhauser's more explicit adoption of eliminativism in Kornhauser, "Doing without the Concept of Law.". Kornhauser sets up a number of different ways of understanding our institutional structures, and argues that we can choose among them, on the basis of their fruitfulness for the further questions we want to answer. Social scientific/explanatory questions remain on this view, as well as evaluative ones. One of Kornhauser's main claims in the paper is that "philosophers of law must elaborate the structure of a distinct political virtue that we call law." Kornhauser, "Governance Structures, Legal Systems, and the Concept of Law," 381.

[82] There are also growing numbers of theorists who suggest that theorizing about the nature of law is futile and unproductive, who may or may not be understood as eliminativist in some sense. See Frederick Schauer, "Hart's Anti-Essentialism," in *Reading H.L.A. Hart's 'the Concept of Law'*, ed. Luis Duarte d'Almeida, James Edwards, and Andrea Dolcetti (Oxford: Hart Publishing, 2013).; Dan Priel, "The Misguided Search for the Nature of Law," unpublished manuscript, http://ssrn.com/abstract=2642461 (2015). Priel and Schauer both talk about the project of discussing law's common and interesting features, rather than its 'necessary' ones. Schauer's view that we should move towards talking about important rather than necessary features of law will be discussed in Chapter 7.

true?"[83] This gives rise to the doctrinal concept of law, which is what Kornhauser proposes eliminating. What does it mean for it to be eliminated? Kornhauser notes that there are three different versions of the claim. The weak version is simply the claim that we can do without the doctrinal concept of law; we can say everything we need to say without it. The semi-strong version claims that it is better for us to do away with it. And the strong version says that there are no propositions of law: there is no substance here and thus no truth conditions.[84] Kornhauser says that his argument provides support for all three, but the strongest support for the weak version.

Hershovitz has recently argued that there is no distinctively legal domain of normativity. "[W]e should be skeptical that law generates a distinctively legal domain of normativity, or even quasi-normativity."[85] He adds that his view is "ontologically spare",[86] and refers to it as "a kind of eliminativism, since it denies the existence of an entity—a distinctively legal domain of normativity, or quasi-normativity—that more traditional pictures presuppose."[87]

But Hershovitz also says that we can go on talking about law:

> To be clear, I do not object to talking about what the law requires. What I object to is the supposition that there is a single entity called *the law* to which all such talk refers. As I said before, I am happy to allow that some of our moral rights, obligations, privileges, and powers are helpfully labeled "legal." But there are many helpful ways to use that label.[88]

[83] Kornhauser, "Doing without the Concept of Law," 6.
[84] Ibid., 14-15.
[85] Hershovitz, "The End of Jurisprudence", above n. 3, p. 1186.
[86] Ibid., p. 1193.
[87] Ibid.
[88] Ibid., p. 1202.

In denying that there is a distinctive legal domain of normativity, Hershovitz takes the view that legal obligations are simply "a species of moral obligations."[89] We identify our obligations as legal because of their source, just as we might say we have a 'family obligation', in conveying that we have an ordinary moral obligation that arises from our family situation. We are not positing an extra domain of family morality.[90] This means that any legal obligation is a genuine moral obligation. We should be eliminativists about the existence of a special domain of legal normativity.

Greenberg's position might be understood as eliminativist.[91] He defends what he calls 'The Moral Impact Theory of Law,' which holds that "The content of law is that part of the moral profile created by the actions of legal institutions in the legally proper way."[92] There is a lot to unpack here, and I will only engage with the issues insofar as they are important for distinguishing and assessing the view *as an account of eliminativism*.

The idea is that law is a term for all those moral upshots that are the result of actions by legal institutions. In other words, legal obligations are a subset of genuine moral obligations—those ones that we can trace to the actions of legal institutions.[93] Put simply, "Legal institutions take actions to change our moral obligations by changing the relevant facts and circumstances… With important qualifications, the resulting moral obligations *are* legal obligations."[94] On the Moral Impact Theory, legal interpretation means asking what is morally required as a result of lawmaking actions.[95]

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[89] Ibid., p. 1188.
[90] Ibid., 1187.
[91] Greenberg, "The Moral Impact Theory of Law", above n 2; see also Mark Greenberg, "How Facts Make Law", Legal Theory 10(3) (2004).
[92] Greenberg, "The Moral Impact Theory of Law", above n 2, p. 1323. To clarify a terminological point, the 'moral profile' is a term Greenberg uses for all our moral obligations, powers, and privileges: ibid., p. 1308.
[93] Moral obligations, for Greenberg, are "*genuine, all-things considered, practical* obligations." Ibid., p. 1306.
[94] Ibid., p. 1294.
[95] Ibid., p. 1303.

