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Law as an Interactive Kind:
On the Concept and the Nature of Law

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1. Introduction

The relationship between law and the concept we have of it is an enduring topic of interest among legal philosophers. Can conceptual analysis teach us anything about law's nature? Does a better understanding of law constitute an elucidation of the concept of law? In answering such questions, philosophers often draw on general theories of meaning and mental content and apply them to the special case of law. According to the logic of such arguments, how we understand meaning and the way it relates to the extension of concepts in general can clarify the particular way in which the concept of law relates to *its* extension: the phenomenon of law. The impact of this line of thought on methodology in legal philosophy is evident, for example, in the influential work of Joseph Raz. Based on a particular understanding of meaning—semantic externalism—Raz arrives at controversial methodological conclusions about conceptual analysis and its ability to teach us things about the nature of law, that is, about the essential characteristics that law *actually* possesses.[1] Some of the main criticisms of Raz's work also center on this point, disputing the applicability of Raz's externalist insights to the case of law.[2]

What is neglected in such accounts and debates is the way in which the concept of law and the phenomenon of law interact with each other *beyond* reference, that is, beyond what any theory of meaning can tell us. Although it seems commonplace to acknowledge that law is the sort of thing that is socially constructed and is therefore sensitive to the concept people have of it, this insight has not made its mark on methodological debates in this field. The main claim of the present article is that, beyond mere reference, the concept and the phenomenon of law causally affect each other in a way that must inform our methodology in legal philosophy.

Drawing on theories of social construction and interactive kinds, this article identifies a relationship between changes to the phenomenon of law and changes in our concept of law. It argues that the way we classify and think about law causally affects what law ends up being (and vice versa). Acknowledging this causal relationship, which is characteristic of what are sometimes called 'interactive kinds', is relevant to our methodological debates in legal philosophy. It

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1. See, for example, Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison" (1998) 4:03 Legal Theory 249.
2. See, in particular, Andrei Marmor, *Interpretation and Legal Theory*, 2nd ed (Hart, 2005) at 71-78.

means that there is virtue in pursuing inquiries into both the concept of law and the nature of law, while acknowledging that the two projects are distinct and that each bears only indirectly on the other's conclusions. In this respect, this article responds to Raz and others who have tried to blur the line between inquiries into the concept of law and inquiries into law's nature. Contra Raz, I argue that this blurring fails to take into account the potential disparity between conceptual content and the extension of a concept.

This article is also an answer to some of the main critics of Raz, including Brian Leiter and Andrei Marmor, who are doubtful about the viability of any rigorous inquiry into the concept of law. Leiter, aiming to salvage legal philosophy from "intuition mongering and armchair sociology", suggests that we should eschew conceptual analysis altogether. Instead, he argues, we should endeavor to elucidate not the "real" concept of law, but rather the concept most useful for our understanding of law and legal institutions as we find them.[3] Marmor's conclusion is similar to Leiter's, although he arrives at it in a different way.[4] Marmor offers a reinterpretation of key positions in analytical legal philosophy to show that they are not instances of conceptual analysis at all. He claims that key thinkers in the tradition of legal positivism, including HLA Hart and Raz, are best understood as engaged in a project committed to the description of law in terms of social facts. Continuing in this tradition, Marmor argues for the primacy of a philosophical project "about the nature of things—that is, about the actual properties of objects or phenomena", not about concepts.

Contrary to these positions, this article defends the philosophical interest in the concept of law—not because this interest can reveal truths about the actual phenomenon of law, but because the concept of law interacts in a causal way with this phenomenon, shaping (although not necessarily mirroring) what law is. Addressing the concerns of Leiter, Marmor and others, I show how treating the concept of law as an independent object of philosophical inquiry can assuage methodological concerns stemming from conceptual plurality, as well as present a new set of questions for legal philosophers to answer.

My argument proceeds in three stages. First, I explain the causal role played by concepts in processes of social construction and use this explanation to address the special case of law. I then compare my conclusions to those drawn by Raz and others, who employ an externalist theory of meaning and mental content for understanding the relations between law and its concept. Lastly, I demonstrate the advantages of the current approach in answering some contemporary methodological difficulties stemming from conceptual plurality or uncertainty, and in opening new avenues for research in legal philosophy.

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3. Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007) at 132-35. Leiter's work builds here, in part, on earlier work by Stephen Perry, acknowledging that evident disagreement regarding the essential features of law and its function pose a problem for conceptual analysis.

4. Andrei Marmor, "Farewell to Conceptual Analysis (in Jurisprudence)" in Wil Waluchow & Stefan Sciaraffa, eds, *Philosophical Foundations of the Nature Law* (Oxford University Press, 2013) 209.

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2. Concept, thing and interaction

A starting point: Law is not a natural kind

I want to start by making clear what sort of thing we should take law to be, and use that as a basis for discussing the relation between law and the concept we have of it.

Today, there is little disagreement on the fact that law is the product of a contingent human classification, and is not what is sometimes referred to as "a natural kind". This has not always been the case. Classical natural law theory understood law as a natural part of a divinely ordained world. What law is in general and what positive law is in particular were not seen as a contingent matter that depended on people's perceptions or behavior.[5] Although the detailed content of positive law can change between jurisdictions and over time, classical natural law theory suggested that law *as a phenomenon* is part of the basic architecture of the world—something with a hidden natural structure that can be investigated and discovered much like the natural structure of trees or bees or the human body.

Some contemporary philosophers, both within and outside the natural law tradition, still exhibit attachment to this pre-modern theology, assuming affinity between law and natural kinds. If one is a moral realist who believes that moral facts are independent from human beliefs, and if one believes that law has some inherent and necessary connection to morality, then one may conclude that at least some (morally valuable) features of law are fixed in its very nature in the same way that certain molecular features are part of the nature of water wherever we find it. Ronald Dworkin comes very close to making this argument in at least one piece, although this attitude is uncharacteristic of his general methodology.[6]

I am unsure whether the claim that law is a natural kind can be demonstrably refuted. It is perhaps possible that there is a natural truth of the matter regarding all law—that is, regarding the sum of legal rules, standards and principles that pertain to human polities at all times and at all places—regardless of anything people believe or do in any particular society (or, potentially, in all actual societies). This position cannot be refuted because it is unfalsifiable in principle. Any instance or evidence that we might give to refute it would simply be dismissed as "not law" or "not law properly so called". Empirical, secular understandings of human societies lead down a different path. The view opposite to the traditional natural law position is the constructivist view. It is the view shared by most theorists today. According to constructivists, law is the product of social construction, and should be investigated as such. The tradition of Anglo-American legal

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5. Aside from relating positive law to God's eternal law, natural law theory also claims that human law has a particular form—and, at least in part, a particular content too that is natural and universal. E.g., Thomas Aquinas, *Summa Theologiæ* 1a2ae Q. 91.3 ("Are There Human Laws?").

6. See Ronald Dworkin, "Hart's Postscript and the Character of Political Philosophy" (2004) 24:1 OJLS 1. For a compelling criticism see Dennis M Patterson, "Dworkin on the Semantics of Legal and Political Concepts" (2006) 26:3 OJLS 545.

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philosophy that continues and reacts to H.L.A. Hart's work has been committed to this view.[7] Although philosophers in this tradition sometimes speak of 'necessity' and 'essential features' of law, they are all committed to the theorization of law as they find it in our culture and social arrangements, and refrain from treating it as a natural kind in the aforementioned sense.

Social construction and interactive kinds

The fact that law is a social construct is at the root of much of the philosophical conundrum surrounding it. John Searle, echoing (without acknowledging) Max Weber, Hans Kelsen and others, explains social construction in terms of a collective imposition of function on brute facts.[8] This means that when we come to investigate socially constructed phenomena such as law in terms of brute (or prelinguistic) facts, there seems to be nothing there.[9] Of course, there is ink printed in the statute book, voices coming out of judges' mouths, and a myriad of beliefs and statements and patterns of human behavior, but none of these (nor their conjunction) is *law*.[10] Law is a status imposed on these and other facts, which exists socially and is irreducible to them.

