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METHODOLOGY IN JURISPRUDENCE:

A Critical Survey

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As with many issues in contemporary jurisprudence, a host of recent debates concerning the proper methodology for legal theorists to adopt have been set into motion by H.L.A. Hart's *The Concept of Law*.[1] In the opening pages of the original edition of the book, Hart presents legal scholars in a self-reflective light, claming that they have a distinctive tendency to be drawn into theoretical debates concerning the subject matter of their discipline: "No vast literature is dedicated to answering the questions 'What is chemistry?' or 'What is medicine?,' as it is to the question 'What is law?'[2]

Following the publication of the "Postscript" to the second edition of *The Concept of Law,* this perhaps somewhat navel-gazing tendency appears to have moved to the metatheoretical level, with "What is legal theory and how should it be conducted?" becoming an increasingly popular and important question in jurisprudential debate. Many of those who have contributed to this debate have been moved to do so in the service of explaining, defending, or attacking Hart's remarks in the first two sections of the "Postscript" in which he attempts to clarify his methodological commitments in response to some of Ronald Dworkin's criticisms of legal positivism.[3] This being so, this article takes Hart's remarks in the "Postscript" as its starting point and considers some of the different lines of argument that those remarks have engendered in order to survey the current state of play in debates about jurisprudential methodology. Where appropriate, I also offer critical comment on some of those debates and position my own views on methodology in legal theory in relation to them.

The article is divided into five sections. In Section I, I briefly characterize what I regard as Hart's most important remarks on methodology in the

1. H.L.A. HART, THE CONCEPT OF LAW (1st ed., 1961; 2nd ed. with Postscript, Penelope A. Bulloch and Joseph Raz, eds., 1994). All page references to this work are given according to the pagination in the 2nd edition.

2. HART, *supra* note 1, at 1.

3. Recent interest in methodology in legal theory also owes much to Ronald Dworkin's work and especially to the discussions of methodology that feature in his explanation of the nature and role of constructive interpretation in DWORKIN, LAW'S EMPIRE (1986).

"Postscript." In Sections II, III, and IV, I examine various views concerning the role of evaluative judgments in jurisprudential inquiry. These sections approach the issue of evaluation in legal theory from three distinct angles. Section II tackles the issue of whether descriptive jurisprudence is possible and, if it is, what exactly it might amount to. This section focuses mainly upon various interpretations of Hart's views on this topic offered by myself, Stephen Perry, and Brian Leiter and attempts to bring some current debates into clearer focus by sharpening up where the points of disagreement between those commentators lie. In Section III, Dworkin's claim that legal theories should explain how law functions so as properly to limit and justify the coercive power of the state is examined *via* a consideration of my own views and those of Jules Coleman and Nicos Stavropoulos. Section IV—which focuses largely on some recent work in methodology by Liam Murphy—considers arguments that claim that we should adjudicate between rival legal theories according to the beneficial moral and political consequences that result from understanding law in one way as opposed to another. Finally, Section V—which draws on recent work by Joseph Raz, Nicos Stavropoulos, Jules Coleman, and Ori Simchen—addresses the role of semantic theories in jurisprudential methodology and discusses what have come to be called criterial explanations of the concept of law in the context of Hart's methodological commitments. Throughout the article, I attempt to draw out the links between Hart's remarks on methodology in the "Postscript" outlined in Section I and the views of various contemporary commentators addressing the same issues in their own work.

I. HART'S POSTSCRIPT

Hart's "Postscript" contains many remarks that are relevant to his view of correct jurisprudential methodology. For present purposes, I will focus on some of the issues that emerge from the first two sections only. For classificatory convenience, these can be carved up into four main points:

A. General and descriptive jurisprudence versus evaluative and justificatory jurisprudence;
B. The importance and consequences of adopting an internal point of view in jurisprudence;
C. Legal theory, legal practice, and the justification of state coercion;
D. Positivism and the semantic sting.

A. General and Descriptive Jurisprudence versus Evaluative and Justificatory Jurisprudence

In the first section of the "Postscript," Hart attempts to characterize in general terms the difference between his own brand of legal theory in *The Concept of Law* and the view of legal theory adopted by Ronald Dworkin. In so

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doing, Hart introduces a distinction that has given rise to much debate and no little confusion in contemporary debates on jurisprudential methodology, namely the distinction between (Hartian) general and descriptive jurisprudence and (Dworkinian) evaluative and justificatory jurisprudence.[4] To take the generality issue first of all: Hart's claim that his conception of legal theory attempts to be general, in the sense of seeking an account of the nature of law wherever and whenever it is found, seems relatively uncontroversial.[5] However, his characterization of Dworkin's evaluative and justificatory jurisprudence as lacking such universalist aspirations and instead as being "'addressed to a particular legal culture,' which is usually the theorist's own and in Dworkin's case is that of Anglo-American law"[6] has been the subject of both ante- and post-"Postscript" debate regarding whether or not this is a correct interpretation of the ambit of Dworkin's interpretivist theory of law.

For example, in a review written shortly after the publication of *Law's Empire*, Philip Soper appears to assume that Dworkin has universalist aspirations for his theory and accordingly criticizes those aspects of Dworkin's views that (wrongly, in Soper's view) assume universal commitment to individual rights.[7] In a recent discussion of Dworkin's methodological commitments, Joseph Raz notes the declared modesty of Dworkin's ambitions in this regard—that, as Hart points out, in *Law's Empire* Dworkin explicitly purports to offer an account of law addressed to a particular legal culture only—but doubts whether Dworkin remains true to his declared intentions.[8] Moreover, Nicos Stavropoulos has recently claimed that the Dworkinian approach to legal theory—which Stavropoulos supports and terms "interpretivism"—aims to offer a general account of the nature of law.[9]

The other aspect of Hart's "Postscript" characterization of his approach to legal theory has likewise given rise to much debate, and discussion of this issue—namely whether it is possible to explain law adequately by means of "descriptive" legal theory that is "morally neutral, and has no justificatory aims"[10]—occupies much of Sections II to IV below. However, a few preliminary remarks concerning Hart's choice of terminology in the "Postscript" are relevant here. By contrasting his own "descriptive" approach to legal theory with "evaluative and justificatory" jurisprudence, Hart laid himself open to being interpreted as claiming that it is possible to construct an

4. HART, *supra* note 1, at 239–241.

5. Of course, while Hart's claim that his account attempts to be general in this sense seems uncontroversial, his success in his self-proclaimed task and indeed the possibility of success in principle in that task are much more contentious.

6. HART, *supra* note 1, at 240. The internal quotation is from DWORKIN, *supra* note 3, at 102.

7. *See* P. Soper, *Dworkin's Domain,* 100 HARV. L. REV., 1166 (1987), esp. 1180.

8. J. Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison, in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 1–37 (J.L. Coleman, ed., 2001), at 26.

9. N. Stavropoulos, *Interpretivist Theories of Law, in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at http://plato.stanford.edu/entries/law-interpretivist/ (2003), esp. sects. 1 and 2.

10. HART, *supra* note 1, at 240.

explanatorily adequate legal theory without making any value judgments whatsoever.[11] As several legal theorists have since argued, however, legal theory cannot be value-free; nor did Hart believe that it could.

As I will discuss further in Section II, in interpreting Hart's remarks on this issue in the "Postscript," it is important to remember that the part of the "Postscript" that was published is a response to criticisms leveled at Hart by Ronald Dworkin. It is hence polemical in style, and its style affects its substance, especially as regards Hart's characterization of the difference between his own methodological commitments and those of Dworkin. Hart largely characterizes his own position by contrasting it with Dworkin's, and his terminology is hence to be read not in the abstract but in the concrete context of the debate between them and in terms of the methodological commitments that Hart ascribed to Dworkin. In this context, it is arguable that the kind of legal theory Hart wishes to distance himself from is not "evaluative" jurisprudence per se but, rather, jurisprudence that is evaluative in the sense in which Dworkin's legal theory is evaluative, that is, in offering a moral and political evaluation of law that puts it in its best light as justifying exercises of state coercion. The polemical nature of the "Postscript" and Hart's goal of seeking to distance his own position from Dworkin's should be borne in mind in interpreting both Hart's remarks themselves and those debates in legal theory that have emerged in response to them.

B. The Importance and Consequences of Adopting an Internal Point of View in Jurisprudence

Having drawn his distinction between general and descriptive jurisprudence on the one hand and evaluative and justificatory jurisprudence on the other, Hart then goes on briefly to consider the reasons behind Dworkin's rejection of descriptive legal theory as being capable of adequately explaining law.[12] He focuses on the nature and role of the internal point of view in legal theory and in particular upon Dworkin's claim that successful legal theorists must adopt an internal point of view in the sense of themselves becoming participants in legal practice offering interpretations of law that compete with those of other participants in the practice. According to Hart, legal theory's necessary commitment to the internal point of view does not demand that legal theorists make claims about law that rival those of participants in legal practice.

In Hart's understanding of the internal point of view, the descriptive legal theorist must take account of and understand law from the internal

11. *See, e.g.*, S.R. Perry, *Interpretation and Methodology in Legal Theory, in* LAW AND INTERPRETATION (A. Marmor, ed., 1995), at 100: "the most satisfactory jurisprudential theories turn out not to be purely descriptive and value-free, as Hart claimed."

12. HART, *supra,* note 1, at 242–244.

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point of view, that is to say, from the point of view of those who create, administer, and are subject to law, but in so doing, he need not share, endorse, or make claims that compete with claims made from that point of view in order to construct an explanatorily adequate legal theory. For Hart, then, even if, as Dworkin claims, participants in legal practice are attempting to offer moral and political evaluations of law that put it in its best light as an example of justified governmental coercion, this is merely something to be understood and taken account of; the theorist need not take a stance of his own on whether and under what circumstances such evaluations and attempted justifications are or would be true. Indeed, Hart even goes so far as to say that even if the participants' perspective on law *necessarily* included beliefs that there were moral reasons to follow the law and that law's use of coercion was justified, this too would be something for the legal theorist to understand and take account of, and that such understanding need not require him to abandon his descriptive task: "Description may still be description, even when what is described is an evaluation."[13]

C. Legal Theory, Legal Practice, and the Justification of State Coercion

Hart's wish to distance himself from a view of legal theory that takes as its task explaining how law can justify state coercion has already been mentioned in discussing the first two points above. However, Hart also specifically rejects Dworkin's connection between legal theory and the justification of state coercion in section 2 (ii) of the "Postscript," in which he criticizes Dworkin's reinterpretation of legal positivism as an interpretive theory of law termed "conventionalism." In this guise, legal positivism puts law in its best light as being capable of justifying coercion by emphasizing the way in which having "plain fact" criteria for the identification of law puts those subject to the law on clear and fair advance notice of the occasions upon which such coercion will be employed against them.[14]

Hart rejects this reinterpretation on the ground that Dworkin's approach to legal theory falsely presupposes: (i) that the purpose of law is the justification of state coercion; and (ii) that hence any adequate theory of law must attempt to explain how and under what circumstances law can achieve this aim. Hart makes it clear in the "Postscript" that he does not regard the point of law as being to justify coercion and indeed states that he is wary of characterizing law in terms of its having one main point or function at all.[15]

13. HART, *supra* note 1, at 244. This is discussed further in Section II.
14. DWORKIN, *supra* note 3, chap. 4.
15. HART, *supra* note 1, at 248–250. These issues are discussed further in Section III.