This can be seen as eliminativist because it means skipping any intermediate step where we ask what the *law* requires. We move directly to an examination of what morality requires. But it is not eliminativist about the very entity of law: law exists, and when we give an account of the moral upshots of our institutions, we are giving an account of law. [96]

Brian Leiter argues against trying to resolve what he calls the 'Demarcation Problem', that is, the problem of attempting to draw a distinction between law and morality.[97] Attempts to develop a set of necessary and sufficient criteria for something's counting as one or the other are doomed to fail, because law is an artefact concept, and such concepts "are notoriously resistant to analyses in terms of their essential attributes".[98] Since this project seems unpromising, Leiter asks why we should pursue it: why does solving this problem matter?[99] His answer is that there are practical implications; the Demarcation Problem "affects what we think ought to be done."[100]

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[96] The view of law Dworkin puts forward in *Justice for Hedgehogs* has been read by many commentators as eliminativist as well. I won't engage with Dworkin's views fully here for reasons of space, but several people have argued that Dworkin is eliminativist in a similar way to Greenberg, so much of what I say about Greenberg might apply to Dworkin as well. I argue that Dworkin is best understood as an eliminativist throughout his career in 'The One-System View…' Dworkin claims that we have to abandon what he calls the 'two-systems view', where law and morality are understood as separate realms, in favor of the 'one-system view', where law is a branch of morality. This means legal questions can only be moral questions. On the two-systems view, "there is no neutral standpoint from which the connections between these supposedly separate systems can be adjudicated." Dworkin, *Justice for Hedgehogs*, above n 6, p. 403. So, if we are to answer the question of how they are connected, Dworkin suggests that it must be answered as a moral or a legal question. Dworkin says that we should place law within the realm of morality, thus making all 'legal' questions questions about morality. As with Greenberg, we can skip any intermediate step and just talk about what ought to be done. See discussion of the similarities and differences between Dworkin and Greenberg in Greenberg, "The Moral Impact Theory of Law", above n 2, pp. 1299-302. Kornhauser refers to Dworkin as a 'proto-eliminativist', because he accepts the same one-step analysis as Kornhauser does. Kornhauser, "Doing without the Concept of Law", above n 1, p. 27. Dworkin's view allows judges and other officials to get by without a doctrinal concept of law: they simply assess their political obligations. They need not determine what the law is first. See also Jeremy Waldron, "Jurisprudence for Hedgehogs", NYU School of Law Public Law Research Paper 13-45, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290309 (2013). Waldron argues that the new view is more radical than the *Justice in Robes* position, "because Dworkin's position now is not just that arguments and judgments in legal *theory* are moral in character, but that *legal* judgments are moral judgments and legal arguments are moral arguments." Ibid., p. 7. See also Greenberg, "The Moral Impact Theory of Law", above n 2, p. 1300, footnote 28, and Hershovitz, "The End of Jurisprudence", above n. 3, p. 1162, discussing the shift in Dworkin's views.

[97] Demarcation Problem, 664

[98] Demarcation problem, 666

[99] 668

[100] 669

If law is moral just because it is valid, then we will have an obligation to obey any valid law.[101] Leiter proceeds to address this issue by saying that moral validity might not mean overridingness in terms of our practical reasoning.[102] "In a world in which people, for example, viewed *moral obligation* as on a par in practical reasoning with 'would feel pleasant', it is hard to see why the Demarcation Problem would matter."[103] He goes on to argue that "even if we cannot precisely demarcate law and morals, we still need to decide what it is we ought to do, and what it is we have an obligation to do. Solutions to Demarcation Problems, if they worked, would give us shortcuts. But if they do not work, then we have to tackle the practical questions directly."[104]

This seems right, but I would go further: the Demarcation Problem does not matter even if moral realism turns out to be right. If moral obligation is overriding and real, we still have to ask ourselves what is morally required. But we don't need to know what category law falls into to answer that question.

Ultimately, it is unclear whether Leiter should be understood as an eliminativist. He closes the article by saying that the argument he has advanced "suggest that we abandon the Demarcation Problem in favour of arguing about *what ought to be done*, whether by judges confronted with novel cases, or citizens confronted with morally objectionable laws."[105] This is, in my view, a precise statement of the eliminativist position in jurisprudence. We need not debate about the answer to the Demarcation Problem, because it has no import, and we should instead proceed directly to the moral questions. His general approach of naturalizing jurisprudence[106] is congenial to the eliminativist approach. However, the naturalized approach

[101] 670
[102] 671
[103] 673
[104] 675
[105] 677
[106] See Brian Leiter, *Naturalizing Jurisprudence* (Oxford: Oxford University Press, 2007)

leads him to adopt a particular concept of law as the correct one. He argues that "For a naturalized jurisprudence, [the approach he favours] would mean taking seriously the enormous social scientific literature on law and legal institutions to see what concept of law figures in the most powerful explanatory and predictive models of legal phenomena such as judicial behavior."[107] That concept of law turns out to be exclusive legal positivism.[108] We might wonder, then, whether the naturalized approach still keeps open the debate about the correct account of law. But I think we can usefully take the eliminativist argument just summarized as further support for the eliminativist view defended here.