For my purposes here, understanding law as a social construct highlights the importance of people's beliefs regarding what law is, suggesting a particular relationship between the concept of law and its nature. This does not mean, of course, that law is whatever people believe it to be, or that a decision to think about law in a certain way would make it into what we choose to think it is.[11] For example, the fact that people in archaic Rome thought that law (*ius*) was discovered through divination did not make it so (not even according to constructivists). We can say today with relative certainty that law could not have been the product of actual divination because communication with Roman divinities is and always has been impossible, and was premised on false

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7. See, for example, HLA Hart, *The Concept of Law*, 2nd ed (Oxford University Press, 1994) at ch 3; Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) at 14-15; Joseph Raz, "Can There Be a Theory of Law?" in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* Oxford University Press, 2009) 17. See also Leslie Green, "The Concept of Law Revisited" (1996) 94:6 Mich Law Rev 1687.

8. See generally John R Searle, *The Construction of Social Reality* (Free Press, 1995). *Cf* Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, translated by Ephraim Fischoff et al, Guenther Roth & Claus Wittich, eds (University of California Press, 1968) at 4-24. *Cf* Hans Kelsen, *Pure Theory of Law*, translated by Max Knight (University of California Press, 1967) at 4-15; Hart, *supra* note 7 at 82-91.

9. Searle, *supra* note 8 at 68.

10. The term 'law' is notoriously ambiguous, potentially referring to distinct social, institutional and normative phenomena. As indicated in the text above, this article uses the term 'law' as referring to a normative phenomenon, that is, to the sum of rules, principles etc., that comprise the body of legally valid norms.

11. This insight has been lucidly articulated by Peter L Berger & Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor Books, 1967) at 128. For a different view, see Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson" (2005) 25:3 OJLS 493. The language of 'design' and 'purpose' that permeates Searle's account may well be at the bottom of this confusion. See, e.g., Searle, *supra* note 8 at 56.

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assumptions regarding the composition of the world. It is clear that the beliefs regarding law prevalent in Roman society of the fourth century BCE, although suitable to people's practices and institutions, cannot be taken as a possible answer to the question, "what was law at that time and place?" Law as a social construction is a collectively imposed function—but it is not necessarily what people believe it to be.[12]

"Social Construction" has become a bit of a buzz-word in social (and legal) theory. However, not everybody finds it philosophically illuminating or helpful. Ian Hacking, for example, warns against the vagueness of this label and the way in which it obfuscates what is actually going on.[13] Hacking's work highlights two important elements that are obscured by the general theory of social construction. The first element is that ideas and beliefs are not only part of the input that changes social facts but are also changed by and sensitive to changes in the social reality that gives rise to them. This insight goes beyond the trivial. Clearly, all ideas are the product of human activity. Without people there would be no language and no mental content, and therefore, there would be no ideas either. This includes, of course, the ideas we have about law. Still, to claim that the ideas we have of law are socially determined implies more. It implies that the reason for us having one particular understanding of law and not another is not determined only by the nature of the thing we classify and characterize (law as an object in the world) and our social-independent cognition of this thing; rather, it is our social circumstances—our societal values, beliefs, relations etc.—that ultimately determine the way in which we understand law.

Hacking deliberately avoids a discussion of the term 'concept' in his work. He usually talks about 'classifications' and 'ideas' and when he does use the word 'concept' he seems to do so in a non-technical sense. However, his work is very relevant to our understanding of the concept of law. Clearly, the meaning of the term 'law' in certain contexts and the mental content associated with this term are sensitive not only to things as they are in the world, and do not only affect processes of social construction, but are also themselves socially determined. This concept, like all concepts, does not mirror perfectly the phenomenon it relates to. It is set in culture and represented in language, and if our social, cultural and linguistic settings had been different, our concept of law would have been different as well.

The second insight that Hacking offers which is relevant to our discussion concerns the causal interaction between concepts and things. While the concept and phenomenon of law do not mirror each other, they are nevertheless related to each other. The particular causal way in which they relate to each other is typical to the way concepts and phenomena relate to each other in *interactive kinds*. The term was coined by Hacking, who explained it in the following way:

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12. Searle, *supra* note 8 at 36 (on the primacy of social acts over social facts). Hart also saw law as constituted by contingent human activity that has its own distinctive history and rationale. For an insightful account, see Green, *supra* note 7 at 1689-97.

13. Ian Hacking, *The Social Construction of What?* (Harvard University Press, 1999).

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> "Interactive" is a new concept that applies … to the kinds that influence what is classified. And because kinds can interact with what is classified, the classification may be modified or replaced.[14]

Law seems to exhibit such interactivity since there is a mutual causation between the constitution of the *phenomenon* of law and the constitution of the *concept* of law. On the one hand, our practices of reference to law, which are constitutive of the phenomenon of law, are dependent on our concept of law. Our concept of law affects our law-related practices, determining the way we identify law and the way we ascertain its content; and since law is not a natural kind whose nature is indifferent to our social activity, this changes what it actually is. On the other hand, our concept of law is shaped in light of our law-related practices and in reaction to the law we actually have. Law exhibits what Hacking calls a "looping effect".

My use of the notion of "interactivity" goes beyond Hacking's. Hacking's work focuses on kinds of people (e.g., split personalities, homosexuals, the working poor, geniuses), who can change their characteristics by virtue of their awareness to their changing classification.[15] This focus reflects his philosophical agenda as well as his interest in mechanisms of normalization, naturalization and identity-creation. Hacking, in this regard, is critical of the terminology of social construction and its excessive use, and to a large extent offers the terminology of interactive kinds to replace the misleading implications of social construction. Still, when it comes to institutional facts of the sort that we discuss when we discuss law, facts that Hacking himself accepts are part of our social reality, his major insight is illuminating. More specifically, in the case of law Hacking's "looping effect" captures something important about the relations between law and the concept we have of it, and about the way these relations should be understood as mediated by human awareness and behavioral change.[16]

We can retain the basic constructivist insight that the phenomenon of law is constituted by the multiple ways people use law and relate to it (the functions they impose on tokens of law). People's attitudes and behavior depend, in this regard, on the concept of law they have. In this way, erroneous beliefs regarding law can shape what the phenomenon of law really is. To go back to the illustration we started with, we can say that the phenomenon of law in fourth century BCE Rome was in fact premised on beliefs in divination and discovery. While the beliefs were false, they were very much *really* held by people. Or consider another example, concerning one of the main controversies that preoccupied twentieth-century legal philosophy. Imagine a society in which everyone's interactions with law—in its making, interpretation, application, self-application, etc.—are informed by the notion that the content of law cannot be grossly immoral. So much so, that this core belief pervades the concept they have of law.

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14. *Ibid* at 103.

15. For a discussion of the applicability of the term to non-human kinds see Muhammad Ali Khalidi, "Interactive Kinds" (2010) 61 British J Phil Sci 335.

16. This aspect is under-explored in Searle's theory, but compare to his discussion of the self-referentiality of social concepts at Searle, *supra* note 8 at 32-34.

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Focusing on interaction and a looping effect between concept and thing, we note that having this concept shapes the sort of phenomenon that law is—the sort of function that is imposed on certain utterances that are considered to be law. So, although we should not conclude that law is in fact confined to having only morally permissible content by virtue of the concept they share, it still seems that any proper theory of what law is in this community would have to take into account this interplay between concept and phenomenon.