D. Positivism and the Semantic Sting

As well as rejecting Dworkin's interpretation of legal positivism as an interpretive theory of law in the "Postscript," Hart also rejects his interpretation of it as a semantic theory of law and attempts to parry the "semantic sting" argument outlined by Dworkin in the opening chapters of *Law's Empire*.[16] Dworkin claims that legal positivists cannot explain the depth or type of disagreements that lawyers, judges, and indeed legal theorists have about what law is, because of their erroneous belief that those legal actors share linguistic rules for determining the truth of purported propositions of law and hence for determining when the term "law" correctly applies.[17]

According to Dworkin, as the legal-positivist view is that these criteria are shared and have only to be uncovered by skillful lawyers, judges, and legal philosophers, any apparent disagreement about whether something is law or not either must be disagreement at the borderlines of application of these shared criteria or else is not true disagreement at all but only people talking past one another, as they do not really share any such criteria in common. Dworkin then contends that these legal positivist commitments yield a grossly inaccurate picture of what legal argument and disagreement is like. Hart responds to the semantic-sting argument by simply claiming that his theory of law is not stung by it: he denies that any aspect of his account is an attempt to uncover the shared linguistic criteria determining the meaning of the word "law."[18]

II. THE ROLE OF EVALUATION IN LEGAL THEORY

As was noted in Section I, in the "Postscript" Hart claims that he is engaged in descriptive legal theory. Although in making that claim he wants to distance himself from Dworkin's brand of evaluative and justificatory jurisprudence, which takes as its task explaining how law can provide a justification for state coercion, other writings of Hart's show clearly that in using the term "descriptive," he is not claiming that legal theory can be completely value-free:

> an analysis which allots a place to moral claims and beliefs as constituents of social phenomena must itself be guided, in focusing on those features rather than others, by some criteria of importance of which the chief will be the explanatory power of what his analysis picks out. So his analysis will be guided by judgements, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values. But

16. HART, *supra* note 1, at 244–248. For the semantic-sting argument, *see* DWORKIN, *supra* note 3, chaps. 1 and 2.

17. The argument is intended by Dworkin to apply both to propositions of law and to the concept of law.

18. HART, *supra* note 1, at 246. This issue is addressed in Section V.

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> again there is nothing to show that this analysis is not descriptive but normative and justificatory.[19]

In this passage, Hart explains that the construction of any explanatorily adequate legal theory involves evaluative judgments regarding which features of law are important to explain. Moreover, Hart also notes that in legal theory it may be important to allot a place to moral claims and beliefs about law, but he claims that the legal theorist can make evaluative judgments that those moral claims and beliefs are important to explain without himself offering any kind of justificatory account of them.

In recent years, several legal theorists have tried to explain why it is necessary and how it is possible to make such evaluative judgments in constructing legal theories without offering a Dworkin-style moral and political evaluation and justification of law. This kind of view of legal theory—as somehow being evaluative without necessarily being morally evaluative or justificatory—is held by, among others, Jules Coleman,[20] Andrei Marmor,[21] Wil Waluchow,[22] and myself.[23] In attempting to explain and defend this position, these legal theorists find themselves in opposition to the methodological views of, among others, John Finnis, Ronald Dworkin, and Stephen Perry, all of whom claim that law cannot be adequately explained without legal theorists engaging in moral evaluation of law and of beliefs and attitudes about law and themselves taking a stance on whether and under what conditions law is morally valuable or morally justified.

A. In What Sense Is Legal Theory Evaluative?

One of the most instructive contributors to this debate is John Finnis. In the opening chapter of *Natural Law and Natural Rights*, Finnis points out that legal theorists—like any other theorists—must make evaluations of significance and importance in order to construct explanatorily adequate theories rather than merely offer miscellaneous lists of information.[24] This point should be uncontroversial among legal theorists. However, Finnis employs it as a starting point from which to construct an argument in favor of a view of legal theory that claims that theorists must make moral value

19. H.L.A. Hart, *Comment, in* Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart (R. Gavison, ed., 1987), at 39.

20. J.L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory (2001), chaps. 11 and 12.

21. A. Marmor, Positive Law and Objective Values 153–159 (2001).

22. W. Waluchow, Inclusive Legal Positivism 19–30 (1994).

23. J. Dickson, Evaluation and Legal Theory (2001). It should be noted that although these theorists share a common position to the extent that they all believe that successful legal theory must be evaluative but need not involve the legal theorist in moral or political evaluation and justification of law, there are important differences between their respective views. Unfortunately, these cannot be discussed in any detail here.

24. *See* J. Finnis, Natural Law and Natural Rights 17 (1980).

judgments and must explain the moral value of law and the way in which law can give rise to moral obligations in order to explain its nature.

He does so via the claim that because law is a social phenomenon that people are aware of, have views about, and use in their practical reasoning about what to do and how to live, legal theorists making judgments of importance and significance about their subject matter must be guided by what is considered important and significant by those who create, administer, and are subject to the law and whose views and activities constitute the subject matter of jurisprudential inquiry.[25] This, too, is a relatively uncontroversial point in post–*Concept of Law* legal theory, for one of Hart's most important achievements in that book is his explanation of the significance of the internal point of view in legal theory, that is, the importance of understanding law taking into account how legal phenomena is perceived by those subject to it.[26]

Moreover, it should also be uncontroversial among legal theorists that at least some of those who create, administer, and are subject to the law may have moral attitudes toward it and moral beliefs about it—some judges, for example, may accept and apply the law of their legal system because they believe that they are morally obligated to do so. The next step in Finnis's argument, however, depends on his stance on the relative importance of different attitudes or points of view toward law in understanding it adequately. As I just mentioned, some of those subject to or administering the law may have moral beliefs and attitudes toward it. Some, however, may not—some of those subject to the law of certain jurisdictions may feel quite alienated from it and, as a result, may disobey the law or may obey only for prudential reasons while decrying it and working toward its reform.

As Hart points out, officials administering the law may also exhibit a variety of attitudes toward it: judges may uphold and apply the law of their jurisdiction for reasons of career advancement or simply out of a desire to adhere to tradition or preserve the status quo as well as because of a belief in its moral value.[27] Finnis, however, claims that some of these points of view toward law are more important and significant than others in understanding law's nature. His view is that the central case viewpoint, the point of view that allows law to come into and be sustained in existence, is that of the practically reasonable man who appreciates the moral value of the law and understands the way in which its unique properties assist us to live well[28] and who hence holds the view that legal obligation presumptively entails moral obligation. According to Finnis, it is from this point of view—that of a practically reasonable person who regards legal obligation as presumptively entailing moral obligation—that the legal theorist must choose which features

25. FINNIS, *supra* note 24, at 12.
26. HART, *supra* note 1, *passim*, but *see esp.* 55–61, 88–91, 105–110, and the *Postscript*, 242–244.
27. HART, *supra* note 1, at 203.
28. For Finnis's account of human well-being and the role of law in securing it, *see* FINNIS, *supra* note 24, esp. 3, and chaps. III–VI, IX, and XII.

of law are most important and significant to explain. To perform that task well, a legal theorist must support his judgments of importance and significance with moral evaluations concerning the law's ability to create moral obligations to obey it and to assist us in realizing certain values in our lives.

In *Evaluation and Legal Theory*, I articulate my understanding of the "evaluative-but-not-morally-evaluative" view of legal theory, which stands in opposition to Finnis's views on this topic and which I term indirectly evaluative legal theory.[29] Although this work is largely focused upon a comparative analysis of the methodological commitments of Joseph Raz, John Finnis, and Ronald Dworkin and seeks in particular to explain my view of how Razian legal theory involves evaluative judgments about law while not engaging in a moral evaluation or justification of it, I believe that Hart's approach to jurisprudence can also be viewed as an example of indirectly evaluative legal theory[30] and that viewing it this way helps illuminate the first two of Hart's methodological commitments in the "Postscript" discussed in Section I above.

In the book, I attempt to explain the commitments and tenability of indirectly evaluative legal theory partly via an analysis of the argument by Finnis just discussed. I begin by arguing that Finnis's claim that theorists must make evaluations of significance and importance in order for their theories to be more than miscellaneous lists of facts is true but somewhat banal. The need for what I term "purely metatheoretical" value judgments[31]—judgments about which data to focus on and how to order and arrange materials for explanation in order for one's theory to exhibit such general theoretical virtues as simplicity, clarity, consistency, and comprehensiveness—are common to all theoretical explanations, including theoretical explanations of law, but noting this point does not yet tell us anything distinctive about the methodological commitments of jurisprudence.

For legal theorists, I argue, there is another reason why they must engage in evaluative judgments concerning not merely the metatheoretical virtues of theories in general but which are judgments about the subject matter or data of legal theory itself. This point arises because the concept of law is one that is very familiar to those in societies that are governed by law, and those who create, administer, and are subject to the law are aware of law and have views about it and about how they ought to act in light of it. Legal theory tries to help us understand ourselves and our social world in terms of law, and so a successful legal theorist must make evaluative judgments of importance and significance about his or her subject matter and must do so in a way that is sufficiently sensitive to those already existing self-understandings in terms of law held by those who create, administer,

29. DICKSON, *supra* note 23, chaps. 2 and 3.

30. I note this point in EVALUATION AND LEGAL THEORY, *see* DICKSON, *supra* note 23, at 3, 35, and 35 note 9.

31. DICKSON, *supra* note 23, at 32–39.

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and are subject to law. Some of these self-understandings will include moral beliefs about and attitudes toward law—for example, the belief that may be held by some that law creates a moral obligation to obey it—and the nature and existence of such beliefs and attitudes about law are important aspects of law to explain.

In short, I support all the steps in Finnis's argument except the final one, that is, the claim that in order to be able to make these judgments of importance and significance in legal theory—including judgments of importance and significance concerning moral beliefs and attitudes about law—the legal theorist must make morally evaluative (or "directly evaluative," as I term them in the book) judgments about the law. I claim, rather, that although it is indeed important to explain features of law such as its claim to moral legitimacy and the acceptance of that claim by some of those who create, administer, and are subject to the law, it is possible for the legal theorist to do this—to know that such features of law are important and to explain them—without himself taking a stance on whether and under what conditions such beliefs or claims are true and hence without making morally or directly evaluative judgments about them.

Judgments of which features of the law it is important and significant to explain are what I term indirectly evaluative judgments that neither entail nor require support from directly evaluative judgments such as whether and under what conditions law is morally justified or creates moral obligations to obey it. This view naturally invites the question: If we need not make moral value judgments in order to know that a particular feature of the law is important to explain, then on what alternative basis can we be justified in making such judgments? My view in *Evaluation and Legal Theory* is that indirectly evaluative judgments that some feature of the law, X, is important to explain may be supported by the fact that X is a feature that law invariably exhibits and that hence reveals the distinctive mode of law's operation; by the prevalence and consequences of certain beliefs on the part of those subject to law concerning that X, indicating its centrality to our self-understandings; by the fact that the X in question bears upon matters of practical concern to us; and/or by the way in which that X is relevant to or has a bearing upon various directly evaluative questions concerning whether it and the social institution that exhibits it are good or bad things.[32]

It is important to reiterate the point that in many cases, certain features of law are judged important to explain because of the role those features already play in the self-understandings of those who administer and are subject to the law. In other words, I fully support the insight—shared by Hart and Finnis—that in legal theory we must understand law by taking into account how those who create, administer, and are subject to the law understand themselves and their own behavior in terms of law. However,

32. DICKSON, *supra* note 23, at 64, and, more generally, chaps. 2, 3, 6, and 7. My views on the above issues cannot be fully explained or defended here. *See further* DICKSON, *supra* note 23.

contra Finnis, I reject the claim that the legal theorist must take a stance on the moral worth of those self-understandings in order to know that they are important to explain.