Finally, on Murphy's view, eliminativism is the view that we should eliminate or discard the grounds of law question. This means dropping any talk of what the law is. As Murphy puts it, eliminativism is the proposal that "in place of inquiry into the content of the law in force, we need nothing at all."[109] Law talk "plays no important role in legal practice and social life generally – it is a wheel spinning on its own. We can get on perfectly well by discussing a range of other questions."[110] In short, eliminativism says that we can drop all talk of what the law requires with no loss.

The doctrinal concept of law tells us what makes a proposition of law true.[111] Thus, Kornhauser's proposal to drop the doctrinal concept of law also means giving up on talking about the content of the law in force. In place of the grounds of law, we need a series of other questions, such as 'what should judges do?'; 'how should lawyers advise clients?' 'how could

[107] Leiter, 'Science and Methodology in Legal Theory', in *Naturalizing Jurisprudence* 184
[108] Ibid 189
[109] Murphy, *What Makes Law* 89.
[110] Ibid.
[111] Kornhauser, "Doing without the Concept of Law," 14.

these practices be normatively improved?' and so on.[112] The way Kornhauser puts it is that, instead of understanding decision-makers as engaged in a two-step process, whereby they first figure out what the law demands and then ask whether there are other reasons that apply, we simply understand them as engaged in a one-step procedure, which requires weighing all the relevant reasons at that first step.[113] Judges have to have theories of adjudication, but these need not depend on a theory of law. Judges and other decision-makers have to simply assess the reasons for action that are relevant in the circumstances, and there is no need to ask whether or not they are legal reasons.[114]

This, Kornhauser notes, sounds implausible.[115] We certainly seem to rely on talk about what the law is, and the idea that we could or should do away with it seems dubious. Indeed, it is for this reason that Murphy does not in the end adopt it: he thinks we cannot get by without an account of the grounds of law because we need to know what the law is.[116] As Murphy says, "Law, it seems, has great everyday importance for all of us. Which makes it all the more disheartening that the prospects for progress with the dispute over the grounds of law are poor."[117] He recognizes that we have reached a troubling impasse, and thus feels the pull of eliminativism. However, he also believes that we cannot be eliminativists without giving up

[112] Murphy, *What Makes Law* 89. One might insist that these questions cannot be answered without answering the question of what one takes law to be. But as I argued above (see 4.3), we can posit a stipulative account of what we mean to include for the sake of discussion, and use this as the basis for answering these further questions.
[113] Kornhauser, "Doing without the Concept of Law," 15.
[114] Ibid., 16-17.
[115] Ibid., 14. "Superficially, the correct identification of the doctrinal concept of law seems central not only to philosophers of law but also to judges, other public officials, lawyers, and citizens. After all, judges *apply the law* as do other public officials; lawyers advise clients about their legal obligations and citizens generally strive to obey it. How could agents perform these tasks without identifying which propositions of law are true?"
[116] Murphy, *What Makes Law* 108.
[117] Ibid., 77.

something of import.[118] I will address this issue in Section 10 below, where I respond to a series of objections.

[Add summary of the different bases for the eliminativist argument by these other authors. Or delete the additional detail? What's the point of adding their args/ how are they different from mine?]

b. My Eliminativist View

The arguments I have made so far lead to eliminativism on methodological grounds: I argued that the widely adopted methodology of seeking law's nature through conceptual analysis which relies on intuitions generates an impasse. The grounds of law question is therefore spurious: it invites us to go beyond experience, meaning we are left with no way to adjudicate between competing views. So we abandon the grounds of law question altogether. What takes its place?

We saw above that we might move forward by disambiguating concepts. That suggests that multiple concepts can coexist. My view accepts a conceptual pluralism of this sort. Conceptual pluralism makes sense with respect to law: we can feel the pull of a concept (or aspect of the concept) of law that highlights its connections with power, and we can see the importance of a concept (or aspect of the concept) of law that emphasizes what it is for our institutions to function well. There are important insights in positivism and nonpositivism. Sometimes we might want to emphasize the law's bruteness, other times we want to discuss its

[118] Ibid., 102.: "So we seem to face a problem. We cannot give up on the idea that it matters what the law is, but disagreement about the grounds of law runs so deep and is so tenacious that we frequently have no option but to say that on one not unreasonable understanding of the nature of law, the content of law is such and such, but that on another, it is something else. Though this situation may not be terribly troubling in other areas of inquiry, where we might just cheerfully accept that there is much disagreement abroad, the role of law in social life makes it troubling for this case in particular."

aspirational qualities. But the metaphysical approach critiqued here assumes that there is a single truth of the matter that hides behind our equivocal concepts.

Conceptual pluralism does not imply that anything goes, or that it is true for *me* that law is all power and true for *you* that it is a moral phenomenon, but rather that it is true for both of us that humans use these different ideas about law, and each plays a particular role in our thinking. So we can develop these various ideas, and set them out clearly as our starting points for further conversation, as long as we do not make the mistake of thinking that they are competing to give an account of law's nature.[119]

We can have multiple useful concepts of law—Law_1 and Law_2—that help draw our attention to various aspects of our experience.[120] Indeed, setting out what we mean by law is an essential preliminary for further questions that we think are important. We can stipulate what we mean by law for the purposes of argument, and then go on to ask normative or sociological questions.