Concepts, even when failing as our best description of what is actually going on, inform a reality of social practices and behaviors. Law is constituted by the many ways in which people relate to it, refer to it, and invoke it in actual circumstances. This means that what the phenomenon of law *truly is* depends on the beliefs people actually hold, although it might be different from what these beliefs claim it is.[17] The relationship, it is important to remember, goes both ways, as changes in the way people relate to law and changes in the phenomenon of law are reflected in our concept of law as well. We respond to the reality of law both in our everyday cognitive efforts and in our theoretical discourse. These responses are part of the circumstances that create and maintain the concept of law. They constitute a foundational connection between law and its concept that is not based on the structure of thought or language, but is causal in nature.

I do not take any of this to be controversial. Nothing I have said so far falls outside the core constructivist view which is shared by most legal theorists. What I sought to emphasize here is only the role *concepts* play in this accepted framework. As we shall soon see, one of the main methodological implications of this way of seeing things is that the concept of law and the phenomenon of law should be investigated separately. Later in the paper I will show that if we are interested in the role played by conceptual content in processes of social construction, we need an account of the actual concept of law that we have—not an embellished, corrected improvement on that concept. Equally, I will argue that there is no methodological justification for making rigorous inquiries into the phenomenon of law subservient to our investigation of the concept of law.

However, before doing that, we must consider a different way of understanding the relation between concept and thing in the case of law. For many legal philosophers, what defines these relations is the fact that concepts refer to things and the special relations this reference constitutes between conceptual content and things in the world. The following section takes up these positions and discusses the way the constructivist insight elaborated so far sits with externalist theories of conceptual content—theories that underpin most of the present inquiries into the concept of law.

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17. Raz suggests that the reason for the disjunction lies in the fallibility of our cognitive abilities. See Raz, *supra* note 7. This is inaccurate. Although mistake is possible (and prevalent), the fundamental failure has to do with the social-dependence and partiality of our cognitive abilities. Our common understanding of law is shaped under different constraints than our scientific or otherwise rigorous account of this phenomenon. When Raz speaks of mistake, he is actually referring to a gap between these two discourses.

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3. Interactivity and externalism

The meaning of the meaning of 'law'

Interactivity between law and the concept we have of it assumes a strong distinction between the content of concepts and the things they refer to in the world. It must be possible for the content of the concept of law to be different from its extension, or otherwise it will be meaningless to talk about an interaction between the two. This strong distinction, however, might seem to go against the grain of externalist views regarding the relations between the content of concepts (or the meaning of terms) and their extensions.

The *locus classicus* here is Hilary Putnam's *The Meaning of Meaning*.[18] Putnam explains that there are two ways in which the meaning of at least some terms (including all natural kind terms) is external to the individual speaker's intentions and beliefs.[19] First, he shows that certain terms have an indexical component to their meaning. He argues that the extension of such a term—that is, the set of things referred to by the term—should be understood as part of the term's meaning. When we talk about water, for example, we are talking about the actual substance in our world that we normally refer to as water, not about whatever is captured by our current beliefs about water. The descriptive beliefs we have about water may turn out to be false or inaccurate, but the meaning of the term 'water' would remain the liquid that was fixed by our initial reference employing the term, along with substances that retain a certain relation of sameness to the paradigmatic sample.[20]

Putnam identifies another way in which the meaning of terms is not determined by the individual speaker's beliefs, due to the social nature of language. Putnam explains that at least part of the meaning of words can only be articulated by a certain group of experts. For example, I might use the word 'gold' without knowing how to distinguish gold from other yellow metals, or without knowing its molecular composition. However, my use of the term depends on the existence of experts in my linguistic community who would be able to determine the set of things that can be properly called 'gold'.[21]

This second, social externalist insight is independent of the first, indexical one. It also applies broadly—not only to some kinds. In his work on mental content, Tyler Burge shows that changes to societal conceptions affect the content of concepts, even when both the thing initially designated and individual beliefs remain constant.[22] This type of externalism is beyond our immediate concern

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18. Hilary Putnam, "The Meaning of Meaning" in *Philosophical Papers* (Cambridge, 1975) 215.
19. Putnam's insight applies to all natural kinds, but is not limited only to them. See *infra* note 24.
20. Putnam concludes that when we offer an account of the meaning of a term, we should therefore offer "… a finite sequence, or 'vector', whose components should certainly include … (1) the syntactic markers that apply to the word, e.g. 'noun'; (2) the semantic markers that apply to the word, e.g. 'animal', 'period of time'; (3) a description of the additional features of the stereotype, if any; (4) a description of the extension." Putnam, *supra* note 18 at 269.
21. Putnam calls this the 'division of linguistic labor'. *Ibid* at 227-29.
22. Tyler Burge, "Individualism and the Mental" (1974) 4 Midwest Studies in Philosophy 73.

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here, since social externalism is not in tension with the claim that there is an interactive relationship between law and its concept. In fact, something akin to such social externalism is assumed by constructivism, which depends on meaning and beliefs being shared within societies. In any case, the fact that conceptual content is not determined at the individual level does not bear on its potential causal interaction with its extension.

The same cannot be said, however, for indexical externalism, which seems to present a challenge to the notion of interactivity. Like the theory of interactive kinds, externalism tries to tell us something about the relations between concept and thing. However, while interactivity depends on divergence between conceptual content and extension, indexical externalism seems to blur this distinction.

The present section of the paper makes two points regarding externalism and interactivity in the case of law. The first point is that the insight about the interaction between concept and thing is not captured by the externalist one—although it is compatible with it. I show this by discussing the work of Jules Coleman and Ori Simchen, which applies Putnam's theory to the investigation of the term 'law'. The second point I want to make is that externalism and interactivity are incompatible only according to an unwarranted, exaggerated interpretation of the externalist insight. To illustrate this point, I turn to the work of Joseph Raz, identify the externalist underpinnings of Raz's methodology and explain where it goes wrong. In the end of the section I show how understanding the various relations between law and the concept we have of it can give the philosophical investigation of the concept of law a new lease on life.

Extension-fixing is not the same as social construction

As noted above, Putnam's work focused mainly on natural kinds. However, Coleman and Simchen rightly explain that there is no reason in principle to deny that the meaning of 'law' is indexically controlled in the way Putnam suggests.[23] They therefore accept that part of the meaning of law is determined by the paradigmatic sample referred to by the term and the relations of sameness between this sample and other potential members of the extension. However, they argue that in the case of law—unlike the case of natural kinds—we do not defer to experts to tell us what constitutes this sameness. Instead, they claim, the extension of the term 'law' is determined by the beliefs of the "average speaker" regarding the relations of sameness between potential instances of law and paradigmatic samples.[24] They distinguish in this regard between extension-fixing beliefs and non-extension-fixing beliefs about law. Extension-fixing beliefs are beliefs about law that influence "the rapport"[25] or "the interaction"[26] or "the

23. Jules L Coleman & Ori Simchen, "Law" (2003) 9:1 Legal Theory 1.
24. *Ibid* at 30. As an aside to my main criticism of Coleman and Simchen's work, as detailed below, I am also skeptical about the decisive role they assign to the "average speaker". If anything, the use of the term 'law' seems a classic case of division of linguistic labour, in which a professional caste is deferred to for determining the extension of the term.
25. *Ibid* at 35.
26. *Ibid*.

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transactions"[27] of ordinary speakers and law. Non-extension-fixing beliefs are beliefs that do not.

Coleman and Simchen's notion of 'extension-fixing beliefs' is an attempt to get at something close to the idea of interactivity, but to do so solely within the framework of a theory of meaning. However, this attempt fails to capture the causal relationship between concept and thing that is explained by the theory of interactive kinds. Coleman and Simchen explain well how the determination of relations of relevant sameness between the paradigmatic sample of law and other potential members of the extension 'law' depends on beliefs. However, they overlook the role played by concepts and beliefs in the social construction of law, that is, in the constitution of the paradigmatic sample itself. This construction is not a matter of extension-fixing beliefs, but a consequence of the causal relations between the concept and the phenomenon of law. I explain this point in greater detail in what follows.