That law claims moral authority and that some people regard law as creating moral obligations to obey it is a very important feature of law to explain, but my view is that one can know that and can explain the structural features of that claim and of those purported obligations without taking a stance on whether and under what circumstances the claim is true. In fact, in *Evaluation and Legal Theory*, I make the further claim that we can go on to answer such questions as whether the law has moral value and whether it creates reasons for action such that we have a moral obligation to obey it only once we have an analytical account of law's important features:

> If we are to be capable of answering directly evaluative questions such as whether and under what conditions legal norms ought to be obeyed, then we need to know quite a bit about how those norms, and the social institution which issues them, operate. Otherwise, how are we to know *what* exactly we are asking the question, "ought we to obey it?" of? In asking whether we ought to obey the law, we are asking whether we ought to obey a particular sort of social institution which differs from other forms of social organisation in that it operates *via* certain distinctive procedures and institutional means. We need to know, therefore, what those procedures and means are in order to have the information relevant to trying to answer whether law ought to be obeyed.[33]

This point begins to reveal my view of the links between indirectly evaluative legal theory and legal theory that takes a stance of the moral value and moral justifiability of the law, namely that the latter should proceed only when the former has done its task of picking out and explaining law's important and significant essential properties.[34] Moreover, in many cases it is the bearing that features of law have upon eventual questions of law's moral value and justifiability that make those features significant and important to explain.

To recap: I stated above that sometimes the reason why a given feature of law is important to explain is because that feature bears upon matters of practical concern to us or is relevant to or has a bearing upon answering various directly evaluative questions concerning whether that feature and the social institution that exhibits it are good or bad things. For example, law's claim to moral authority is (arguably) an important feature of law to explain because the existence and nature of that claim means that law will hold us to certain standards whether we agree with them or not and will coercively enforce its edicts against us, perhaps radically curtailing our freedom in certain circumstances if we disobey. This is important because

33. DICKSON, *supra* note 23, at 135.

34. In EVALUATION AND LEGAL THEORY, I attempt to explain the methodological commitments of legal theory that aspires to give a general account of the nature of law in all legal systems.

it bears upon what matters to us—for example, being able to live a fulfilling autonomous life—and because law's compulsory and potentially coercive nature is relevant to answering to questions such as: Is law morally valuable or justified? and When ought we to obey it?

Their relevance to answering those latter sorts of questions, then, can make certain features of law important to explain; if you want to know whether you ought to obey something, you will be able to consider the matter better if you first of all know something about its nature and about the character of the demands being made upon you. This aspect of indirectly evaluative legal theory is also noted by Wil Waluchow in discussing correct jurisprudential methodology in *Inclusive Legal Positivism*.[35] Waluchow expresses this point by saying that one can judge a given feature of law—such as its use of coercion—to be morally relevant, that is, relevant to any eventual moral evaluation of law, without knowing whether that feature is a morally good thing or is morally justified. Waluchow, following Leslie Green[36] then refers to such judgments as judgments of value-relevance, and characterizes the type of legal theory that he supports as "value-relevant, descriptive-explanatory" theory.[37]

Although Waluchow retains the term "descriptive" in characterizing the kind of legal theory he has in mind, all this emphasis on the ways in which evaluative judgments must enter into any explanatorily adequate legal theory seems to take us quite far from the "descriptive jurisprudence" referred to by Hart in the "Postscript." In my view, however, it is merely the term "descriptive" that is a misnomer, and it is so only insofar as it is taken to imply that legal theorists merely record the passing scene of legal phenomena and need not make any evaluative judgments about it in constructing their theories.

As I noted above, my view is that Hart is a proponent of what I refer to as indirectly evaluative legal theory[38] and that this is evidenced by his emphasis on the importance of understanding law by taking into account how those who administer and are subject to the law understand it, by his remarks quoted at the outset of this section stating clearly that in his view an analysis of law must be guided by controversial judgments about what is important and hence will not be neutral between all values, and by an examination of *The Concept of Law* itself, in which Hart does not merely describe a long list of phenomena that are thought of as having a legal character, but rather fixes on those important properties of law—such as how law regulates its own creation, how it creates its own rules via which law is to be identified,

35. WALUCHOW, *supra* note 22, at 19–30.

36. L. Green, *The Political Content of Legal Theory*, 17 PHIL. SOC. SCI., 1–20 (1987), at 15. This article offers a thoughtful analysis of different possible types of legal theory and claims that an evaluative but not morally evaluative approach to legal theory is a tenable position.

37. WALUCHOW, *supra* note 22, at 22.

38. *See* note 30, above.

changed, and adjudicated upon, how laws form into legal systems, and so on—which give his account cogency and explanatory power.

I want to conclude the present discussion about the possibility and nature of descriptive jurisprudence by examining two alternative views—one fairly recent and one very recent—of the correct interpretation of Hart's commitment to descriptive jurisprudence in the "Postscript." The first of these views is propounded by Stephen Perry, who claims that Hart does not stand by his own declared descriptivism and, moreover, that he cannot do so if he is to offer an adequate answer to what Perry takes as jurisprudence's most important questions. The second alternative interpretation of Hart comes from Brian Leiter, who counsels the abandonment of conceptual analysis of the concept of law and urges us to take a naturalist turn and think of philosophy of law as being continuous with empirical inquiry in the social sciences. In the remainder of this section, I will outline these alternative views and then briefly indicate what I regard as the correct response to them. My aim here is to present a clearer picture of some contemporary views on methodology in jurisprudence by bringing into better focus the points of disagreement between them.

B. Perry's View of Descriptivism

Stephen Perry's valuable contribution to the debate about the role of evaluative judgments in legal theory comes in the form of several interesting articles discussing aspects of Hart's views on this topic.[39] For present purposes, I will focus upon his argument in "Hart's Methodological Positivism."[40] In that article, Perry argues that there is a methodological tension in *The Concept of Law* insofar as Hart implicitly combines two different methodological approaches in that work that Perry terms the descriptive-explanatory method and the method of conceptual analysis respectively. According to Perry, then, the descriptive legal theory that Hart claims to be engaging in turns out on closer examination to be a hybrid methodology that combines elements of the descriptive-explanatory approach and a form of conceptual analysis.

Descriptive-explanatory theory, for Perry, is characterized as a scientific, morally neutral enterprise in which "there is no necessary reason why the theory's categories should track the concepts of the participants in the social practices under study."[41] In undertaking conceptual analysis, on the other hand: "We would inquire into the manner in which we conceptualize our

39. *See e.g.*, S.R. Perry, *supra* note 11, at 97; Perry, *Hart's Methodological Positivism* 4 LEGAL THEORY 427 (1998), *reprinted in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (J.L. Coleman, ed. 2001), at 311; Perry, *Holmes v. Hart: The Bad Man in Legal Theory*, *in* "THE PATH OF LAW" AND ITS INFLUENCE (S. Burton, ed., 2000), at 156.

40. Perry, *Hart's Methodological Positivism*, *supra* note 39.

41. Perry, *Hart's Methodological Positivism*, *supra* note 39, at 321.

own social practices so as, presumably, to clarify the concept and come to a better understanding of the practices themselves."[42]

Perry claims that—in terms of this terminology—Hart wishes to engage in conceptual analysis, and he is surely correct to do so, given Hart's persistent emphasis in his work on the importance of the internal point of view in understanding law adequately. But according to Perry, Hart's brand of conceptual analysis—which Perry terms "external conceptual analysis"[43]—retains elements of the descriptive-explanatory approach:

> This can, perhaps, be viewed as a hybrid methodology. As in the hermeneutic tradition, Hart aims to understand how the participants regard their own behaviour, but he hopes to achieve this understanding by taking up an external, observational stance reminiscent of that adopted by pure descriptive-explanatory theories.[44]

Perry contends that external conceptual analysis is not an adequate methodology for answering what he regards as the most important questions of legal theory, such as how law provides reasons for action that we would not otherwise have and under what conditions law possesses the authority over us that it claims.[45] Some commentators doubt that Hart set out to answer these questions in *The Concept of Law,*[46] a point that leaves Perry open to the charge that he is being somewhat unfair to Hart in criticizing him for failing to supply adequate answers to questions he did not attempt to address. Throughout his writings on this topic, however, Perry has been insistent that questions such as those mentioned above are central jurisprudential questions that legal theorists must address, and that the only methodology that is adequate to this task is what Perry terms internal conceptual analysis, which is, "in all essential respects, Dworkin's interpretivism."[47]

One strand in Perry's argument in *Hart's Methodological Positivism* is to show that Hart's position is frequently threatening to and often does overstep what Perry refers to as its external or descriptivist leanings, and that once it does so, in order to answer those questions that Perry takes as central to jurisprudential inquiry, the legal theorist must engage in Dworkinian interpretivism and attempt to put legal practice in its best moral light in terms of the value or point it is taken to serve. Perry's argumentative strategy is

42. Perry, *Hart's Methodological Positivism*, *supra* note 39, at 314.
43. Perry, *Hart's Methodological Positivism*, *supra* note 39, secs. IV–I.
44. Perry, *Hart's Methodological Positivism*, *supra* note 39, at 326.
45. Perry, *Hart's Methodological Positivism*, *supra* note 39, secs. IV and V.
46. *See, e.g.*, Liam Murphy, *The Political Question of the Concept of Law, in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (J.L. Coleman, ed., 2001), at 371, note 10, and 378; Michael Moore, *Hart's Concluding Scientific Postscript* 4 LEGAL THEORY 301–327 (1998), *reprinted in* M. Moore, EDUCATING ONESELF IN PUBLIC (2000), at 79; Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17–51 (2003).
47. Perry, *Hart's Methodological Positivism*, *supra* note 39, at 349.

hence to create a dichotomy and then force Hart's methodological position into one or other arm of it.

Two strategies may be used in combination to try to resist this reinterpretation of Hart as having to engage in moral value judgments about law in order to understand it adequately. The first is to demonstrate the implausibility of Perry's alternative to Dworkinian interpretivism in order to show that the dichotomy he sets up is false and reveals an impoverished view of the spectrum of possible methodological positions. If an implausible interpretation of descriptive legal theory is adopted, then it will be easy to show that Hart fails to stay within the confines of that methodological approach. The second strategy is to stake out a viable alternative position that demonstrates how legal theorists can offer explanatorily adequate evaluative legal theories that are interpretations of the concept of law and of people's self-understandings in terms of that concept but that do not require the theorist to make moral evaluations of law or attempt to put it in its best moral light in order to understand it. This second strategy—sometimes in combination with the first—is what I take Coleman, Green, Marmor, Waluchow, and myself to be trying to do in those works referred to in notes 20 to 23.

Some brief remarks on the first strategy, that of demonstrating that Perry sets up a false dichotomy by presenting an implausible view of the commitments of descriptive legal theory, are in order here. As was noted above, Perry claims that Hart engages in external conceptual analysis, a methodological approach that attempts to clarify and explain our self-understanding in terms of the concept of law but that in doing so, retains "descriptive" or "external" leanings. Perry tends to characterize such descriptive leanings in a distinctive way, suggesting that this kind of methodological approach places legal theorists in a kind of passive recording role in relation to the phenomena they seek to explain. At several points in *Hart's Methodological Positivism,* descriptive legal theory is presented as a kind of dictation exercise in which legal theorists take into account the internal point of view by merely absorbing and reproducing in their theories the beliefs and attitudes held by those who create, administer, and are subject to law:

> the whole point of [Hart's] approach is to describe existing conceptualizations rather than create new ones.[48]
>
> The *idea* of a rule of recognition appears to be an external theoretical notion, as instance of which has, from outside the practice, been observed within it. But simply to make such an observation does not, without more, constitute a clarification or elucidation of the participants own conceptual scheme.[49]

48. Perry, *Hart's Methodological Positivism*, *supra* note 39, at 327.
49. Perry, *Hart's Methodological Positivism*, *supra* note 39, at 337 (emphasis in original).

> Clarification cannot be achieved by an external description, which if it is to be accurate must either mirror the facts of confusion, uncertainty, and disagreement. . . . Conceptual clarification is, unavoidably, an internal enterprise.[50]

In characterizing the descriptive aspects of Hartian legal theory in this manner, Perry presents Hart and by implication any other legal theorist with a stark choice: either they have descriptivist leanings and merely passively record and reproduce the passing legal scene, hence not providing an elucidation or analysis of aspects of law at all, or when, as Perry argues, they inevitably overstep the bounds of this enterprise and offer an *explanation* of features of the law, they must be engaging in internal conceptual analysis that turns out, for Perry, to be Dworkinian interpretivism.