Some of the normative questions we can ask are about how we should structure our systems, what sort of things should be subject to governmental determination and enforcement, and how better to organize ourselves in the areas we do decide to legislate. This is what is typically referred to in the literature as 'normative jurisprudence', as distinguished from 'general jurisprudence'.[121] This realm deals with questions like "Should sex work be decriminalized?", or

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[119] With verbal disputes, when we disambiguate, do we usually think both ideas remain? With the squirrel case and 'going round', we do: they are both plausible accounts of going round. There is no answer to which one is really 'going round'. So we separate the issues and go on to talk about one or the other of the accounts.

[120] If our experience all tells us that there is single way to think about something, then it's obviously not the case that we should be conceptual pluralists about it – we can't just say that any description goes. My point is that for something where our experience of it is so mixed, it might be important to distinguish different ways of looking at it, and to think of each of these as elucidating an important aspect of it, not getting at the essential nature.

[121] General jurisprudence is sometimes called 'analytic' jurisprudence. Shapiro says "The philosophical discipline of jurisprudence is typically divided into two subareas: normative and analytical. Normative jurisprudence deals with the *moral* foundations of the law, while analytical jurisprudence examines its *metaphysical* foundations." Shapiro, *Legality* 2. (emphasis in original.)

"Is the current tax system fair?", or "How can the law of tort be systematized and made more coherent?" These are important questions that can be pursued on the eliminativist account. We don't need an account of the nature of law. Rather, we can stipulate what we mean by law. We can establish, for example, that we mean something like 'positivistic law', and then we can go on to discuss how that stipulated set of norms could be made more just, more coherent, or better along whatever dimension we are concerned with. Another normative question, as we have seen, is about how a judge should decide a case. We have to give an account of the right normative attitude for the judge to take to the historical and institutional facts with which she is faced, and the sorts of arguments that are appropriate for her to employ.

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

But eliminativism means, as Murphy points out, giving up on making any claims about the content of the law in force.[122] Can we plausibly take such a view? I will argue in what follows that we can abandon the grounds of law debate without giving up on anything that really matters. This next section defends the viability of eliminativism by responding to a number of objections. In the process, I hope to clarify what eliminativism commits us to.

[122] Murphy, *What Makes Law* 88-90.

10. Response to Objections

a. What is the Law?

Murphy's primary objection to eliminativism is the deceptively simple one that "we need a view about the grounds of law if we are to be able to figure out the content of the law in force."[123] He insists that we need to answer the grounds of law question so that we can answer concrete problems about what the law is.[124] My short answer to this objection is that I think it gets things backwards. It can't be that we need an answer, because we don't have one, and we do get by! The argument goes the other way: the fact that lawyers and citizens go through life without settling the grounds of law question should show us that having a settled answer is *not* essential.

For Murphy, this is because there is a substantial overlap between the different views. Simple, clear statutes that enact crisp rules rather than vague standards—such as speed limits—are considered law on both the positivist and the nonpositivist account of law. People will all use the term as a shorthand for that area of agreement. But the eliminativist's argument is much stronger. The eliminativist view is that we could get along fine even if the two views gave different answers to every legal question, because nothing ever turns on the question of what the content of law is. That does sound radical, but I will argue in what follows that it is defensible.

Murphy uses a number of examples to make the point about the importance of knowing the content of the law in force. Here I will focus on one—the example of same-sex marriage. "Whether the exclusion of same-sex couples from the institution of marriage in New York was in

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[123] Ibid., 77.

[124] See ibid., 14.: "anyone who is attempting to answer a question about the content of law must as an initial matter have a view about the grounds of law."; ibid., 16.: "Each of us needs to take a stance on the dispute about the grounds of law if we want to be able to offer answers to legal questions."; ibid., 77.: "The problem lies with the idea that there are simply different fundamental pictures of what law is and that these different pictures will yield different answers to particular questions about the content of law. At least initially, the natural thought is that one of these views about the very foundations of law must be right."; See generally ibid., Chapter 6.

violation of the state constitution in, say, 1995 depends upon the grounds of law."[125] Murphy argues that positivists will conclude that the sources did not determine this question and it was therefore open until it was settled by a court, in 2006, and then changed again by the legislature in 2011. Nonpositivists believe that the morally best reading of the legal materials is the true answer to what the law is, and will conclude that it was illegal to limit marriage to opposite-sex couples this whole time, regardless of the court's decision or the new enactment. Thus, on one view there was no legal answer for a time, then same-sex marriage was not allowed, and it was later permitted. On the other view, it was always unlawful to prevent same-sex couples from marrying. "Different views of the grounds of law, different conclusions about what the law is. And it does seem to matter, to New York residents at any rate, what the law about marriage in New York is."[126] Murphy concludes that we need to have a view about the grounds of law if we are to answer legal questions. "Far from nothing turning on it, it looks as though, as far as the law is concerned, everything turns on it."[127]

