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OUR KNOWLEDGE OF THE LEGAL ORDER

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I. INTRODUCTION

What is law, and how do we know what law is? When a philosopher of law asks these questions, it pays to be cautious. When asked philosophically, the question *what is law?* is clearly not a question about the content of *particular* laws, although that question is not devoid of philosophical interest: As Nigel Simmonds has said, when disagreements about the law's content occur, these are generally not disagreements about what the rules *are*, nor do they revolve around theses of ambiguity in the semantic structure of specific rules. Rather, they seem to depend upon varying conceptions of the framework of principles upon which the law is based.[1]

When asked *philosophically*, however, the question of what law is may be devoid of *any* interest. Simmonds has argued that law is essentially a culturally relative affair, and that the law of a developed market society may be a highly distinctive intellectual product which is not available in social orders of a different nature.[2] If this view is correct, then the attempt to understand law in terms of fundamental or defining properties would seem to be a futile endeavor. In fact, however, even supposing Simmonds's view to be correct, this objection is effective only against a more limited enterprise, such as the one pursued by Bentham. Bentham's definition of law was intended to serve, roughly speaking, as a template; it is laying down a means for deciding whether any given candidate rule is *truly* a (valid) law.[3] In other words, what Bentham's definition does is to provide an empirically verifiable means of measuring the legal nature of a norm, in the same way as his principle of utility provides a means of measuring the *value* of a law. If understandings of law are culturally relative, then this project of distinguishing law from everything else is dealt a decisive objection.

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1. *See* Nigel Simmonds, THE DECLINE OF JURIDICAL REASON 17–19 (1984).
2. *Id.* at 28–32.
3. Jeremy Bentham, OF LAWS IN GENERAL (H.L.A. Hart ed., Book I, §1, 1970).

However, there is still a sense in which the question *what is law?*, philosophically posed, can have genuine point. Although the general decline of natural law thinking in favor of positivism produced a Copernican turn in legal epistemology, this could not alter the most basic features of our knowledge of law: At a fairly deep level, we are bound to confront a set of questions about our knowledge of law which are invariant even under radical permutations in our conception of what law is. Such questions turn upon a property of law which is itself transcendent of the question of cultural relativity—namely, the law's *abstractness* in terms of any reasonable version of the abstract/concrete distinction familiar in ontology. It is this fact that gives substance to philosophical explorations of the question about the nature of law.

Arguably the most refined attempt within the positivist tradition to answer these deeper questions about knowledge of law is the Institutional Theory of Law (ITL). If ITL's goal were only to offer a philosophical basis for the positivist account of law, then interest in it would be confined to adherents of its parent theory. But proponents of ITL do not claim to be offering a *possible* account of legal knowledge; they naturally assume that it is the *correct* account to offer in response to fundamental questions. According to ITL, the basic unit of explanation in such an account is the *institutional fact*. In what follows, I do not contest that the concept of an institutional fact is the correct unit of explanation for a *Hartian* account of law. The question to be addressed in this article is whether this concept can serve as an explanation of our knowledge of law in a more fundamental sense. If my claim that it can*not* is correct, then this may raise the need for a reassessment of the philosophical basis of Hartian positivism.[4]

My attention in this paper will focus upon the version of the institutional theory propounded by MacCormick and Weinberger in their 1986 book.[5] Other, radically different, versions of ITL (such as those developed by Searle and, more recently, Morton) rely on notions of social fact and, in particular, speech-act theory, in a more thoroughgoing way. While I would view what I have to say as being applicable to those other versions of the institutional theory—as well as to *any* theory of the type lately considered that purports to furnish explanations of the ontology and epistemology of law—I do not defend that claim here: To do so would involve a time-consuming and ultimately unrewarding digression into the relationship between the semantic approach adopted here and the theory of speech acts. MacCormick and Weinberger themselves have, of course, made modifications to their 1986 position (see, for example, MacCormick's remarks in his review of Morton's recent book on ITL).[6] However, the core elements