The first arm of the dichotomy is decidedly suspect, and it is so because it does not take into account the type of evaluative judgments that feature in any explanatorily adequate legal theory. As I have noted in this section, it is my view that legal theorists must make evaluations of significance and importance about their data, and those evaluations must be sensitive to existing evaluations of significance and importance on the part of those who create, administer, and are subject to law. The type of jurisprudence that Hart is engaged upon does much more than merely passively record and report on views about the law held by those subject to it, attempting as it does to systematize, clarify, evaluate for importance and relevance, and incorporate them into a cogent and persuasive account of the nature of law.

That Hart himself was well aware of the need for such evaluative judgments is evident from the quotation at the beginning of Section II[51] and from the fact that *The Concept of Law* does not present a list of all possible self-understandings in terms of law but rather offers an analysis of the character of certain important self-understandings—for example, that officials in a legal system must regard themselves as bound in common by a rule that is manifest in their official practice and by means of which they identify what counts as valid law—that must be present in order for a legal system to exist.

The upshot of all this is that explanatorily adequate legal theory requires theorists to make a whole host of evaluative judgments concerning the subject matter that their theories address and bears little resemblance to Perry's characterization of the descriptivist aspects of Hart's methodology. In characterizing those descriptivist facets of Hart's work in the terms he does, Perry makes it all too easy to demonstrate that Hart does not employ this implausible methodology and hence to begin his task of reinterpreting Hart as having to adopt a Dworkinian methodology in order to construct an adequate account of law. However, as neither Hart nor any other

50. Perry, *Hart's Methodological Positivism*, *supra* note 39, at 339.
51. Hart, *supra* note 19, at 39.

legal theorist of whom I am aware has ever employed the methodology that Perry terms "descriptive-explanatory," he is attacking a straw man and setting up a false dichotomy that obscures the possibility of there being other methodological positions besides an implausible version of descriptive legal theory on the one hand and Dworkinian interpretivism on the other.[52]

C. Leiter's Interpretation of Indirectly Evaluative Legal Theory

Another challenge to my view of Hart's methodology as being a form of indirectly evaluative legal theory emerges in the course of recent work by Brian Leiter. In a series of articles, Leiter has articulated a highly original and challenging approach to jurisprudential methodology. He argues that traditional attempts to understand some aspects of law—notably the adjudication process—using the methodology of conceptual analysis should be abandoned and replaced instead with a "naturalist" methodology committed to the view that "a satisfactory theory of adjudication must be continuous with empirical inquiry in the social sciences."[53]

Leiter views his thesis as extending the naturalistic turn taken by late-twentieth-century philosophy to legal philosophy. He characterizes that turn in terms of a growing awareness of the fruitlessness of conceptual analysis and what he refers to as "the a priori, armchair methods of the philosopher"[54] as tools for making progress in answering traditional philosophical questions. These methods are hence to be abandoned and replaced by or embedded within empirical scientific inquiry.

When we turn from general philosophy to legal philosophy, Leiter argues in support of his view via an interpretation of the American Legal Realist movement as offering theories of adjudication that are naturalist in tenor. Just as Quine wished to naturalize epistemology by replacing traditional epistemological questions with questions from the empirical sciences such as psychology, Leiter claims that the Legal Realists wished to naturalize adjudication, in that they argued against a traditional view of adjudication in which legal reasons are presented as generating uniquely correct outcomes in cases and instead counseled in favor of empirical studies concerning the psychology and sociology of the judiciary in order to

52. Andrei Marmor also argues that such a dichotomy is spurious in MARMOR, *supra* note 21, at 153–159, esp. 158.

53. B. Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997), at 285. *See also* B. Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis, in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (J.L. Coleman, ed., 2001), at 355; Leiter, *Naturalism and Naturalized Jurisprudence, in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY (B. Bix, ed., 1998), at 79; Leiter, *Legal Realism and Legal Positivism Reconsidered* 111 ETHICS (2001), at 278; Leiter, *Beyond the Hart/Dworkin Debate*, *supra* note 46.

54. Leiter, *Rethinking Legal Realism*, *supra* note 53, at 286.

improve our understanding of which inputs produce which outputs in adjudication situations.[55]

This approach to jurisprudential methodology throws down the gauntlet to the many approaches to theorizing about law that rely heavily on conceptual analysis. This being so, Leiter's views are likely to provide fruitful debating ground for the future, especially as his most recent work involves investigating whether different forms of naturalism and attendant doubts about the fruitfulness of certain forms of conceptual analysis have wider application in legal theory than in the arena of adjudication, where Leiter's inquiries began.[56]

For present purposes, however, I want to focus on those aspects of Leiter's views that are relevant to the issue of the correct way to interpret Hart's remarks in the "Postscript" and to my claim that Hart's commitment to descriptive jurisprudence should be read as a commitment to the indirectly evaluative approach to legal theory. In a recent paper, Leiter claims that legal theorists have been engaging in the wrong debate in arguing about the kind of issues surveyed in this section; in particular, the issue of whether and in what sense jurisprudence can be descriptive. According to Leiter, jurisprudence is descriptive, but the real question is whether there has been overreliance on conceptual analysis and on analyzing our intuitions about law in contemporary legal theory. Leiter believes that the more fruitful debate is to be had in investigating those latter questions and in considering whether certain naturalist doctrines might be of assistance in supplementing or replacing conceptual analysis if it is found wanting when applied to law. In reaching this conclusion, however, Leiter does engage with the debate concerning whether and in what sense jurisprudence is descriptive and considers the character of the indirectly evaluative approach to legal theory examined in *Evaluation and Legal Theory*.[57]

According to Leiter, indirectly evaluative legal theory as I explain it is not a tenable position. He characterizes indirectly evaluative legal theory as an attempt to find a position "intermediate between descriptive jurisprudence and the view of Dworkin and Finnis that jurisprudence requires moral evaluation of the law."[58] Leiter's argument attempts to show that this intermediate position in fact collapses into another position that Leiter terms "a descriptive theory of a Hermeneutic Concept"[59] and that there is no tenable middle ground between this latter position and the morally evaluative legal theory of Finnis and Dworkin.

55. Leiter's views are much more subtle than I can express in this brief summary. For a detailed taxonomy of different types of naturalism and their potential roles in legal theory, *see* B. Leiter, *Naturalism in Legal Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at http://plato.stanford.edu/entries/lawphil-naturalism/ (2002).

56. *See* Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, sec. III; *see also* B. Leiter, *Objectivity, Morality and Adjudication, in* OBJECTIVITY IN LAW AND MORALS 66 (B. Leiter, ed., 2001).

57. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, sec. II, 40–43.

58. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 40.

59. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 43.

The argument is brought into better focus by examining Leiter's characterization of a descriptive theory of a Hermeneutic Concept. Leiter and I share the view that all theorists, no matter the subject matter of their theories, must make value judgments of a certain kind and that these value judgments are required simply in virtue of the nature of theoretical accounts; namely, that they attempt to construct cogent and structured explanations that can assist others in understanding as fully as possible the phenomena under consideration. In *Evaluation and Legal Theory,* I term these kinds of value judgments "purely metatheoretical" value judgments and include simplicity, clarity, elegance, comprehensiveness, and coherence among the virtues that any successful theory attempts to live up to.[60] Leiter terms these "epistemic values" and includes comprehensiveness, simplicity, and consilience among their number.[61] As my characterization of indirectly evaluative legal theory earlier in this section indicates, Leiter and I also share the view that law is what he terms a hermeneutic concept, which he characterizes in terms of these two conditions: "(i) it plays a hermeneutic role, that is, it figures in how humans make themselves and their practices intelligible to themselves, and (ii) its extension is fixed by this hermeneutic role."[62]

Leiter's contention, then, is that the position that I term indirectly evaluative legal theory in fact only requires legal theorists to engage in epistemic or purely metatheoretical value judgments. It is just that, as law is a hermeneutic concept, in order to present any explanatorily adequate account of it, those epistemic or purely metatheoretical values require us to describe how those using the concept understand their own behavior and attitudes in terms of it. However, although hermeneutic concepts such as law demand that theorists describe how those using the concept make sense of themselves in terms of it, in offering those descriptions, the theorist need not himself make evaluative judgments about the beliefs and attitudes held by participants trying to make sense of themselves in terms of the concept.

The only value judgments that the legal theorist must engage in are hence purely metatheoretical or epistemic value judgments concerning the simplicity, comprehensiveness, consilience, and so on, of his or her theory. In the case of a hermeneutic concept, however, in order that his theory exhibit these virtues and adequately explains what the concept is, it is necessary also to describe the beliefs and attitudes of those making sense of themselves in terms of that concept:

60. DICKSON, *supra* note 23, at 32–33, and, more generally, chap. 2. *See also* the discussion of indirectly evaluative legal theory earlier in this section.

61. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 42.

62. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 40. *See also* DICKSON, *supra* note 23, at 41–44.

> Insofar as a descriptive theory of law takes as its target a Hermeneutic Concept, necessarily a comprehensive, simple and consilient theory—i.e., a descriptively adequate one—must account for how the concept is "used by people to understand themselves."[63]

> it does not . . . require that we attend to how the theorist . . . *evaluates* those practices. Thus, the resulting theory is "indirectly evaluative" only in the trivial sense that to account for the extension of a Hermeneutic Concept—one that figures in the *evaluations* of agents who employ the concept—we must attend (descriptively) to *their* evaluative practices."[64]

The important point in this for Leiter appears to be his claim that the legal theorist is not required to make value judgments about the self-understandings of participants or about their practices of making evaluative judgments about law. Rather, the legal theorist must make evaluative judgments in order that his theory exhibit those epistemic virtues that it ought to in order to be successful, and in the case of a hermeneutic concept, this requires the theorist to describe how those employing the concept understand themselves in terms of it and the evaluative judgments that they make in the course of so doing.

One thing that Leiter considers in making his case is whether this is merely a terminological disagreement—indirectly evaluative legal theory and a descriptive theory of a Hermeneutic Concept being attempts to characterize the same methodological stance under different names. In denying that this is so, Leiter claims that:

> it is Dickson's central thesis that there is conceptual space between the view of theorists like Finnis and Dworkin that "in order to understand law adequately, a legal theorist must morally evaluate law ("the Moral Evaluation Thesis")" and the Hart-style descriptivist who holds that an adequate understanding of law does not require a moral evaluation of law.[65]

As it stands, this is false as a statement of my views. As is discussed earlier in this section and mentioned explicitly in *Evaluation and Legal Theory,* I understand Hart's "general and descriptive jurisprudence" as being an instance of indirectly evaluative legal theory.[66] Insofar as I regard myself as staking out an intermediate position, then, the position is not intermediate between Hart's descriptive jurisprudence on the one hand and Finnis's and Dworkin's morally evaluative and justificatory jurisprudence on the other.

63. Leiter, *supra* note 46, at 42. The internal quotation is from J. Raz, *Authority, Law and Morality, in* J. RAZ, ETHICS IN THE PUBLIC DOMAIN (1994), at 237.

64. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 43 (emphasis in original).

65. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 43. The internal quotation is from DICKSON, *supra* note 23, at 9.