But this doesn't seem right. What does turn on it? In what sense will my experience be different if one view or another is right? One thing that matters is whether the officials will perform or uphold my marriage. But the answer to *that* question is the same on both accounts. Now, this might sound like legal realism. But my point is not that law *really is* just whatever the judges do. Rather, my point is that the realists reminded us that sometimes the question of what the people in power will do does matter. That is often what we care about. The predictive question of Holmes's bad man is important to those who are subject to judicial decisions.[128] But

[125] Ibid., 15.
[126] Ibid., 16.
[127] Ibid.
[128] See Holmes, *The Path of the Law* 8-9., and see Hart, *The Concept of Law* 147., making the point that prediction is often important.

that is not the only question. There are also important normative questions, as I will discuss below.

Thinking of experiential consequences we can actually point to, there seems to be nothing that turns on which view is right. The experiential evidence is the same, and all that is different is the description. So the only thing that is different is that on one view we describe what takes place as legal. But on both views, the same things happen. The upshots are the same. So, although Murphy wants to say that it matters what the law is, it seems not to matter in any practical way to people. The only sense in which it seems to matter is if we care about giving the 'correct description' of what the law demands—and that is precisely the metaphysical question I have insisted is unanswerable.

Once we have converted to the eliminativist position, Murphy argues, there is much we can do with our various theories about law, but we cannot "discuss what the law now is: any such question must be paraphrased into a moral question about what a person ought to do or a descriptive question about the state's likely responses to people's decisions."[129]

What's missing here is a recognition that these kinds of paraphrases are *already* what we are dealing with. 'Law' is, in various instances, being used as a placeholder for a particular idea. 'Law' tends to be used in a wide range of ways, and we must always take care to clarify what someone who uses it means. Some people may use 'law' as a shorthand for 'what the people in power do', and others may use it as a shorthand for the idea that we have committed ourselves, morally speaking, to certain standards of behavior and interaction. So we should always be aware that there are at least two possible questions in the vicinity: "What are the people in power likely

[129] Murphy, *What Makes Law* 90.

to do?" and "What are my moral obligations?"[130] It is not that eliminativism requires us to make convoluted paraphrases, but that it reminds us to inquire further about how a term is being used.

This is even truer in hard cases: when we ask "What's the law on possession of marijuana in Colorado?" we might be asking one of several things: "Will I be thrown in jail if I smoke this?" Or: "How is the supreme court going to come down on this issue, given the conflict between state and federal laws?" These are both forms of the predictive question. Or we might be asking: "What should the supreme court decide, in light of the institutional commitments and norms of our society?" This is a normative question.

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

These questions do have a sort of appeal. They seem like they should be answerable. But there is no special domain of the legal.[131] There are normative questions and descriptive questions. We simply have no choice but to clarify what is actually being asked. There must be an assumption in the background that indicates whether the questioner means to ask a factual (predictive) or a normative question. The only other alternative is that they are asking about what law requires, on the correct account of the boundaries of that phenomenon. Then they are asking

[130] Note the similarity to Felix Cohen's view: "Fundamentally there are only two significant questions in the field of law. One is, "How do courts actually decide cases of a given kind?" The other is, "How ought they to decide cases of a given kind?" Felix S. Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review* 35, no. 6 (1935): 824.
[131] Cite Hershovitz

the metaphysical question about whether the grounds of law include moral principles—the question I have rejected.

As I argued above, I think Raz and others are asking a metaphysical question. But others insist this is not what they are asking; Murphy says he just wants to know what the law is. If this is to be understood not as a metaphysical question, and to find a foothold in answerable territory, the options are the kinds of questions the eliminativist wants to pursue: predictive or normative questions.

b. Moral Criticism

It is claimed that to ask important normative questions about law, and to mount criticisms of it, we need a general theory of law.[132] If so, the eliminativist is in trouble. But do we really need to solve the grounds of law problem to pursue such questions? Murphy argues that in many areas of political theory we have persistent disagreement, but it is of a superficial sort—answering the question of what democracy *is* doesn't really matter.[133] Rather, we recognize that in discussions of values like democracy or the ROL, we can move forward without getting to the bottom of questions about essential nature. Instead, we can move forward by talking about related values.[134] We engage in Chalmers's "method of elimination".[135] As discussed above, this entails disambiguating different versions of the term—liberty$_1$ and liberty$_2$, for example.[136]

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[132] The point is made more explicit in Leslie Green, "The Concept of Law Revisited," *Michigan Law Review* 94, no. 6 (1996): 1717.: "The main interest in a general theory of law, I think, rests in the way that it helps us understand our institutions and, through them, our culture…What is law that people take such pride in it? Is law a good idea? How and to whom do legal institutions distribute power? Is the rule of law always desirable? Can it help achieve justice? What might we gain, or lose, by limiting the reach of law? Those are deep and urgent questions for political theory, and also for political practice. Anyone who wants answers to them will need the help of a general theory of law."