It is not completely clear what Coleman and Simchen take "the paradigmatic sample of law" to be. At times it seems that it is something like the law of the United States, which may or may not have relations of sameness to, say, the socio-political arrangements of a secluded tribe in the Amazon; at other times it seems the paradigmatic sample is taken to be something like a set of statutes and precedents that may or may not have relations of sameness to, say, resolutions adopted by the United Nations Security Council.

We can note the ambiguity without resolving it, because both variants suffer from the same problem. At least some of the changes in beliefs that Coleman and Simchen are rightly sensitive to are not really about the relations of sameness to any clear paradigmatic sample. Rather, they are changes in the beliefs regarding what the paradigmatic sample *is*. So, for example, people used to think that "the reason of the statute is the soul of the statute" and that God's precepts are part of the valid law of Spain. These might be seen as beliefs that fix the extension of 'law', but they do not do so by means of arbitrating relations of sameness between a paradigmatic case and new cases. At least part of what Coleman and Simchen are talking about—the part in which law (the thing) is sensitive to the beliefs-based human interaction with it—is not really extension-fixing but a change in the social construction of law. To use Searle's terms, it is about the imposition of function on brute facts which constitutes paradigmatic cases of law.

Consider the following analogy, inspired by Muhammad Khalidi's work on non-human interactive kinds.[28] Humans have so far been very active in genetically engineering all sorts of (up until recently) natural kinds. Let's assume that lemons have been genetically modified as well, and that the average lemon that we have today in Europe, North America and other affluent parts of the world is bigger, juicier, and shinier than the average lemon a thousand years ago. Let's assume that this process of genetic engineering continues for another five hundred years, to the point that after a long and gradual process of change lemons have little to no genetic or exterior resemblance to the original medieval lemon.

27. *Ibid* at 30.
28. Khalidi, *supra* note 15.

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I think that it would be highly misleading to say that the extension of 'lemon' has changed and is now (that is, in the future) fixed differently. A better way of describing the change that occurred is to point to the change of the actual thing—the lemon—over time.

In the case of law, the object picked up by the concept is not a set of words printed on paper or a set of statements made by people. These are only "brute facts." They are not the socially constructed object that is law. As we have seen, the socially constructed reference of the concept 'law' is changing based on people's actions and orientation in their dealing with law; but it is misleading to describe this change as a change in the extension-fixing of the concept. What has changed in the course of European history since the times of archaic Roman law and Germanic law is not only the relations of relevant sameness between a paradigmatic sample of law and other instances. Law itself, as a kind, has changed.[29] This is so because law is not a natural kind, and its core features do not necessarily remain constant over time.

Coleman and Simchen rightly note the role played by our changing beliefs. Many of the changes in the core features of law in European legal history were brought about by changes in our beliefs about law, its role in social and political life and its relations to other social institutions. What we should not accept is that this impact is relevant to the way the semantics of the word 'law' works and the way its extension is fixed. Rather, we should acknowledge that such changes in the law are the product of social construction, and their relations to changes in the concept of law are due to the looping effect between concept and thing.

In Section 3, I will explain why this observation is important for legal philosophy. Among other things, this way of seeing things opens up methodological possibilities for exploring law as a "moving target" rather than a referent frozen in time. The question is not only what is being picked up by the term 'law' now; it is also what law as a social construct is (as distinct from the brute facts on which it is imposed) and how this is connected to and constrained by the concept we have of it. A proper account of the concept of law—including its inaccuracies, its falsities and unavoidable vagueness—is important here. However, before moving on to unpacking these methodological implications, we should first conclude the discussion of externalism and its impact on contemporary legal philosophy.

Concept-improvement and the neglect of stereotypes

Liam Murphy identifies "a vexing ambiguity" in the way the term 'concept' has been used in twentieth-century Anglo-American philosophy.[30] Murphy explains that besides the way in which I use the term 'concept' here, namely, as referring to mental content present in culture and represented in language, the

29. Another way to go about this point is to invoke Kripke's notion of 'initial baptism'. Saul A Kripke, *Naming and Necessity*, new ed (Harvard University Press, 1980) at 135-39. If we imagine a baptism of the concept of law somewhere in the history of the European legal tradition, then what changed over time is the thing itself that was captured by the initial reference.

30. Liam Murphy, "Razian Concepts" (2007) 6 APA Newsletter on Philosophy and Law 27.

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term has also been used to denote something closer to a theoretical account of phenomena. For Murphy, this is the sense in which John Rawls talked about 'the concept of justice' in the work leading to his *A Theory of Justice*,[31] and is also the way Hart had used the term 'concept' in *The Concept of Law*. This noted ambiguity is directly relevant to the present discussion, as it ties together the two projects—our inquiry into the concept of law and our theorization of the phenomenon of law.

In Hart's case, this conflation was based on a belief that the clarification of the concept of law is an important component in a sociological description of law.[32] His stated hope was that we would be able to use, in JL Austin's terms, "a sharpened awareness of words to sharpen our perception of the phenomena."[33] Quite apart from the externalist insight, this connection assimilates the investigation of concept and thing in a way that echoes (again, without acknowledging) Weber's theory of the meaning of social action and is hospitable to Searle's later work on social construction.[34] As we have seen, to the extent that this methodology identifies the elucidation of the concept of law with a theory of what law actually is, it is unwarranted. This has been made clear once we developed a better grasp of (and a better vocabulary for talking about) social construction than the one that was available to Hart in the 1960s. I have already noted some of the pitfalls of identifying our concept of law with the socially constructed phenomenon of law in the first part of this paper. In any case, it seems that Hart's particular sociological bent is not the reason behind the enduring conflation between the elucidation of the concept of law and the theorization of law.

Raz's work is a case in point. Raz also assimilates our best theory of what law is into an analysis of the concept of law. His reasons for doing so, however, are not sociological but are rooted in semantic externalism. As we saw, Putnam's version of externalism insists on a connection between the concept and the thing it refers to. If this is right, then a theoretical account of phenomena such as law can be seen as a refinement and elucidation of their understanding, and therefore, as a refinement of the concepts we have of them. Based on this general account, Raz argues that our analysis of the concept of law should be guided by our understanding of the phenomenon of law. "Broadly speaking," Raz stipulates, "the explanation of a concept is the explanation of that which it is a concept of."[35] While concepts are vague, theoretical accounts of concepts are more precise and complete, aimed at the improvement of the concepts that we do in fact have, rather than at their mere description.[36] He explains that "in this sense, explanations of concepts … are more than just explanations of the concepts … narrowly conceived." Raz therefore concludes that by focusing on the nature of

31. John Rawls, *A Theory of Justice*, revised ed (Harvard University Press, 1971). Compare to the discussion of the concept of justice in John Rawls, "Legal Obligation and the Duty of Fair Play" in Sidney Hook, ed, *Law and Philosophy: A Symposium* (New York University Press, 1964) at 13.
32. Hart, *supra* note 7 at vi.
33. *Ibid*.
34. See *supra* note 8. See also Green, *supra* note 7.
35. Raz, *supra* note 1 at 255.
36. *Ibid* at 26.