66. DICKSON, *supra* note 23, at 3, 35, esp. 35 note 9.

Of course, when Hart's descriptivism is mischaracterized—in the way that I regard some of Stephen Perry's remarks as mischaracterizing it—then indirectly evaluative legal theory might appear to be an intermediate position between an implausible interpretation of the descriptive aspirations of jurisprudence and Finnis's and Dworkin's position. However, in my view, Hart's descriptivism, properly understood, is simply an instance of indirectly evaluative legal theory. As my remarks in this section should make clear, I regard this type of legal theory as involving legal theorists in significant evaluative work in constructing and defending their accounts of law. Because "descriptive" has "value-free" connotations for some,[67] and has resulted in what I regard as misinterpretations of the commitments of the kind of legal theory that Hart and Raz engage in, in *Evaluation and Legal Theory* I advocated abandoning the term "descriptive" in characterizing this approach legal theory. This is partly why I do not use the term myself in that work, preferring to characterize afresh the methodological approaches I discuss.[68]

For all this, however, I think that Leiter may perhaps be right to insist that more than terminology is at stake here. This issue turns on whether Leiter's understanding of what is required for an explanatorily adequate descriptive account of the hermeneutic concept of law and what I understand to be required for explanatorily adequate indirectly evaluative legal theory differ. In *Evaluation and Legal Theory,* I do make a claim that seems directly to contradict Leiter's view, namely that purely metatheoretical evaluative judgments that all theorists must make and that concern the simplicity, coherence, and comprehensiveness, and so on, of their theoretical accounts are not sufficient for explanatorily adequate legal theory.[69] I present them as insufficient because of the kind of concept that law is, that is, that it is a concept people use to understand themselves and their social world.

This in turn means that legal theorists in constructing explanatorily adequate legal theories must do more than attempt to have their theories live up to the purely metatheoretical virtues that all good theories should live up to, because they are further constrained in constructing theoretical accounts of law by the need to do adequate justice to the fact that those who create, administer, and are subject to the law already have views on it and make evaluative judgments about it in conducting their lives. As I put the matter in *Evaluation and Legal Theory,* in making those judgments about which features of the law are most important or significant to explain, therefore, indirectly evaluative legal theory must "be sufficiently sensitive to, or take adequate account of, what is regarded as important or significant,

67. *See* Perry, *supra* note 11.

68. DICKSON, *supra* note 23, at 32. Jules Coleman also notes the unfortunate connotations of Hart's use of the term in COLEMAN, *supra* note 20, chap. 12.

69. *See* DICKSON, *supra* note 23, at 37 and 38–49.

good or bad about the law, by those whose beliefs, attitudes, behaviour, etc. are under consideration."[70]

But doesn't all of this just amount to Leiter's point that in the case of a Hermeneutic Concept such as law, epistemic or purely metatheoretical values direct the theorist to attend to how those living under law understand it, and that hence indirectly evaluative legal theory does indeed collapse into what Leiter calls a descriptive account of a hermeneutic concept?

The answer to this turns on the right way to understand Leiter's claim that in constructing a descriptive theory of a hermeneutic concept, the legal theorist need not himself make evaluative judgments about the beliefs, attitudes, and evaluative practices of those he is studying, but need only "attend (descriptively)"[71] to participants' self-understandings in terms of and evaluative judgments about law.[72] If by this Leiter means that the hermeneutic aspects of the legal theorist's task are discharged purely by recording and reproducing in his theory—subject to epistemic evaluative judgments about how best to capture and explain them to his audience—the beliefs, attitudes, and evaluative judgments of those subject to and administering law, then an important difference between Leiter's view and indirectly evaluative legal theory remains.

As the previous discussion of Stephen Perry's views indicates, indirectly evaluative legal theory is not a kind of market research or dictation exercise wherein the legal theorist passively records wholesale the self-understandings and evaluative judgments of those living under law and then orders and presents them, taking into account epistemic virtues of simplicity, comprehensiveness, and so on. Rather, in making indirectly evaluative judgments of importance and significance and in explaining legal phenomena, the legal theorist himself has to be able to discriminate between and make evaluative judgments about participants' self-understandings in order to pick out which are most relevant in understanding law's important and significant features.

In doing, so, as I state above, he or she is constrained by the hermeneutic aspects of the enterprise to "be sufficiently sensitive to, or take adequate account of"[73] the self-understandings of the participants, but being sufficiently sensitive to or taking adequate account of those understandings does not merely amount to a mirroring or reproductive exercise. Some 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. It seems likely, for example, that understandings of features of law that are relevant to ultimately answering questions about law's moral value and ability to

70. DICKSON, *supra* note 23, at 43.
71. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 43.
72. *See, again,* Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 43.
73. DICKSON, *supra* note 23 at 43.

create moral obligations to obey will be among the most important self-understandings of participants.

As is explained in *Evaluation and Legal Theory,* the bearing of features of law on questions concerning its moral worth and whether we ought to obey it (or what Waluchow calls their "value-relevance") is often precisely what makes them important features to be explained. My contention, of course, is that one can know that features of law are relevant to answering morally evaluative questions without yet knowing the answer to those morally evaluative questions. We can thus analyze those important features of the law that are relevant to its moral evaluation before going on to undertake such evaluations.[74] All this requires the legal theorist not merely to record and reproduce but to *evaluate* the self-understandings of participants in explaining law's important and significant features. Contra Leiter, it seems natural to me to say—and I do say throughout *Evaluation and Legal Theory*[75]—that this is an evaluation—albeit not a moral evaluation—of aspects of legal practices themselves, because as Hart always emphasized, participants' self-understandings are an important part of the data of legal theory to be explained, being constitutive of those practices that legal theorists study.

All this, however, may yet not mark a difference with Leiter's descriptive theory of a hermeneutic concept. Leiter does not speak of the legal theorist passively reproducing participants' self-understandings but rather claims that he or she must "attend to"[76] and "account for"[77] them. If, therefore, in Leiter's understanding of it, all of the kinds of evaluative judgments mentioned above—including evaluative judgments about the evaluative practices of those subject to law—can be incorporated within his idea of a descriptive theory of a Hermeneutic Concept, then I think that there is likely very little, if any, difference between this approach and indirectly evaluative legal theory.

If this were the case, however, it would be difficult to see why Leiter would reject the point that the judgments that a legal theorist must make require him or her to evaluate—although not morally evaluate—the practices he or she is studying and the beliefs, attitudes, and evaluations of those subject to law that constitute those practices. Leiter's explicit rejection of this point ("it does not . . . require that we attend to how the theorist . . . *evaluates* those practices"[78]) suggests that a difference of opinion remains, and if he envisages the task of legal theorists as being merely to record and reproduce participants' understandings and then present them in the form of a theory imbued with the epistemic values he mentions, then this difference of opinion will be a significant one.

74. Dickson, *supra* note 23, esp. at 60–64 and 134–137.
75. Dickson, *supra* note 23, *passim*, but *see esp.* 35, 37, 43–44.
76. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 42.
77. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 42.
78. Leiter, *Beyond the Hart/Dworkin Debate, supra* note 46, at 43 (emphasis in original).

This section has considered several commentators' views on Hart's remarks in the first section of the "Postscript" concerning descriptive jurisprudence. As I have mentioned at several points, I believe that Hart's methodology is an instance of what I term indirectly evaluative legal theory. As has been also been discussed in this section, however, some theorists appear to characterize Hart's emphasis on the internal point of view in overly passive terms and view the factoring in of the participants' viewpoint in his theory as a mirroring or reproductive exercise. This may be due in part to Hart's own remarks on this issue in the first section of the "Postscript," briefly outlined in thesis B of Section I above ("The importance and consequences of adopting an internal point of view in jurisprudence") and in particular may be influenced by the formulation of his position in which he states that: "Description may still be description, even when what is described is an evaluation."[79] This formulation, and the points that precede it about the legal theorist having to "record but not to endorse or share"[80] the internal viewpoint of participants in the legal system may have overly passive connotations, and may suggest to some that legal theory merely mirrors or reproduces participants' views in adopting an internal point of view.

In interpreting these remarks of Hart's, however, I think it is important once again to bear in mind the polemical nature of the "Postscript" and its aim of distancing Hart's position from that of Ronald Dworkin. Hart wanted to emphasize that it is possible to offer an understanding of law taking into account the internal point of view of those subject to and administering the law without sharing those views or, where those views have a moral content, without taking a stance on their moral correctness. In his desire to distance himself from the position that claims that legal theorists must make morally evaluative judgments that are competitive with those of participants in legal practice (concerning, for example, the moral obligatoriness of law and the conditions under which its claimed authority is justified) Hart may lean too far in the other direction, and as a result some of the formulations he uses may suggest to some that his own legal theory factors in participants' understandings by merely recording them.

As has already been mentioned, however, other of Hart's writings clearly show that he was fully aware that the legal theorist must make evaluative judgments in order to judge which participants' beliefs and attitudes are important and hence cannot merely passively record all such beliefs and attitudes wholesale:

> an analysis which allots a place to moral claims and beliefs as constituents of social phenomena must itself be guided, in focusing on those features rather than others, by some criteria of importance of which the chief will be the explanatory power of what his analysis picks out. So his analysis will be guided by judgements, often controversial, of what is important.[81]

79. HART, *supra* note 1, at 244.
80. HART, *supra* note 1, at 243.
81. HART, *supra* note 19, at 39.

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Hart did not change his view on this point in the "Postscript" but merely shifted his emphasis because of his task in that work of distancing his own position from that of Ronald Dworkin. The best evidence of this is to be found in the substantive arguments about the character of law featuring *The Concept of Law* itself. In arguing in favor of his view of law in that work, Hart does not engage in a mere "lifting" or reproduction of participants' views about the law but rather attempts to evaluate and identify what is significant and important in those self-understandings and evaluative practices of those subject to and administering law.[82]

III. A POINT OR PURPOSE FOR LAW? LEGAL THEORY AND THE JUSTIFICATION OF STATE COERCION

As was mentioned in Section I, as well as rejecting the general thesis that he is engaging in evaluative and justificatory jurisprudence in the opening section of the "Postscript," later in that work Hart also specifically rejects Ronald Dworkin's particular brand of justificatory jurisprudence, including his reinterpretation of legal positivism as an interpretive theory of law that attempts to put law in its best light as providing a certain justification for the exercise of the coercive power of the state. Hart claims that Dworkin's reinterpretation of legal positivism goes against the grain of his work because he (Hart) does not believe that the purpose of law is to provide a justification for state coercion, and indeed he doubts that law has one overall purpose or point that it is the job of legal theory to elucidate.[83]

Other commentators, too, have taken issue not merely with the general thesis that successful jurisprudence requires legal theorists to engage in moral evaluation and justification of law but with Dworkin's particular way of implementing that idea in his own theory, that is, his claim that legal theories must explain how law can function so as to justify state coercion. Dworkin arrives at this claim via his constructive interpretation thesis. According to Dworkin, participants in certain social practices—namely those practices that have value or have some point and where the rules of that practice are sensitive to its point—develop interpretive attitudes toward those practices. When faced with a practice of this kind, in order to understand it adequately, the theorist must constructively interpret the practice, that is, he must himself take a stand on its purpose or point and attempt to show it in its best light according to that purpose or point.

In giving an abstract characterization of this process as applied to law in *Law's Empire,* Dworkin proposes that our discussions about law assume that the abstract point of legal practice is properly to constrain governmental power by setting the conditions under which the exercise of collective force

82. *See also* my remarks on this issue at the close of Sections II.A and II.B above.
83. HART, *supra* note 1, at 248–249.

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is justified.[84] This being so, according to Dworkin, it is the task of legal theory to explain how and under what conditions law can perform this function well, and hence to explain the connection between law and the justification of state coercion.

In *Evaluation and Legal Theory,* I took issue with this view, claiming that by fixing in place law's point or function at the outset of his inquiry and claiming that all adequate legal theories must explain how law can justify the coercive power of the state, Dworkin closes down many important jurisprudential questions—such as whether law has one overall function at all, whether that function is such that law necessarily possesses some moral value, and whether it is the task of legal theory to put law in its best light in terms of that function—before they can properly be raised.[85] My point in that work was to emphasize that Dworkin fixes in place the point or function of law at an early stage in his inquiry and to argue that once he does so, the methodological question is already begged in favor of a particular type of legal theory with particular commitments about the nature of law.