[133] Murphy, *What Makes Law* 64.

[134] Ibid., 65.

[135] Chalmers, "Verbal Disputes," 530.

[136] Ibid., 532. Recall that Chalmers calls this the 'subscript gambit'.

Chalmers suggests that this method is widely applicable to disputes of the form 'What is X?'[137]

Murphy argues that this strategy will not be successful with respect to law, but I think it can. The moral criticism aim can be fulfilled without first resolving the grounds of law question. We can say all that we want to say by starting from stipulated, shared positions from which we can engage in moral debate. We can talk about related values, and we can stipulate that for the purposes of the present discussion, we mean law to include x, y, and z.[138] The interlocutor who thinks law *really* doesn't include y can still engage in the discussion by understanding herself to be talking about the moral value of *that social practice that includes x, y, and z*, even if she would not accept that that social practice is coextensive with law.

c. Expressive Significance

In the realm of criminal law, Murphy finds the eliminativist position particularly implausible, arguing that it is absurd to suggest that there are no crimes, but only good or bad decisions and predictions with respect to the criminal justice system. "There is, at the very least, an expressive significance to the criminal law that this redescription cannot capture."[139] He provides an example of a statute criminalizing sex between consenting adult males, which is on the books though it is explicitly stated that it will not be proactively enforced. Murphy asks, "Does that mean that gay men in Singapore have nothing to complain about until the government

[137] Ibid., 534. Indeed, he includes "What is law" as one of his examples. Ibid., 531.
[138] And the stipulation need not be arbitrary; many people agree that there are a great deal of institutions and norms that we pre-theoretically identify as legal, and there is no reason why our stipulation can't track these, in order to make it more theoretically useful. See Hart, *The Concept of Law* 3., talking about what the ordinary educated man knows about law: he would identify features such as "(i) rules forbidding or enjoining certain types of behaviour under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones." See also Dworkin, *Law's Empire* 91., on preinterpretive data.
[139] Murphy, *What Makes Law* 90.

changes its mind and starts prosecuting gay men for having sex?"[140]

It seems obvious that they do have something to complain about, but it is much less obvious why we need an answer to the grounds of law question to see that. Why can't we think that a person has just as strong and valid a complaint against the government for expressing such things, whether or not they count as 'law' properly understood? The citizen has a further complaint against the government in this situation on rule of law grounds, because the government is acting inconsistently with expectations it has generated, undermining predictability for the citizen. But again, we don't need a theory of the grounds of law to object to this. We can simply say that the rule of law demands that government action be congruent with its declared intentions, which we understand by looking at statutes and prior decisions, without taking sides on whether what's being done is properly called law.

d. The Internal Point of View

A further objection is that law plays an important role in many people's lives. People treat the law as valid—they accept it, or in Hart's terms, they take the internal point of view.[141] In that case, they adopt a standing policy to follow *the law*, not an attitude of case-by-case assessment of the costs and benefits of compliance. But the eliminativist has to give up on the idea of acceptance of the law. To allow that a person can take the internal point of view and accept the law makes no sense; the eliminativist cannot say that this could be helpful to them, since it is a charade. I think this is right: we can't say that people *should* go on taking a confused attitude, and for the eliminativist there is no law to accept, so a legally-committed point of view is nonsensical.

But people do seem to take an attitude of acceptance towards 'the law'. What is it they

[140] Ibid., 90-91.
[141] Ibid., 91.

are doing when they do this?[142] Again, we have to make the claim sensible. The attitude of acceptance adopted must either be an attitude of commitment to doing what those in charge see as required, which will look something like the Holmesian view. Or it must be an attitude of commitment to doing what is morally required by our institutions.

Remember that eliminativism does not entail denying that we have practices and institutions, which people have sometimes called 'legal'. We can talk about the phenomena that occur: statutes are enacted, judges make decisions. None of this disappears. The committed citizen can be understood as doing her best to make sense of this set of institutional structures that we have, and she does that by a complex mix of interpretation of our practices, conformity to community standards, and prediction of official behavior. This need not devolve into case-by-case reasoning about each action. Rather, it is an attitude of acceptance, but acceptance of what is morally demanded by our practices. So again, we seem not to need to resolve the grounds of law problem.

e. Law and Adjudication Must be Distinguished

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

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

'adjudicatory view of law'.[143] This substitution would obscure something important: the ability "to say, for example, that while I accept the law as it is, I believe that the courts ought to overrule the relevant precedent or invalidate what has until now been valid legislation."[144] Positivists regard it as a virtue of their view that it highlights judicial lawmaking.[145]

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

It makes no difference whether we say we are exposing a judicial power to make law or a judicial power to declare law in a context where it was previously uncertain what the law was. A citizen, acting as an advocate for a particular cause, might want to make the point that a judge has the power to change the law. But what she's saying can be rephrased as the claim that the judge has the power to *determine the outcome of the case*. At the end of the day, it's the judge's view that is backed by the power of the state, whether or not the positivist is right that the judge *really* made new law. This power that judges wield is important to recognize, under either description.