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the extension, our explication of concepts *improves* the ordinary understanding competent users have of the phenomena they refer to.[37]

The gist of Raz's argument is that, due to semantic externalism, we can use our best theory of law as part of the explanation and refinement of our concept of law. But this move is unwarranted, and is based on an exaggeration of the externalist insight. This is clear if we compare two possible interpretations of Putnam's externalism. One version—the version Raz employs—identifies the meaning of a term (or the content of a concept) with its extension. If this is the case, then our best theory of the phenomenon of law is actually our best description of the meaning of the word 'law'. A better understanding of the thing people refer to would mean, according to this interpretation, a better understanding of the term's meaning.[38] On the second interpretation—the one actually espoused by Putnam—more attention is given to other components of Putnam's theory of meaning. Putnam explained that alongside its extension, a proper description of a concept's meaning should include its syntactic and semantic markers (that is, the general sort of thing the referent is taken to be) as well as the features of the stereotype associated with it—that is, the conventional beliefs about the thing, which may well be inaccurate.[39] The content of concepts, according to this interpretation, is not exhausted by their extension.

There is no reason to accept the first, exaggerated interpretation of Putnam's externalist insight. There is more to a concept than the mere act of reference, and there is more content to the concept of law than mere reference to the phenomenon of law. This realization should be enough to drive a clear wedge between our best theory of law and our account of what our concept of law is. Any account of the concept of law should include the conventional beliefs associated with law, even if they are inaccurate (and even if they turn out to be false). The neglect of these beliefs is not a theoretical improvement of our concept of law—as Raz would have us believe—but an intentional distortion of the actual concept that we have.[40]

What should we make of Raz's claim that the theorization of concepts should aim at their improvement, and that this improvement should be based on our best theory of the thing of which they are a concept? I think that we should acknowledge the partial validity of this claim—in the sense that the concept of law does refer to law, and, as such, a better description of the referent would be a better description of the content of the concept; but we should also remember that the claim should not be taken too far. Part of the content of the concept of law has to do with the normal perceptions of the phenomenon, perceptions that may well be false or inaccurate.

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37. *Ibid* at 255-56.

38. *Cf* Hilary Putnam, "Explanation and Reference" in Glenn Pearce & Patrick Maynard, eds, *Conceptual Change*, Synthese Library 52 (Springer Netherlands, 1973) 199.

39. Putnam, *supra* note 18 at 269.

40. In other places Raz seems to acknowledge this. Consider the following: "I regard the explanation of the nature of law as the primary task of the theory of law. That the explanation of the concept of law is one of its secondary tasks is a result of the fact that part of the task of explaining the nature of law is to explain how people perceive the law, and therefore, where the law exists in a country whose population has the concept of law, it becomes relevant to know whether the law is affected by its concept." Raz, *supra* note 7 at 23.

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As Raz would readily admit, theoretical accounts of the phenomenon of law do refine and change the theorist's understanding of this phenomenon, but they do not necessarily correspond to the concept of law that exists in the particular culture. Durkheim's finding, for example, that law performs a social function of maintaining solidarity, is explicitly meant to tell us something about law that is not part of our communal conceptual resources.[41] More generally, any sociological investigation of the *latent* function of social institutions is always intended to yield a theory of such institutions that is different from their common understanding. Conversely, our concept of law does not reflect our best theory of the phenomenon of law. Concepts and phenomena do not mirror each other and neither do concepts and our best theories of phenomena.

Brian Leiter has made a similar point in a compelling way. However, his practical conclusion—that we should abandon our conceptual inquiries altogether and focus on improving our understanding of the phenomenon of law—strikes me as unwarranted. Leiter writes:

> If a proposed conceptual analysis is to be preferred to others, it must be because it earns its place by facilitating successful *a posteriori* theories of law and legal institutions. … what would ultimately vindicate the conceptual arguments for Hard Positivism is not simply the assertion that they best account for the "real" concept of law, but that the concept of law they best explicate is the one that figures in the most fruitful *a posteriori* research programs, i.e., the ones that give us the best going account of how the world works. That would require jurisprudence to get up from the armchair and find out what anthropologists, sociologists, psychologists, and others can tell us about the social practices in and around law.[42]

There are two reservations that should be added to this otherwise accurate statement. The first is a minor terminological point. I suggest that we keep the term 'the concept of law' for referring to our actual concept of law, and not use it interchangeably with 'our preferred theory of law'. This is important for the purpose of analytical clarity if we believe that our best theory of law and the concept of law are two distinct entities. The second reservation is more fundamental. If we agree that concepts do exist, then Leiter is absolutely right that we should not confuse their description with the theorization of the things they refer to. But this does not mean that there is no sense in taking up the theorization of our concepts as a distinct philosophical project.

The philosophical investigation of the concept of law is both worthwhile and viable. The concept of law is an important entity, whose study can teach us about our social world. As we have seen, the concept of law plays an important role in the social construction of law. From a better understanding of how we think and talk about law we can learn something about the forces that have shaped law and continue to maintain it as a social institution. In this respect

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41. Emile Durkheim, *The Division of Labour in Society*, translated by WD Halls (Palgrave Macmillan, 1984) at 122. See also Roger Cotterrell, *Emile Durkheim: Law in a Moral Domain* (Edinburgh, 1999) at 106-18; Anthony Giddens, *Capitalism and Modern Social Theory: An Analysis of the Writings of Marx, Durkheim and Max Weber* (Cambridge University Press, 1971) at 65-81.

42. Leiter, *supra* note 3 at 134.

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analyzing and otherwise elucidating the concept of law can teach us not only how law has come to be what it is, but also what maintains it and determines its evolutionary possibilities.

We can agree with Leiter that we should evaluate our theories in light of their contribution to *a posteriori* research programs explaining how the world works. However, there is no reason why we should not have an *a posteriori* theory of our concept of law, explaining the workings of this part of the world—the part that has to do with our mental content about law and its representation in language. If we agree that concepts do exist in culture and are represented in language, then they can be objects of theorization. The methodologies appropriate for theorizing them may not be the empirical methods developed by the natural and social sciences (which might come as a disappointment to some). However, this should not lead us to the conclusion that the entire project is indefensible.[43]

Can philosophy teach us anything about the stereotype that we have of law and is part of its concept? In *The Meaning of Meaning* Putnam comments that the study of stereotypes—the conventional beliefs we have about things—is best left to linguists and psycholinguists.[44] While this might be true for the study of stereotypes concerning natural kinds, this seems unnecessarily restrictive of the philosophy of social institutions. Social institutions always subsist in a system, and the stereotypes we have of them are both significant to their constitution and related to the way we conceive other social institutions.[45] Understanding these relations (quite differently from recording the linguist use of the terms referring to social phenomena) can benefit from philosophical attention.

Twentieth-century philosophy offers several methodologies in this respect, all of which contribute to *a posteriori* research programs that improve our understanding of our concepts. Following P. F. Strawson, I want to mention two such methodologies. In his later work, Strawson distinguished between reductive conceptual analysis and connective analysis (or better still, connective elucidation) as two possible methodologies.[46] Reductive analysis is committed to the continuous analysis of complex concepts to increasingly simple ones—the ultimate goal being, perhaps, to reach the most primitive concepts that are irreducible to each other, and with which it is possible to construct all other concepts. Connective elucidation, on the other hand, is not committed to this sort of dissection. It recognizes that conceptual complexity is not so much a function of composition, as it is the function of interconnections. Strawson, following Ludwig Wittgenstein and others, argued for the attractiveness of this type of philosophical elucidation. "Let us imagine," he writes,

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43. See, for example, Stephen R Perry, "Interpretation and methodology in legal theory" in Andrei Marmor, ed, *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press, 1995) 97 at 107 ("in principle, law can simultaneously be the subject of both internal and external theories, just as human beings can simultaneously be the subject of both biological and psychological theories."). On the relation between our inquiry into the concept of law and Hart's internal perspective, see text accompanying note 63 below.

44. Putnam, *supra* note 18 at 267.

45. *Cf* Searle, *supra* note 8 at 35-36, 65.