Dworkin himself claims that these charges of question-begging do not stick because the function or point he ascribes to law is merely an uncontroversial and provisional assumption that is necessary in order to create a plateau upon which interpretive debate can begin.[86] In *Evaluation and Legal Theory*, I discuss these claims and argue that they are false. Dworkin's assumed point or function of law is not uncontroversial in the least, as Hart's remarks in the "Postscript" and the views of other commentators on this issue make clear.[87] Moreover, Dworkin's claim that his postulated point or function of law is merely a provisional suggestion is hard to sustain when he appears to refuse to take challenges to his view that it is the task of legal theory to explain how law justifies state coercion seriously.[88] This being so, I conclude that in *Law's Empire* a controversial and quite specific assumption about the point or purpose of law that is put in place rather than extensively argued for at the outset of the inquiry begs many of the most important methodological questions before they can properly be raised.

Jules Coleman has also argued that Dworkin's ascription of the function of justifying state coercion to law and his claim that legal theory must explain how law provides such a justification are lacking in argumentative foundation and close down the question of whether legal theorists need

84. DWORKIN, *supra* note 3, at 93.

85. DICKSON, *supra* note 23, chap. 6.

86. DWORKIN, *supra* note 3, at 93.

87. For example, *see* J. Raz, *Postema on Law's Autonomy and Public Practical Reasons: a critical comment*, 4 LEGAL THEORY 1 (1998), esp. 2–4.

88. *See, e.g.*, DWORKIN, *supra* note 3, at 190: "A conception of law *must* explain how what it takes to be law provides a general justification for the exercise of coercive power by the state"; *see also* his reinterpretation of legal positivism as "conventionalism" in DWORKIN, *supra* note 3, chap. 4; and his cursory dismissal of the alternative task of legal theory postulated by the critical legal studies movement in DWORKIN, *supra* note 3, at 271–274.

engage in substantive moral argument in characterizing law.[89] Coleman makes the point that even if we accept that certain social practices are to be interpreted in light of their purpose or function, this still does not take us all the way to Dworkin's claim that legal theories must engage in moral evaluation and justification of their subject matter in order to explain it. The kinds of arguments that can feature in a good interpretation of something in light of its purpose depend on what that something is taken to be and what kind of point or function it is taken to serve; a good interpretation of a work of art, for example, need not necessarily involve moral evaluation or justification of it because works or art need not serve a moral function in order to be good examples of their genre.

In Coleman's view, then, two further theses must be established in order to take us to the conclusion that legal theorists must engage in moral and political evaluation and justification of their subject matter: (i) that we should impute a *moral* function to law, that of properly justifying the coercive power of the state, and (ii) that we should understand law in its best light as largely *succeeding* in fulfilling that function and hence being the kind of thing that does morally justify the exercise of state coercion. Coleman claims that Dworkin assumes the truth of these further theses without sufficiently arguing for or defending them in *Law's Empire*.

These objections are more specific than some of the arguments mentioned in Section II that claim that it is not necessary to engage in morally evaluative or morally justificatory legal theory in order to explain law, as they are objections to (i) the way in which Dworkin implements his own particular brand of morally evaluative and justificatory jurisprudence, namely by claiming that legal theorists must attempt to explain how law can provide a justification for state coercion; and (ii) the way in which Dworkin introduces and supports this claim, namely that he offers insufficient argument for it and, by fixing in place his view of law's point or function at an early stage in his inquiry, employs it in begging the question of whether legal theorists need engage in moral and political evaluation and justification of law in order to explain it adequately.

Those persuaded by recent work by Nicos Stavropoulos, however, may regard these conclusions as somewhat hasty and are perhaps unfair—if not to Dworkin himself, given his particular way of setting up his argument in *Law's Empire,* then at least to the general methodological approach of which he is the leading exemplar and that Stavropoulos terms interpretivism. According to Stavropoulos, in categorizing and understanding the commitments of various legal theories, our starting point should be to discern their distinctive answers to the question of what determines our legal right and duties or, to put things another way: What makes legal propositions true when they are true?[90] He presents this as a methodological point

89. COLEMAN, *supra* note 20, chap. 12, esp. at 183–186.
90. *See* Stavropoulos, *supra* note 9, sec. 1.

about which question we should ask in legal philosophy in order to gain an understanding of the commitments of various theories of law without begging any questions against any of them at the outset.[91]

Interpretivism is then characterized as the theory that claims the determinants of our legal duties are interpretive facts—a propositions of law is true in virtue of the fact that the proposition follows from the best justification of the community's political practice.[92] Stavropoulos argues that the interpretivist legal theorist's task is to postulate a value that could justify legal practice requiring in fact what it is held to require, and that carrying out this task amounts to attributing a rationale or point to law in attempting to construct a hypothesis that can explain and justify, so far as it is possible to do so, all the relevant data of legal practice.[93] However, he appears to formulate the commitments of the interpretivist position in this regard in quite an abstract way, which may assist him in deflecting some of the criticisms leveled at Dworkin's stance on the point or function of law mentioned above.

First of all, Stavropoulos emphasizes that while interpretivism requires theorists to search for a rationale or point that is capable of justifying a given practice, there is no guarantee that such a rationale will in fact be found. If it cannot, then the practice will not be capable of justification—it will not instantiate the value it purports to and will not generate requirements to act according to its precepts.[94] Although Dworkin considers this possibility briefly in *Law's Empire* in discussing particular examples of legal practice—such as the Nazi legal system—that may be incapable of successful constructive interpretation in the form recommended by *Law's Empire,*[95] in emphasizing this point in his characterization of interpretivism in the abstract, Stavropoulos makes clear that on his understanding of this approach, this matter is left open for investigation in a way that (at least according to some commentators, myself included) the argumentative structure of *Law's Empire* does not seem to allow.

Moreover, Stavropoulos also claims that interpretivism is not committed to any particular view of law's point or function but rather merely to the view that a correct account of the nature of law will attempt to ascribe some such function to law in the course of trying to identify the value that it instantiates and hence how its requirements are justified.[96]

91. It is Stavropoulos's view in *Interpretivism* (unpublished manuscript, Oxford 2004), part I, that legal positivists take the starting point for legal theoretical inquiry to focus on the questions: In virtue of what are laws part of a legal system and from whom (or from which institution) do such laws emanate? and that so doing already loads the dice in favor of the positivist understanding of law as systems of rules emanating from sources of a particular kind.

92. This formulation is taken from Stavropoulos, *Interpretivist Theories of Law*, *supra* note 9, sec. 1.

93. Stavropoulos, *Interpretivist Theories of Law, supra* note 9, sec. 4.

94. On this point, *see* Stavropoulos, *Interpretivist Theories of Law*, *supra* note 9, secs. 3, 4, and 7.

95. DWORKIN, *supra* note 3, at 101–108.

96. Stavropoulos, *Interpretivist Theories of Law*, *supra* note 9, secs. 3, 4, and 7, and Stavropoulos, *Interpretivism*, *supra* note 91, sec. I.

Once again, this characterizes interpretivism in very abstract terms and emphasizes Stavropoulos's keenness to separate the interpretivist approach to legal theory in general from particular instantiations of it that assign particular points to law. For Stavropoulos, in order to be justified in rejecting interpretivism as the best way to understand the nature of law, we must have reasons to reject in general the *kind* of account of law interpretivism offers and not merely reasons to reject particular instances of it.[97] Stavropoulos's subtle characterization of the character of interpretivism in the abstract may allow this approach to parry some of the criticisms made of Dworkin's particular brand of it.

IV. "PRACTICAL-POLITICAL" ARGUMENTS, OR CAN WE CHOOSE WHICH ACCOUNT OF LAW TO ADOPT?

As is evident from the preceding two sections, the "descriptive" versus evaluative and justificatory jurisprudence debate is alive and well in contemporary discussions of correct jurisprudential methodology. This section concludes the present discussion of this issue by briefly examining another way in which evaluative judgments are viewed by some legal theorists as figuring in an accurate and explanatorily adequate account of the character of law. Some legal theorists believe that which theoretical account of law we adopt has practical consequences of a moral and political nature and that in arguing in favor of one legal theory over another, we should make evaluative judgments concerning what those consequences will be and which consequences we want to ensue from adopting a particular view of law, and should decide upon which view of law to espouse accordingly. Although this section focuses on Liam Murphy's version of this view as expressed in his article, *The Political Question of the Concept of Law*,[98] several legal theorists have adopted it in some form.[99] Murphy has been chosen here as his is a relatively recent example of the position and one that features an extended explicit discussion of its methodological commitments.

Murphy advocates adopting a kind of hybrid methodology in understanding law. He takes as his focus attempts by various legal theorists to answer the question "What makes legal propositions true?" or, to put the question another way, "How do we go about determining what the law on a particular issue is?"[100] In particular, he focuses on the dispute between Hart and

97. Stavropoulos, *Interpretivism*, *supra* note 91, sec. I.

98. Murphy, *supra* note 46, at 371.

99. In DICKSON *supra* note 23, chap. 5, I discuss Frederick Schauer's version of the position, which I term a "beneficial moral consequences argument." Schauer's argument can be found in F. Schauer, *Positivism as Pariah, in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM (R.P. George, ed., 1996); and Schauer, *Positivism through Thick and Thin, in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY (B. Bix. ed., 1998). Neil MacCormick is also a proponent of this kind of view; *see* MacCormick, *A Moralistic Case for A-Moralistic Law* 20 VAL. U.L. REV. 1–41 (1985).

100. Murphy, *supra* note 46, at 372 and 376.

Dworkin over whether and under what circumstances moral and political argument determine what the law on a particular issue is. According to Murphy, the first methodological stage in investigating that question involves reflection on our existing shared concept of law.[101] This shared concept constrains later arguments in favor of viewing law in one way as opposed to another that Murphy claims should be made on moral or political consequentialist grounds.

Reflection on that concept, however, will not yield determinate answers to all the important questions about the character of law and in particular will not supply the answer to whether and in what sense law is to be identified by reference to moral and political argument. Murphy hence contends that the dispute between exclusive positivism, inclusive or soft positivism, and Dworkinian interpretivism cannot be settled by reflection on our existing shared concept of law, as that concept is "equivocal"[102] as regards the issue of whether moral and political argument can or must figure in identifying the law. For Murphy, the correct way to settle this dispute is to move to the next stage in his methodological approach and to employ what he refers to as "practical-political" argument in favor of one particular approach to identifying what the law is. Murphy's victor in this regard is an account of law committed to the social thesis and, further, to the interpretation of the thesis that hard or exclusive positivism favors.[103]

Practical-political argument involves ascertaining what social and political consequences will ensue from adopting one or other view of certain aspects of law (within the constraints set by our existing shared but equivocal concept of law), evaluating which consequences we should be aiming for, and opting for that view of law that can best bring about those consequences. Murphy's particular argument in favor of the social thesis—and the exclusive positivist interpretation of that thesis, which Raz refers to as the sources thesis[104]—rests on the claims that adopting a view of law that rejects the social thesis brings the threat of "quietism" in the form of a lack of critical evaluation of existing law, and that such quietism is undesirable. His concern is that "the overall political climate created by a view of law that merges law with morality"[105] will be insufficiently questioning of legal directives and too ready to adopt the line of thought, "'Since this is presented as law, it probably is law, and therefore just.'"[106]

101. Murphy, *supra* note 46, at 372, 382–383, and 389.

102. Murphy, *supra* note 46, at 383.

103. On the difference between hard and soft (or inclusive) positivism, *see* L. Green, *Legal Positivism*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at http://plato.stanford.edu/entries/legal-positivism/. On different interpretations of the social thesis, *see* J. RAZ, THE AUTHORITY OF LAW (1979), chap. 3.

104. RAZ, *supra* note 103, chap. 3.

105. Murphy, *supra* note 46, at 391.

106. Murphy, *supra* note 46, at 391. The internal quotation marks are Murphy's and do not signal a quotation from any other work.

Since this is, in Murphy's view, a dangerous consequence to be avoided, and since he believes that a theory of law that is committed to the sources thesis avoids this consequence, the sources thesis supplies an answer to the question of what determines the grounds of law that is preferable on practical-political grounds to both soft positivism and Dworkinian interpretivism. Our shared-but-equivocal concept of law should hence be refined further so that we are committed to the view that law is to be identified exclusively by reference to social facts.