When an eliminativist wants to make this sort of claim, they can say something like 'I think the judge should deviate from the standard practice of enforcing statutes and should not

[143] The adjudicatory view of law is the view that "all normative considerations that judges are authorized to take into account when deciding a case are necessarily part of the existing law." Murphy, *What Makes Law* 9.
[144] Ibid., 93.
[145] Ibid.

apply this one, because of its moral failings.' But the question is always a moral one: the question of whether the statute is 'really law' doesn't tell us anything about the important moral question of whether and why judges should decide cases in line with statutes or prior decisions. If we think they should decide the way the statute points, we need a moral argument for that, just as we need a moral argument for deviating from what it demands.[146]

Of course, people will not stop using the word law. So even if someone does choose to use the term law, for rhetorical purposes, or simply because they have learned to use language this way and haven't thought about whether it tracks some deeper truth, we have to understand them as using it with a particular meaning. We can interpret the claim as something like: "The judge has the power to determine outcomes. The citizen lacks the power to do this." This is true whether he is "really" legislating or "really" applying law, properly understood.

f. Executive Branch

The next objection is about "how nonjudicial branches of government should approach the matter of determining the content of the law that applies to them."[147] On the eliminativist view, Murphy says, they would have to approach all their decisions about law as though they were adjudicating disputes, even on nonjusticiable matters. Here, and in the case of legislatures as well, "eliminativism would make it impossible to discuss what appear at first glance to be significant political/legal questions."[148]

But it's not clear to me what would be unable to be discussed. Again, it is important to remember that we currently don't have anything close to a settled view on whether positivism or nonpositivism is right about the nature of law, and yet the executive branch carries on making

[146] These moral reasons for keeping faith with the past will be ROL reasons.
[147] Murphy, *What Makes Law* 95.
[148] Ibid., 98.

assessments about the law that applies to them. So what is it that they are doing? Executive officials can make an assessment of what is required of them without imagining themselves as judges. They can make a thoughtful interpretation of what this whole system of rules, norms and principles demands of them, in their institutional role. To do this they need not answer the question of whether the moral principles they appeal to are really part of the law or just additional considerations. They only need to engage in moral assessment of what they ought to do. Of course, they can also make terrible interpretations, morally speaking, as when they determine that torture is permissible. But either way it is a moral assessment, in the sense of being a question of what ought to be done.

Whereas citizens can sometimes adopt something more like a predictive approach, government officials are almost unavoidably engaged in moral assessment.[149] This might seem crazy, if we think about a low-level official with minimal discretionary power: even when doing their job well, it doesn't seem like they engage in moral decision-making, but rather that they adopt an attitude of obedience. But we have to see that as one sort of moral choice: given their role, they weigh obedience to authority very heavily, such that it will never or rarely be outweighed by other moral factors. Maybe this is the wrong assessment. But the only real question is the moral one.

The idea that officials should 'apply the law' is widespread. So it might seem natural to say that the president should do what the law requires. But this on its own tells us nothing: as I've been arguing, we don't have a settled view of what the law requires, so we must look behind the platitude that officials should apply the law and ask what it means. We will find that it is a normative demand, requiring normative engagement by officials. It often has something to do

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

with predictability, and the idea that officials are bound by the clear enactments of a democratic legislature. But even that is for a normative reason: because we think it matters that we respect the democratic will, or because we think complying with clear statutory demands makes life more clear and predictable for citizens. So, digging deeper than the 'apply the law' idea, the demands we place on our officials and our executive actors are thoroughly normative, and furthermore, do not require them to have an answer to 'what the law is'. They must instead have a view on what ought to be done, in light of the existence of statutes, social norms, customs of executive action, and so on.[150]

g. Legislative Branch

Lawmakers also pose a problem according to Murphy: "Lawmakers do not think that they are creating legal materials that will have varying practical significance for people depending on their institutional role."[151] They think they are making law. It seems that eliminativism should be able to explain this straightforward idea about what lawmakers are doing.

When lawmakers believe they are making law, what is the content of that belief? One lawmaker votes to enact a statute with a moral term in it, and thinks, along Razian lines, that he has just enacted a statute with a gap that the judges will have a legal obligation to fill using moral reasoning, and that that moral reasoning will be dispositive of the issue as far as citizens are concerned. Another lawmaker votes to enact that same statute, but holds the view that he has enacted a statute which *includes* a moral term, and has thereby turned the moral demand a legal

[150] Even if a governmental official did have a view on the grounds of law, this would make no difference: they would *still* need a further account of why it matters in any way that a particular act would conform to law. There needs to be a moral argument for why they, as an official, ought to take acts if and only if those acts conform to the law, properly understood.
[151] Murphy, *What Makes Law* 109.