46. PF Strawson, *Analysis and Metaphysics: An Introduction to Philosophy* (Oxford University Press, 1992) at ch 2.

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> … the model of an elaborate network, a system, of connected items, concepts, such that the function of each item, each concept, could, from the philosophical point of view, be properly understood only by grasping its connections with the others, its place in the system—perhaps better still, the picture of a set of interlocking systems of such a kind.[47]

The concept of law is connected to many other concepts. It therefore invites this sort of connective elucidation by tracing its relations to such concepts as 'authority', 'morality', 'justice', 'government', 'rule', 'principle' etc. Gilbert Ryle described philosophy in this regard as cartography of our use of natural language.[48] This is a useful metaphor. Words—or for our purposes, concepts—are situated in relation to each other, and one of philosophy's possible tasks is to map these relationships in a useful way. Like any act of mapping, the value of this theoretical effort depends on its *a posteriori* contribution to our understanding, that is, to our understanding of the way concepts operate in the world. This theoretical effort is distinct from a theory of social phenomena, but is no less viable.

If we take Putnam's theory of content, we can identify exactly what part of the content of law can be investigated in this way. What will emerge from this mapping exercise is an account of the stereotype we have of law—the conventional beliefs that are connected to and sustained by many other beliefs we have, many of which may be false, vague, or inaccurate. This stereotype constitutes part of the content of the concept of law that is more than mere "neutral" or scientific cognition of the phenomenon. It is culturally and linguistically constrained by its connection to other concepts and other beliefs we hold as true. As such, the stereotype of law is contingent and dependent on social, cultural, and linguistic circumstances. There is no reason to neglect its study as part of our elucidation of the concept of law. More than most other lines of law-related inquiry, this elucidation holds a promise of improved understanding of the forces that shape and maintain our legal reality.

4. The methodological implications of distinctness and causation

So far we have seen interaction between law and the concept we have of it in the following sense. Law is socially constructed, and so is the concept we have of it. Although we can agree that the extension of the concept of law is part of its content in a way that allows people with different beliefs about law to talk about the same thing, at least part of the concept of law consists of our stereotype of law, that is, of our potentially false and often inaccurate beliefs about law. These beliefs are, at least in part, dependent on larger conceptual frameworks that are culturally and socially determined. Moreover, the social construction of law and the continuous change of (the stereotypical component of) the concept of law are causally interdependent. Changes in our concept of law lead us to change our law-related practices, which then lead to a different constitution of what law is.

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47. *Ibid* at 19.
48. E.g., Gilbert Ryle, "Abstractions" (1962) 1:01 Dialogue 5.

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Changes in what law is impact our experience of it, influence our perception of it and thus feed back to our concept of law.

Implicit in this multifaceted view of the relations between concept and thing is that law and the concept we have of it are both distinct and causally related.[49] In the remainder of this paper I explore the implications of this to our methodology in legal philosophy. I will first show that we can overcome existing objections to our analytical interest in the concept of law by distinguishing our theory of the concept of law from our theory of the nature of law we. I will then show that, so long as the two projects are kept distinct, we do not require a theory of the concept of law as a first step in our theory of the phenomenon of law. Lastly, I will explore points of contact between the two projects that stem from the relations of causation between concept and thing.

A theory of conceptual plurality

Recognizing the causal relationship between law and its concept explains why the study of the concept of law as a distinct entity (and not as something that is elucidated by our best theory of the phenomenon of law) can be significant for our understanding of social reality. It can also help answer a persistent objection to the philosophical preoccupation with the concept of law. Murphy, for example, argues that an inquiry into our concept of law is useless because there is simply no unitary concept of law to be found. He explains that—

> there is insufficient agreement in the intuitions that are the data for any philosophical conceptual analysis. … on the question of the boundary between law and morality, the concept of law is simply equivocal—some of us, in some moods, see that boundary as strict, others of us, in other moods, see it as very porous.[50]

A similar point was made by Danny Priel, distinguishing between different concepts individuals might have of law and a concept of law shared by a community.[51] Priel suggests that different people might have different concepts of law, all consistent with our contemporary legal practices. If this is the case, he claims, any theoretical reconstruction of a shared concept of law would be artificial and false. It is possible, explains Priel, that—

> some participants in the practice may form one view, others another, but the theorist, at least so long as she keeps to her descriptive guise, will have no way of deciding among them. … as long as opposing views of different participants in the practice are consistent with the practice, there will not be any way of deciding which view explains the practice more accurately.[52]

These objections pose a real challenge to twentieth-century legal philosophy and it would be wrong to dismiss them too quickly by stating our externalist

49. Only entities that are distinct can be in relations of causation to each other.
50. Liam Murphy, "Concepts of Law" (2005) 30 Aust J Legal Phil 1 at 7.
51. Danny Priel, "The Boundaries of Law and the Purpose of Legal Philosophy" (2008) 27:6 Law & Phil 43 at 656-61.
52. *Ibid* at 658.

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commitments. It might be true that part of the problem is alleviated by the fact that the extension of the concept of law can be seen as part of its content. Still, at the level of stereotype, there can be different concepts of law, that is, different potentially false and inaccurate beliefs about the nature of law.

Neither is the problem solved by the realization that the concept of law is socially determined. Of course, not every individual has a personal, unique concept of law, but we should still acknowledge that this does not rule out plurality altogether. It is quite possible that in a diverse socio-linguistic community, such as our own, there would be multiple traditions and conceptual frameworks that individuals can draw on. Concepts—even at the interpersonal level—may be contested and multiple.

If this is indeed the case, this constitutes a valid objection to theories that purport to describe our single concept of law, particularly theories of the Hartian or Razian sort. The failure of these theories is built into their common structure and goes to their conflation of the two lines of philosophical inquiry, that is, the inquiry about the concept of law and the inquiry concerning law's nature. Plurality at the conceptual level is indeed a problem if we expect our account of "the concept of law" to simultaneously constitute both an improved description of our concept of law and our best theory of the phenomenon of law. A theory of a phenomenon is by definition singular. If there is a plurality at the conceptual level, the discrepancy is inevitable.

Things might be different, however, if we distinguish properly between a theory of the phenomenon of law and a theory of the concept of law. So long as we keep these two theoretical questions apart, plurality (at either level) ceases to be a problem. If there is a certain plurality or inconsistency in our concept of law—by all means, let us theorize it. The challenge from plurality is not so vast that it defies any theory. We are not faced here (as the rhetoric of some of these critiques implicitly suggests) with hundreds of individual concepts of law all different from each other. Rather, we are talking about a handful of traditions of thinking about law, most of which are much closer to each other than the heated philosophical debate may suggest. This is hardly an insurmountable hurdle for theorists who wish to give an account of our concept of law. The objection here is nothing more than a slippery-slope argument, and can be resisted.

It is not a preliminary condition for theoretical inquiry that its subject matter be unitary. Surely, whatever plurality (or multiplicity, or inconsistency) there might be in our concept of law it is not beyond description or theorization. It is true that the concept of law—what Leiter sometimes refers to in scare quotes as the "real" concept of law[53]—is unruly, and its complete mapping might be hopeless. But it is not that a theory of the concept of law is impossible or not worthwhile. On the contrary, it is the traditional role of theory to explain plurality and multiplicity. Why can we not have, then, a theory of the concept of law, even as a non-unitary, inconsistent entity?

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53. See quote accompanying *supra* note 42.

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It is important, of course, that when we move from plurality to a theory of this plurality, we do so in a methodologically appropriate way. In this sense, we have already noted one improper theoretical move: conflating the theorization of the phenomenon of law with the analysis or elucidation of the concept of law. Raz, we should remember, acknowledges that a theoretical account of the concept of law is different from the mere description of this concept, which might be more "vague" than what the theorist aims to find.[54] It is possible that by talking about "vagueness," Raz was trying to refer to something similar to the disagreements noted by Murphy, implying that the concept of law is wide enough to accommodate many of the different positions.[55] However, as we have seen, the methodology he proposes is inadequate for this purpose.