Part of the aim of Murphy's article is to demonstrate that Hart consciously employed practical-political arguments concerning the consequences of espousing one view of law as opposed to another in defending his version of legal positivism in *The Concept of Law*. As moral and political value judgments about the actual and desired consequences of adopting a particular legal theory inevitably feature in such arguments, Murphy disputes Hart's claim in the "Postscript" that his account is "morally neutral and has no justificatory aims."[107] The particular practical-political argument Murphy ascribes to Hart is to be found in chapter 9 of *The Concept of Law,* in which Hart appears to defend legal positivism—and in particular positivism's adherence to the social thesis—on the ground that conceiving of law this way will lead to clearer and morally more critical thinking about the law, especially in situations where law is being used to morally abhorrent ends.[108]

Without examining the substance of Murphy's argument in detail, I want to make a number of remarks about the general character of his methodological approach in order to bring it into better focus. First of all, it is important to note that Murphy is committed to the thesis that reflection on the concept of law that "we already share"[109] is a necessary part of correct jurisprudential methodology and that this concept, correctly characterized, constrains any practical-political arguments to be made about the best way to understand aspects of law. Murphy is also committed to the thesis that the adoption of at least some legal theories has practical consequences: that which theory of law a society adopts can make a difference to the political climate of that society and may enhance or inhibit the morally critical faculties—at least as applied to law—of that society. This claim is not uncontroversial among legal theorists; for example, Philip Soper has explicitly argued that as regards the Hart-Fuller debate over the correct tests for identifying purportedly legal directives as law, "no practical consequences of any kind or, at least, not of the kind that concerns ordinary moral theory, attend this debate at all."[110]

107. Murphy, *supra* note 46, at 371. Hart makes this claim in THE CONCEPT OF LAW; *see* HART, *supra* note 1, at 240.

108. HART, *supra* note 1, at 207–212. Hart's concern with this question arose in the context of the Hart-Fuller debate, itself a response to postwar German courts' attempts to deal with the way in which law was used to immoral ends during the Nazi regime.

109. Murphy, *supra* note 46, at 372.

110. P. Soper, *Choosing a Legal Theory on Moral Grounds*, *in* PHILOSOPHY AND LAW 32 (J. Coleman and E.F. Paul, eds., 1987).

Perhaps most important in understanding Murphy's approach to methodology is that his position seems to commit him to the view that which legal theory we espouse is partly a matter of choice and that the choice is to be made on moral and political consequentialist grounds. Murphy's claim is that our existing concept of law simply does not provide determinate answers to some important jurisprudential questions. This leaves us with some leeway to decide to adopt one or other view of law, and the practical-political arguments that Murphy advocates amount to a methodology for how to exercise choice within that leeway. This aspect of practical-political arguments marks a difference with many legal theories on both the "descriptive" and the "evaluative and justificatory" sides of Hart's "Postscript" divide. This is because many of those theories appear to presuppose that their task is to give an account of the nature of law, that is, to identify and explain those characteristics that make it into what it is.

In my view, this approach unites Raz, Hart, Dworkin, and Finnis, for all their differences as regards both methodology and substance in legal theory. Although Dworkin and Finnis each claim that moral value judgments are necessary for successful legal theory, they believe that they are necessary because only by employing that methodology can we understand what law is like. There is no hint in either Finnis or Dworkin that there is room for maneuver in Murphy's sense, that is, that we have a choice to conceive of aspects of law in one way or another and that the possible moral and political consequences should guide us in choosing which conception to adopt. On the contrary, both are insistent that their methodological approach is the only way to construct an explanatorily adequate account of the nature of law[111] and both argue throughout their works that their view of what law is like is the correct one, not merely that it is one among others that can be chosen when our analyses of the concept of law "run out" and leave us with leeway in this regard.[112] Murphy's methodology, on the other hand, appears to commit him to the view that, at least as regards certain issues, law has no nature, and that hence the important question as regards such issues is whether to view law in one way or another based on the consequences of so doing.

This position has attracted criticism from some for appearing to turn legal theory into a form of wishful thinking. The wishful-thinking charge arises because the direction of argument in practical-political methodology appears to be as follows: Within the constraints supplied by our existing concept of law, first decide upon what consequences it would be beneficial for our view of law to engender. Then adopt that view of law most likely to engender those consequences. In other words, the argument moves from

111. In ascribing to Dworkin a theory about the nature of law, I am following Stavropoulos's interpretation of Dworkin's position in Stavropoulos, *Interpretivist Theories of Law*, *supra* note 9, secs. 1 and 2.

112. For further consideration of Dworkin's stance on this issue, *see* DICKSON, *supra* note 23, chap. 5.

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"it would be good if law were to have qualities XYZ" to "therefore it does have qualities XYZ," which does indeed appear to turn legal theory into a form of wishful thinking and ride roughshod over the view of legal theory as searching for the truth or fact of the matter about those properties of law that make it into what it is.[113]

Murphy's response to this objection is that a legal theorist cannot indulge in wishful thinking if there is no fact of the matter that he is ignoring in making practical-political arguments.[114] On his view, then, there is no fact of the matter as to what makes propositions of law true, and so debates between exclusive positivism, inclusive positivism, and Dworkinian interpretivism are incorrectly understood as being disputes entirely about the existing character of law—about what law is like. One point to note about this view is that at least on the surface, and at least in the eyes of those theorists involved in them, these debates do seem precisely to be arguments about what law is like, and there would hence seem to be an explanatory burden placed upon proponents of the practical-political approach to give some kind of account of why so many legal theorists appear to misunderstand the character of their own task and what has led them to do so.

As was mentioned above, one of Murphy's claims is that Hart does not misunderstand what he was up to in defending his version of legal positivism as he explicitly acknowledged his adoption of a practical-political argument in chapter 9 of *The Concept of Law:* "If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance or clarify our moral deliberations, or both."[115] In this passage, Hart is referring to the "choice" between what he terms the wider and the narrower concepts of law, where the wider concept would admit as law morally wicked directives of the Nazi regime if they passed certain source-based tests, and the narrower concept would withhold the title of law from any such directives that failed to live up to certain moral standards, despite their conformity with the requisite source based tests.

There has been vigorous debate among Hart scholars over exactly how to interpret these remarks, especially as the rest of *The Concept of Law* does not seem to take the view that which account of law we espouse is a matter of choice in this manner. In claiming that law is a union of primary and secondary rules and that the "two minimum conditions, necessary and sufficient for the existence of a legal system"[116] are that primary rules are by and large obeyed and secondary rules determining what is to count as law

113. For versions of this objection, *see* P. Soper, *Legal Theory and the Claim of Authority*, 18 PHIL. & PUB. AFF. 214 (1989); P. Soper, *Choosing a Legal Theory on Moral Grounds*, *supra* note 110; W. WALUCHOW, *supra* note 22, at 86–98. I also press this objection against Frederick Schauer in DICKSON, *supra* note 23, chap. 5.

114. Murphy, *supra* note 46, at 389, note 70.

115. HART, *supra* note 1, at 209.

116. HART, *supra* note 1, at 116.

are accepted by officials from the internal point of view, Hart appears to be arguing about law's nature and seems to present a view about the essential properties of legal systems. Moreover, in contending that the rule of recognition is to be identified by reference to the social fact of what judges accept as constituting valid law, Hart seems to be arguing that the nature of law is such that its identification ultimately rests on social facts and not moral argument. Hart's argument that law has this particular characteristic seems to rule out "choosing" the narrower concept of law in any form that rejects the social thesis.

Such apparent contradictions have sparked a variety of responses from commentators, with, for example, Neil MacCormick enthusiastically attributing what Murphy terms a practical-political argument to Hart, and Philip Soper and David Lyons expressing reservations about interpreting Hart in this way for reasons along the lines of the wishful-thinking objection considered above.[117]

V. HOW WRONG CAN WE BE ABOUT LAW? CRITERIAL EXPLANATIONS, INTERPRETIVISM, AND DISAGREEMENT

I want to conclude this critical survey by considering some contemporary debates that are relevant to the fourth of the methodological themes from the "Postscript" to *The Concept of Law* identified in Section I above, namely whether Hartian positivism is stung by Dworkin's semantic-sting argument. As was noted in Section I, Dworkin claims that Hartian positivism is hamstrung because of its erroneous commitment to a certain semantic theory. Positivists such as Hart cannot explain the depth or type of disagreement about law that persists among lawyers, judges, and indeed legal theorists because of a mistaken belief that those legal actors share linguistic rules for determining the truth of purported propositions of law and hence for determining when the term "law" correctly applies.[118] In the "Postscript" Hart responds to the semantic-sting argument by attempting to deflect it: he simply denies that any aspect of his account is an attempt to uncover the shared linguistic criteria determining the meaning of the word "law."[119]

Commentators on this issue, however, have not been willing to leave the matter there. Some have come out in support of Hart's attempt to parry the semantic-sting argument; for example, Timothy Endicott has argued that while *The Concept of Law* features brief "atmospheric" references to elucidating the meaning of words as a means to explaining the nature of law, Hart "did not have a criterial semantic theory or any semantic theory

117. *See* MacCormick, *supra* note 99, and *cf.* D. Lyons, *Moral Aspects of Legal Theory*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (Marshall Cohen, ed., 1984); P. Soper, *Choosing a Legal Theory on Moral Grounds*, *supra* note 110.

118. The argument is intended to apply both to propositions of law and to the concept of law.

119. HART, *supra* note 1, at 246.

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at all, if a semantic theory is a general explanatory account of what makes an application of an expression correct."[120] Other legal theorists, however, have not been willing to allow Hart to escape the alleged sting of Dworkin's argument simply by claiming that he did not intend any part of *The Concept of Law* to be an explanation of the meaning of the word "law."

Interestingly, the view that—contra Hart—the semantic-sting argument is on target is shared by two legal theorists adopting very different views regarding the sting's success as an argument, namely Joseph Raz and Nicos Stavropoulos. Raz and Stavropoulos both claim that Hart's explanation of the concept of law is what they refer to as a "criterial" explanation, that is, an explanation that seeks to state the criteria for the correct use of a concept and that is successful to the extent that it correctly captures the conditions for correct use of that concept that are actually used by those who use the concept.[121] Criterial explanations of a concept, therefore, seek to explain the concept by explaining the criteria governing the way in which the concept is actually used by those whose concept it is. In the case of law, this type of explanation is an attempt to uncover shared criteria determining the correct use of the concept of law and is therefore stung by the semantic-sting argument, which claims that legal theories committed to such a methodology cannot explain the nature or depth of disagreement about what law is.

Some important glosses on the character of both the semantic-sting argument and the jurisprudential methodology at which it is directed emerge in the course of Raz's and Stavropoulos's consideration of this issue. First of all, Raz is keen to emphasize that although the type of explanation of the concept of law Hart offers is stung by the semantic-sting argument, it is not an attempt to explain the meaning of the word "law."[122] Reiterating a long-standing view of his, Raz claims that an explanation of the concept of law cannot be an explanation of the meaning of the word "law," as that word applies to many things that legal philosophy does not seek to explain, such as scientific, mathematical, and divine laws.[123] Dworkin's semantic-sting argument, which he sometimes directs against and which Hart in the "Postscript" takes to be directed against attempts to explain law via

120. T.A.O. Endicott, *Herbert Hart and the Semantic Sting*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (J.L. Coleman, ed. 2001), at 41.

121. In N. Stavropoulos, *Hart's Semantics*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (J.L. Coleman, ed. 2001), at 59, but *see esp.* sec. B; and J. Raz, *Two Views of the Nature of the Theory of Law: a Partial Comparison*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW (J.L. Coleman, ed. 2001), esp. 12.