demand. He recognizes, however, that there is disagreement about what that term means, and that judges will have the power to interpret that term—that their view will ultimately be determinative of what happens. There is no difference between these positions. The question of which captures the 'reality' of the situation is spurious, because we couldn't decide between them on the basis of consequences: their consequences are identical. The eliminativist view is that, given that these positions have identical upshots, there can be nothing at stake here, and we should therefore discard the question. We do not discard the question of what judges should do, or whether legislating so that judicial interpretation (whether it is called lawmaking or lawfinding) will be necessary is a good or bad thing. These are normative questions that can be answered. But nothing turns on the question of what law is.

h. Eliminativism is Artificial

Murphy argues that the various rephrasings required by eliminativism are too much of a stretch. The picture we have to adopt is "implausibly artificial."[152] I tried to show above that the idea that we are searching for the true nature of law, and that it is accessible via our intuitions, is problematic. Once we really think about what accounts of the nature of law are claiming, that sort of picture starts to seem rather artificial as well, especially given the fact that the 'true nature' of law might depart from our experience of it, and may require revising things we thought we knew about law. In other words, all theories can be distorting and artificial in certain respects, and positivism and nonpositivism do not do so well in this respect. So this should not impugn eliminativism specifically.

But the more direct response is this: I do not think that eliminativism is as strange as it might seem. The eliminativist is saying: set aside questions of the nature of law. What matters is

[152] Ibid., 99.

that we can talk about how decisions are typically made in our community, and how we think they morally ought to be made. We can talk about traits of our governance systems, what officials are likely to do, or about normative ideals associated with our institutions—topics that are in principle answerable. This, it seems to me, is not artificial at all: it is a way of bringing our talk about law back down to a realm where it might actually be accessible to human inquiry. All of a sudden it is not the eliminativist who sounds so crazy, but the theorist making claims about the 'true nature' of law.

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

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

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

Recall the discussion above, about the method of elimination. Murphy argues that with democracy and other values, we can move forward by using Chalmers' method of elimination, and we can carry on without settling what democracy really is, by talking about related ideals.[153] We can, in short, drop talk of democracy.

[153] Ibid., 63-69.

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

If *this* is the sort of discussion we are having about democracy, I would be happy to say that it is spurious. It does not matter whether democracy *really is* about equal voting, whatever other evidence we might face.[154] We can be eliminativists about this dispute. What we do instead is disambiguate meanings for democracy, and move on to normative discussions about the value of democracy, about what it means to give substance to the ideal of giving every person one vote, and whether the Senate violates that ideal. But we cannot have a discussion about what democracy really is.[155]

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[154] See Dworkin's discussion of archimedean approaches to political values such as democracy, in Dworkin, "Hart's Postscript and the Point of Political Philosophy," 146-47. He argues against the idea of defining it neutrally first, as 'majority rule', or whatever, in a way that leaves open the substantive questions about whether it is a desirable value. He doesn't talk in terms of eliminativism, but this is the same idea: we need not talk about what it *is*. All the important discussion happens on the normative terrain.

[155] Waldron worries that eliminativism might cause us to lose our grip on other concepts that operate in connection with what is eliminated. He criticizes Felix Cohen's eliminativism about certain legal concepts: see: Jeremy Waldron, ""Transcendental Nonsense" and System in the Law," *Columbia Law Review* 100, no. 1 (2000)., critiquing Cohen, "Transcendental Nonsense and the Functional Approach." Waldron's concern is that eliminativism about

So we may end up being eliminativists about quite a number of things, not just law. This is not as radical as it might seem. As I've tried to show, we can often substitute a different, answerable question for the spurious one about what some thing—etiquette, for example, or money, or a hospital—really is.[156]

11. Conclusion

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

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various legal concepts, as proposed by Cohen, could be problematic if those ideas are operating as a nexus in a web of disputes. If we 'eliminate' one of these concepts, we may lose the sense of its relationship with others. Technical vocabulary does serve an important purpose, he argues, especially in a system that tries to manage disagreement within a society. These terms have to stand in and play a role in stabilizing expectations in that system. This is an important critique, and I do not disagree that words often play important functions, and that systematicity is important. But the issue is what is being eliminated. I do not argue for the elimination of all technical vocabulary, and for what it's worth, I do not think this is what Cohen argues for either. He claims that we must abandon the *metaphysical interpretations* of these terms, which serve only to obscure things. I agree with Waldron that there are times when Cohen implies unnecessarily that all this metaphysics is just trickery by judges. Waldron, ""Transcendental Nonsense" and System in the Law," 29. But we need not go that far to see that Cohen's point that metaphysical questions such as 'Where is a corporation *really* located?' is a dead end, even if judges engage with it earnestly. In the case of law, or democracy, I think all the important connections within our web of concepts can remain: as I've argued, we can make normative arguments about what a judge should do, and how a case should be settled, and we reframe them in ways that are more accessible. We don't lose the ability to talk about the importance of voting, or the right to have a say, or any of the important moral values at stake.

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

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