The important question of methodological tools appropriate for dealing with plurality and inconsistency at the conceptual level cannot be thoroughly addressed here. Generally, I see no reason why our theorization of plurality at the conceptual level should not proceed by employing the same theoretical criteria of economy and explanatory force that normally inform our theoretical efforts in other areas. Our theory should provide the best account for our existing concept of law—or concepts of law (if such plurality in fact exists). But the point I want to make here is more modest and limited. It is that a proper distinction between the concept of law and the phenomenon of law is a necessary first step in overcoming the difficulties associated with the theorization of such a plurality.

An analysis can account for multiplicity and contradictions if we acknowledge that the analysandum may contain contradictions and inconsistencies. Our connective elucidation of concepts, for example, can map how our concept of law maintains inconsistent relations with other concepts, a possible state of affairs that might explain our contemporary conceptual conundrums. In short, there is no reason to think that the challenge from plurality cannot be met or that it should make us forsake the investigation of the concept of law altogether. The only thing we need to do is keep our methodology straight by making sure we are focusing on one object of inquiry at a time: either concept or phenomenon.

Conceptual choices as a methodological preliminary

Another methodological problem which relates to conceptual plurality has been raised by Stephen Perry. Perry focuses his criticism on Hart's commitment to the "internal point of view" on law and the conceptual choices to which it implicitly leads. Perry explains that given that there is no single internal point of view shared by all participants,[56] what Hart actually did was to impose his own concept of law on the social practice of law—a concept crafted based on the theorist's own value-preferences:

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54. Raz, *supra* note 1 at 26.

55. To get a sense of the similarity, see Liam Murphy, "Better to See Law This Way" (2008) 83 NYUL Rev 1088 at 1093 ("if there is a concept of law that 'we all share,' it is indeterminate or partly ambiguous.").

56. Perry, *supra* note 43 at 128.

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> Hart is … delimiting the concept of law by appealing to the values of certainty, flexibility, and efficiency. … Note that the resulting concept is the creation of the theorist; it may or may not coincide with any conceptualization of social practices that the subject under study might happen to possess.[57]

Perry's analysis brings to the fore the conceptual choices that theorists interested in law (the phenomenon) must make. To engage in rigorous social theory, it is often necessary to identify the exact boundaries of the phenomenon examined, beyond the general reference of the concept and beyond prevalent stereotype. Perry's conclusion from this is that our theory of law cannot help but employ value-laden normative preferences. Leiter, as we have seen, suggested an alternative standard for making this conceptual choice: its relative contribution to an *a posteriori* theory that explains the world.[58] This strikes me as the most appealing standard, for reasons noted above.

The point I wish to make here is that we should be free to make this choice independently of our best theoretical elucidation of the concept of law. To some, this might still sound counterintuitive. Raz explains that, when it comes to the inquiry into the nature of the phenomenon of law, "[w]hat counts is the nature of the institution which the concept of law (i.e. the one we currently have and use) designates."[59] The same is true for projects that study the phenomenon of law without reference to its "nature" (that is, to the properties that are essential to the phenomenon).[60] Raz concludes that the explanation of our parochial concept of law is an important contribution to our self-understanding, and an interlude to the philosophical investigation of the nature of law.[61]

But this philosophical interlude to the investigation of the phenomenon of law is unnecessary. There is no reason why, beyond the general (and potentially vague) "designation" of law, the theorist must commit to the particular descriptions and stereotypes that are part of our concept of law. If further precision is needed in delineating the boundaries of the investigation (that is, in stating clearly what it is we are talking about), then there is no reason to privilege our stereotype of the phenomenon. Although there is a conceptual choice to be made when embarking on the theorization of the phenomenon of law, this choice need not necessarily be based on our concept of law. This is particularly true if we have reason to think that a certain plurality or inconsistency associated with this concept might make it unfit for orienting our theoretical efforts.

The conceptual choices we make in our theory of law cannot avoid being influenced by our common concept of law. This is clear. However, there are

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57. *Ibid* at 118.
58. See text accompanying notes 43-44 above.
59. Raz, *supra* note 7 at 27.
60. *Ibid* at 25.
61. On the value of conceptual inquiry as an exercise of self-understanding, see *ibid* at 27 ("The notion of law as designating a type of social institution … is a common concept in our society … entrenched in our society's self-understanding. … In large measure, what we study when we study the nature of law is the nature of our own self-understanding. The identification of a certain social institution as law … is part of the self-consciousness, of the way we conceive and understand our society. Certain institutions are thought of as legal institutions. That consciousness is part of what we study when we inquire into the nature of law.").

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other considerations that theorists can legitimately weigh in making these choices, including the explanatory force of the resulting theory and the disciplinary commitments of the theorist. This is one point of contact between our theory of law and our concept of law that does not warrant conflation of the two separate theoretical projects. If we want to describe the conceptual choice employed by a theorist for orienting an investigation, we should note that the concept of law being employed is set in a different conceptual network than the one shared by the community. It is unitary, neater and much better defined than our shared concept of law. It is related to the core concepts of the theorist's discipline, and bears explicit (sometimes definitional) relations to other concepts in her theory. The theorist's concept is of little need of philosophical elucidation, since it is highly controlled by its connections to other concepts within her theory. To go back to Ryle's metaphor, we do not need to draw a map for such a concept since it already appears in a flowchart.

This is an important point to remember when we reflect on our theory of law. Our various theories of the phenomenon of law do not proceed in a conceptual vacuum, and necessarily draw on existing conceptual classifications of phenomena on the part of the theorist. It is not clear, however, that this initial theoretical classification is (or should be) informed by our best theory of the concept of law.

Social theory and diachronic analysis

Most of what I have said so far concerned the methodological necessity to distinguish between our (important) theory of the concept of law and the theory of its nature. This reflects the potential disparity between conceptual content and the extension of a concept—notwithstanding the plausibility of externalist positions on this matter. There are, however, important ways in which our theory of law and our theory of the concept of law can come together and inform each other in a legitimate way, reflecting the interactive causal connection between concept and thing. I want to conclude the paper by briefly noting two potential connections of this sort. One concerns the juxtaposition of our conclusions from the two projects to the benefit of a more complete social theory; the other concerns the use of both sets of conclusions to explain processes of social construction and concept-formation over time.

A possible way in which the two lines of inquiry—one regarding law and the other regarding the concept we have of it—can come together is as complementing parts of our social theory. I noted earlier that the concept of law is part of the social reality underlying the constitution of the phenomenon of law. I used the example of archaic Roman law to note that the (mistaken) belief in the possibility of law-promulgation by divination informed the social practices surrounding this law. There is no reason to exclude this dimension from our social theory. Even if we could be content with the mere behaviorist account of the practices relating to this law, surely we can gain a better understanding of law in that time and place by accounting for the contemporary concept of it.

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If there is an "internal perspective" that is important for the proper description of law as a social phenomenon, I think this is it.[62] Only through an understanding of the concept of law of a particular community and its relations to other normative and political concepts can we gain insight into the force of law in *that* culture and the function it played in *that* society.[63] As noted, there might not be a single internal perspective or a unitary, shared concept of law, but still theorizing this plurality or inconsistency can shed light on our social reality. A theory of law that takes into account the concept of law provides access to people's orientation in their law-related practices, and does not stop at the external description of their patterned behavior. It takes into account the ideas people have and their convictions, and by doing so it incorporates into the theoretical description of the social practice an important set of facts that would otherwise be left unaccounted for and would leave our understanding of it deficient.