122. In stating that Raz believes Hart's approach to legal theory to be "stung" by the semantic-sting argument, I mean no more than that he takes the argument to be on target. As is mentioned later in this section, Raz does not believe that the argument is successful against criterial explanations of the concept of law because in his view it is false that, as the semantic-sting argument claims, such explanations cannot account adequately for disagreement about law.

123. Raz, *supra* note 121, at 7. *See also, e.g.*, J. Raz, *The Problem about the Nature of Law*, *in* RAZ, ETHICS IN THE PUBLIC DOMAIN (1994), at 195, sec. I.

explanations of the meaning of the word "law"[124] must hence be reformulated along the lines indicated above to refer instead to criterial explanations of the concept of law.

The second important gloss—offered by both Stavropoulos and Raz—has to do with the point that criterial explanations of a concept are successful when they correctly capture the conditions for correct use of the concept that are actually used by those who use the concept. As Stavropoulos and Raz point out, the role attributed to actual usage in such explanations must be understood with care. In Stavropoulos's view, in referring to the conditions for correct use of a concept actually used by those who use the concept, theorists offering criterial explanations in fact have in mind a kind of idealization of actual usage.[125] For example, some instances of actual usage can be discounted if users are drunk or are mistaken regarding the conditions for correct use of the concept. That is to say, in speaking of the conditions for the correct use of a concept actually used by those who use the concept, theorists are referring to a normative standard—correctness is not merely pegged to however attempted users of a concept de facto do use it but to how they ought to use it if they are using it correctly according to the common standard or criteria to which they hold themselves in using the concept.[126]

Stavropoulos also makes the point that what he refers to as the "raw data of actual usage" needs sifting and ordering by the legal theorist in order to assist in analyzing the concept, and that sometimes this sifting and ordering process requires legal theorists to eliminate inconsistencies in actual usage or render more precise or make explicit the perhaps quite rough rules employed by users of the concept to determine whether the concept applies.[127] Raz makes a similar point in explaining the difference between what he refers to as ordinary and theoretical criterial explanations.[128] According to Raz, theoretical criterial explanations seek a more systematic and comprehensive understanding of concepts than ordinary criterial explanations. This has the consequence that legal theorists offering theoretical explanations of the concept of law can allow themselves to be slightly freer with regard to actual usage than they would be if offering an ordinary criterial explanation; for example, they may render actual usage more precise and may introduce distinctions not normally noticed by ordinary users of the concept.

For all this, however, Raz is keen to point out that any leeway allowed to those offering theoretical explanations will be minor, otherwise the resulting theories "would fail in their aim to explain the concept as it is, the concept that people use to understand features in their own life and in the

124. *See, e.g.*, DWORKIN, *supra* note 3, at 31, 36, 39; HART, *supra* note 1, at 245–246.
125. Stavropoulos, *supra* note 121, at 73–75.
126. Stavropoulos, *supra* note 121, at 74–75. On this point, *see also* Raz, *supra* note 121, at 16–18.
127. Stavropoulos, *supra* note 121, at 73–79.
128. Raz, *supra* note 121, at 25–27.

world around them."[129] This means that if law is to be explained via a criterial explanation of the concept of law, there are quite strict limits to how wrong we—that is, we who use the concept—can be about the character of law. For sure, individual users may misunderstand aspects of the concept and so apply it erroneously, and theorists may tidy up actual usage in weaving it into a systematic and comprehensive explanation of the concept, but the bottom line is that the conditions for correct use of the concept are those that are actually used by those who use that concept such that it cannot be the case that we, en masse, are wrong about what we count as law. On this view, there is no hidden fact beyond actual usage that could demonstrate that what we thought was law was not truly law at all.

But should we regard law as a concept that admits of criterial explanation? Is this the correct methodological approach for a theory of law to adopt? It is here that Raz and Stavropoulos part company. Although both make very similar points about the character of criterial explanations of concepts, and both hold that Hart, in offering such a criterial explanation of law, cannot evade the semantic sting in the way he believes himself to have done in the "Postscript," Raz believes that it is possible to explain the concept of law adequately via a criterial explanation and that Dworkin's semantic-sting argument is not successful in its aim of refuting such a possibility, whereas Stavropoulos rejects criterial explanations of the concept of law and instead urges legal theorists to embrace Dworkinian interpretivism.

According to Stavropoulos, law is an interpretive concept. In recent work, he has characterized interpretive concepts as being what he terms both evaluative and deep.[130] A concept is evaluative if it refers to a value and if correct interpretation of the concept turns on what the value really is. It is the idea of depth that is of most interest here. For Stavropoulos, a concept is deep if the criteria for correct use of the concept can transcend actual usage, such that correct use depends not on what competent users of the concept collectively think its correct use is but on what in fact it actually is. In the case of law, this fact of the matter will be supplied by political values (such as Dworkinian "integrity"[131]) that will determine correct use of the concept and will justify users' applications of it. On this view, users of the concept can go wrong—even collectively—in applying it; we may be wrong in our collective views of what makes law into what it is, and hence a theoretical explanation of the concept may uncover essential properties of law that would require users, even collectively, to modify considerably previous actual usage.[132]

129. Raz, *supra* note 121, at 26.

130. N. Stavropoulos, *Interpretivism supra* note 91, part II.

131. DWORKIN, *supra* note 3, chaps. 6 and 7.

132. For more on these points, *see* Stavropoulos, *supra* note 91, part II. *See also* Stavropoulos, *supra* note 121, at 81–85. This more recent work builds on Stavropoulos's attempts to argue that the concept of law is deep in the sense outlined above by drawing an analogy from the nature of natural kind concepts in N. Stavropoulos, OBJECTIVITY IN LAW (1996).

How is this issue—of whether law is to be explained via a criterial or interpretive explanation of the concept of law—to be settled? In both Raz's and Stavropoulos's discussions of this issue, much turns upon the issue of how wrong we—collectively—can be about law and upon how to explain the nature of disagreements about correct use of the concept of law that arise between us. This brings us back to Dworkin's semantic-sting argument and to his claim that criterial explanations of the concept of law cannot account for the nature and depth of disagreement about correct use of this concept. Dworkin is of course correct that legal theorists, lawyers, and sometimes citizens subject to the law engage in persistent and complex disputes about the criteria for correct use of the concept of law and explain the concept of law in different and sometimes conflicting ways. Any methodological approach that cannot account for the possibility and nature of this disagreement is hence rendered extremely implausible. Raz attempts to explain Dworkin's view of the problem that he claims criterial explanations of law have in accounting for disagreement as follows:

> Dworkin may be assuming that all competent users of a concept, which can be explained criterially, agree on its explanation, i.e. on the criteria for its correct application. Were this to be the case, then they could not disagree on pivotal cases. On this assumption, when two people converse using a concept that can be criterially explained, then each of them uses the concept according to a set of criteria for its correct use, and each knows or can easily find out the criteria used by the other; and if they match they are using the same concept and cannot disagree regarding the criteria for its correct use, whereas if they do not match then they are using two different concepts and there is no disagreement between them. If they do not realize that, then they are talking at cross-purposes.[133]

In order to demonstrate that the semantic-sting argument is ultimately unsuccessful, Raz offers an explanation of the several ways in which there can be disagreement about the criteria for correct use of a concept that admits of criterial explanation even though the criteria for correct use of that concept are pegged to what competent users agree are the conditions for correct use of that concept.[134] In Raz's view, explaining how interesting theoretical disagreement can arise for those engaging in criterial explanations of the concept of law refutes the semantic sting and removes one important obstacle to the possibility of explaining the concept of law via a criterial explanation such as Hart offered.

For Stavropoulos, the issue of whether law is a criterial or interpretive concept turns on the *best* explanation of disagreement about the criteria for the correct use of the concept. In Dworkin's original "semantic sting" argument, the claims made in this regard are quite crude, namely that legal

133. Raz, *supra* note 121, at 14.
134. Raz, *supra* note 121, secs. IV and V. These arguments cannot be discussed here.

positivism cannot offer any kind of adequate explanation of a certain type of disagreement about law, and indeed that legal positivism either reduces disagreement about law to unimportant marginal disputes about the borderlines of correct application of the concept of law in particular cases or else renders legal practice a "grotesque joke"[135] in explaining such disagreement in terms of people having different concepts of law and hence talking past one another.[136] Stavropoulos's view appears more subtle than Dworkin's and takes into account attempts—such as Raz's—to explain how criterial explanations of a concept are compatible with many forms of disagreement about that concept.

Stavropoulos hence claims not that criterial explanations of concepts cannot explain disagreement at all but that a certain kind of disagreement about law is best accounted for by an interpretive explanation of the concept of law. The kind of disagreement in question is disagreement over the conditions for the correct use of the concept that does not assume that there are shared criteria to which users are holding themselves accountable and that determine correct use of the concept. In this kind of disagreement, it would be possible to doubt and disagree with whether any such existing common understanding or shared criterion for correct use of the concept really was correct; it would be meaningful to argue that everyone is in error regarding what they count as law—that we have collectively gone wrong in our understanding of the nature of law or of some aspect of law.

In other recent work on this topic, Jules Coleman and Ori Simchen have attempted to develop and defend a position concerning the relation between semantic theories and jurisprudence that rejects both criterial explanations of the concept of law (which Coleman and Simchen refer to as "criterialism") and the alternative to such theories espoused by Stavropoulos.[137] According to Coleman and Simchen, legal positivism need not be committed to criterialism, which is in any case inadequate as an account of meaning in general and of the meaning of "law" in particular.[138] As an alternative to such accounts, Coleman and Simchen espouse an account of meaning that, like those offered by Hilary Putnam and Saul Kripke,[139] attempts to undermine criterial semantics by demonstrating the way in which

135. DWORKIN, *supra* note 3, at 44.

136. DWORKIN, *supra* note 3, at 39–46.

137. *See* J.L. Coleman and O. Simchen, *Law,* 9 LEGAL THEORY 1–41 (2003).

138. In the article, the authors address a variety of issues that are relevant to the question: What is the meaning of "law"? and to the relation between that question and questions such as What is law? What is a law? and What is the law? in order to explore the relation between semantic theories and jurisprudence. At the outset of this article, they state explicitly that they are concerned with "'law' as it pertains to systems of governance of human conduct" and not "'law' as it pertains to regularities in nature"; Coleman and Simchen, *supra* note 137, at 1, note 1.

139. *See* H. Putnam, *The Meaning of "Meaning," in* MIND, LANGUAGE AND REALITY: PHILOSOPHICAL PAPERS 215–271 (Vol. 2, 1975); S. Kripke, NAMING AND NECESSITY (1980).

there is an "environmental component"[140] or a "world-involving" element to the determination of the semantic contents of common nouns that is inadequately attended to by criterialist explanations.

However, Coleman and Simchen also wish to resist the thesis that they claim is embraced by some fellow anticriterialists (such as Stavropoulos) that correct application of the term "law" is dependent on the outcomes of jurisprudentially expert investigations into the character of law. According to Coleman and Simchen, while the extension of some natural-kind terms is determined by the best current scientific theory of the character of that to which such terms refer (e.g., the extension of "gold" is fixed by the scientific accounts of the nature of gold held by experts in this field), in the case of law, it is views about law held by ordinary average speakers rather than the views of jurisprudential experts that fix the extension of "law."[141]

The spectrum of opinion on these issues and their evident continuing interest for various contemporary legal theorists seems to indicate that they will remain live and lively topics of debate for the future. This article has attempted to survey these and other recent debates concerning correct jurisprudential methodology that, at least in part, have arisen in response to some of Hart's remarks on this topic in the "Postscript" to *The Concept of Law*. Just as the original book rekindled interest in jurisprudential issues about the nature of law thought long dead, the "Postscript" has helped fan the flames of ongoing debates concerning correct jurisprudential methodology. Happily, the state of the art of methodology in jurisprudence is that such debates are many, various, and flourishing.

140. Coleman and Simchen, *supra* note 137, at 19.
141. Coleman and Simchen, *supra* note 137, at 21–28.