Of course, acknowledging the importance of the internal perspective does not mean identifying it with the theorist's own conceptual and moral convictions. One does not have to be a natural lawyer in order to see that adhering to natural law beliefs about law was essential for the endurance of particular legal and political arrangements in pre-modern Europe. If we were asked what law *was* in these circumstances, we would have to say that it was a *phenomenon shaped by widely shared beliefs regarding law, at least some of which were theoretically expressed by natural law theory*. Although we might reject the idea that European law in the 15th century was truly part of God's eternal law, it was still *actually* suffused with value-considerations, moral convictions, and religious precepts. Law is not a natural kind and its nature is sensitive to the concept we have of it. What it is depends on human practices, and these are always related to the society's concept(s) of law.

Emphasizing the interactivity between law and its concept suggests that we juxtapose our conclusions from our different strands of inquiry to benefit from both "the internal perspective" and the empirical study of the phenomenon of law. In this respect, our theory of the concept of law is an important addition to our social theory of law. Acknowledging the causal connection between the concept of law and the phenomenon of law would allow us to explain not only the regularities (or the pattern of the irregularities) of our legal practices and our identification of law, but also the orientation of our behavior and why we refer to law in the way that we do. Conversely, it would explain not only what our concept of law is, but also how this concept makes sense given our legal practices and our regular (or fragmented) references to law.

Another way in which the two projects can be brought together to advance our understanding of law is by using their conclusions as pieces in a diachronic account of the constitution of our law-related practices and the formation of our

62. *Cf* Searle, *supra* note 8 at 98. For the origins of this methodological commitment, see Hart, *supra* note 7 at 114-16, 254-56. See also Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978) at 139-40.

63. *Cf* Weber, *supra* note 8 at 4 (regarding the meaning of social action). *Cf* Searle, *supra* note 8 at 5.

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concept of law. In this respect, the study of interactivity in law allows us to go beyond a static, synchronic (and at times achronic) account of the concept of law and the phenomenon of law. Talking about interaction, which necessarily takes place over time, introduces this diachronic dimension to our legal philosophy—a dimension it sorely misses. It invites inquiry not only to *what* our concept of law is (right now), but also to *why* we have the concept of law that we do (as a function of political, societal and intellectual developments).

Raz's work on conceptual analysis exhibits the traditional static view of the role of legal philosophy. Raz recognizes that our social practices and concepts are in a constant flux, and yet insists that "the essential properties of law" are unchanging.[64] This claim of (metaphysical) necessity is based on the fixed reference of the concept of law.[65] Although we might be more hesitant about the status of essential properties here,[66] it seems plausible that since our concept of law refers to the law that we actually have, the core features of law cannot be different from what they actually are.

It should be clear by now that something has gone wrong here, and that this has to do with a neglect of the interactive nature of law. Law's essential properties are *not* unchanging. On the contrary, we know for a fact that law has changed tremendously through the ages—including in ways that can be considered as "essential" to the contemporary phenomenon of law. Law is different in this respect from 'water' or other natural kinds, whose nature is perhaps fixed in the way that Raz suggests. We can agree that the referent of the concept of law is fixed in the sense that it is always law. But we should acknowledge that this referent is malleable and changing.

Although Raz readily admits that the concept of law is contingent, he is content with taking a snapshot of our current concept of law and the current state of the phenomenon to which it refers and devoting the entirety of our philosophical attention to the analysis of this snapshot. Questions concerning concept-formation and social construction are left, perhaps, to theorists interested in intellectual and social history. Legal philosophy, suggests Raz, is interested in the concept of law that we have and the phenomenon of law that is part of our social lives right now, and this means investigating them as we find them.

This limitation is unwarranted. In the same way that the concept of law is situated in relation to other concepts and is sensitive to the context of the social practices that surround it, it is also situated in time. There is no reason to ignore this context in our philosophical investigations. The methodologies of analytic philosophy, its attention to complex concepts and its sensitivity to relations between concepts and between concepts and things, can be put to good use in the exploration of the evolutionary forces that shape our ideas and practices.

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64. Raz, *supra* note 7.

65. On the notion of metaphysical necessity, see Kripke, *supra* note 29.

66. The notion of essential properties seems to go to properties that are common to all members of the extension of the concept. If we accept Coleman and Simchen's sensible claim that relations of sameness to the paradigmatic sample of law are not determined by means of expertise, then it is not at all clear that there would be a common essence to all members of the extension.

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Relating the evolution of our concept of law to the evolution of our law-constituting social practices is the proper way to philosophically explore this diachronic context. Surely, our self-understanding can be improved if we understand not only the content of our concepts but also the contingent circumstances that led to their formation and evolution. Why, then, should we exclude the diachronic context from our philosophical investigation? The contingency of our concepts is not beyond the reach of critical examination. To theorize it does not require us to leave our concepts behind and assume an objective view from nowhere—an impossible condition on any account. It only requires us to acknowledge that our concepts—including our concept of law—have a history, and that the forces governing this history are susceptible to rigorous philosophical investigation.

The benefit from such an inquiry is not limited to the satisfaction of historical curiosity. Tracing the forces that shaped the concept of law in the past can help us understand better the forces that keep it as it is in the present. It not only locates our concept of law and the phenomenon of law in time, but also grounds them in their proper social context, relating them to each other and to the practices, institutions, and theoretical traditions that shape them. As long as we continue to investigate law as a *nature morte*, we leave outside the scope of our philosophical inquiry the most urgent questions philosophy can answer today. We leave the conceptual connections and forces that define our understanding of law unexamined, and sustain by our philosophical methodology the perceived necessity of our current concept of law and our current legal arrangements. We nod to contingency and acknowledge it, but we do not trace it or examine it. We accept our concepts as they are without their historical context, and avert our attention from the analytical inquiry that is most important for our present and our future. Why do we think of law in the way that we do? Why do some aspects of law seem necessary to us? How are these perceptions instrumental to the persistence of modern law, and how do they limit and shape its possible futures?

5. Conclusion

I take the insight regarding the interaction between law and its concept to be relatively uncontroversial, at least in the sense in which I use the term and among the theorists who were discussed in this paper. The idea that the concept of law is contingent and that the phenomenon of law is a social construct are commonplace in contemporary theory. The identification of the causal relations between the two entities, although not usually emphasized or explored, does not strike me as particularly controversial either. However, in important ways our leading theories in the philosophy of law do not follow this insight to its methodological conclusions.

Although I have not addressed other law-related concepts, it is clear that at least some of them are interactive in a similar way. Courts, legislatures, statutes, precedents, bureaucracies, and governments all strike me as potentially interactive in the sense developed here. The concepts we have of them are socially contingent and changing. These concepts affect how these things are actually

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constituted in the world, and are, in turn, affected by their changed constitution. To acknowledge this interactivity means to open up new paths for reflection on these institutions and the concepts we have of them beyond the restricted treatment they have received so far.

The characterization of law and other law-related kinds as interactive restricts our methodology in legal philosophy in certain ways, while opening new avenues for philosophical exploration. On the one hand, it emphasizes the relative autonomy of conceptual inquiries from our investigations of social and legal phenomena, and warns against conflations of the two projects. Despite the fact that any theory of law employs concepts, and despite the fact that any concept-formation occurs against the backdrop of a social reality and its theorization, there is no identity between our concepts and our best theoretical accounts of law. We should be careful, therefore, not to make an inquiry into one entity dependent on our conclusions regarding the other.

On the other hand, in the case of law as in many other cases, concept and things are causally related. They constitute each other, maintain each other and effect change in each other over time. This means that the distinct theories of the two entities can relate in different ways. Our social theory of modern law can benefit from the juxtaposition of our conclusions from the two projects, yielding a fuller and deeper understanding of the logic of our legal practices. More importantly, the two lines of inquiry complement each other diachronically. Their coming together can therefore explain the trajectory of the evolution of modern law, and provide an illuminating history of our legal present.

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