4. I do not, however, propose to explore this last point in the present article.

5. MacCormick & Weinberger, AN INSTITUTIONAL THEORY OF LAW (1986) [hereinafter *ITL*].

6. Weinberger has been more prolific in this regard: *see, e.g.,* Ota Weinberger, *Institutional Theory of Action and its Significance for Jurisprudence,* 6 RATIO JURIS 171 (1993); Weinberger, *Die Revolution in der Rechtssatetheorie,* 84 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 263 (1998).

of their respective approaches as explored here have not changed to any appreciable extent in the intervening years, and it will be more convenient to restrict discussion, where appropriate, to the more systematic development of their views in the earlier work.

II. THE INSTITUTIONAL THEORY

Alberto Coffa once defined Logicism in terms of an enemy, a goal, and a strategy.[7] The same may be said for the Institutional Theory of Law: In this case, the enemy was, broadly speaking, Reductionism; the goal was to present an ontological account of law sufficient for legal practice while avoiding incredible theses about impossible objects; and the strategy was to cast talk about law in terms of "institutions" and "institutional facts." The body of this paper is devoted to a discussion of problems with that strategy that prevented it (in my view) from reaching the goal. A final section attempts to show that there is, nevertheless, a very simple way in which that goal could have been achieved.

Proponents of ITL have always prided themselves that it simply gives theoretical expression to the fundamental assumption behind black-letter approaches to law (*ITL*, 1–2). That is why proponents of ITL, like MacCormick, tend to think of ITL as being as commonsensical as legal theory can get:

> ITL offers . . . a suitable theory of knowledge for legal dogmatics ('black letter law') as a wholly respectable and indeed valuable domain of humane knowledge. What [ITL] would not support would be the claim that there is any justification for a legal dogmatics pursued in complete abstraction from legal theory and from the sociological appreciation of the conditions and consequences of actual legal forms and institutions. 'Legal science without consideration of social reality is', as Weinberger puts it . . . 'unthinkable'. We hope that this will be recognized as an underlying *leitmotif* for our whole approach. . . . For what we seek to do, *inter alia*, is to resolve a fundamental ontological problem in the face of every sociological or doctrinal approach to law. (*ITL*, 7)

The "fundamental problem" is normativity. Any successful theory of law must account for the normativity of legal rules, which means recognizing that those rules cannot be stated merely in terms of "brute" facts, such as the occurrence of strings of symbols on a page of legal text or the existence of certain psychological dispositions in the minds of people (*ITL*, 4–6): Any

For a usefully concise, and not unduly out-of-date, account of MacCormick's views, see Neil MacCormick, *Institutions, Arrangements and Practical Information*, 1 RATIO JURIS (1988). MacCormick's review of Morton's *An Institutional Theory of Law* (1998) is in MacCormick, Book Review, 115 L.Q. REV. 145 (1999).

7. Alberto Coffa, *Kant, Bolzano and the Emergence of Logicism*, 74 J. PHIL. 679 (1982).

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such approach would involve "inevitably a reductionist sociology and therefore a contestable sociology." The reductionism is contestable precisely because the treatment of norms in terms of something fundamentally nonnormative will never do as an *explanation* of the set of concepts under investigation. Attempts at such explanation would, moreover, amount to an informal reductio of the reductionist enterprise, even supposing it could be carried through:

> These concepts so re-defined would bear only a chance relationship, if any, to the concepts we currently deploy by using the terms mentioned. . . . A sociological approach such as that of Max Weber, a sociology which assumes the necessity to use concepts with understanding (*Verstehen*) in the same sense as that in which they are intelligible to social agents, could have no truck with such reductionism. (*ITL*, 5–6)

This point, which should be familiar from Hart's writings, reiterates the received view that legal action, and indeed rule-governed action generally, cannot be exhaustively described in purely behavioristic terms. Taken as such, it has both an epistemological and an ontological component.

The epistemological point is the familiar one concerning the need for an "internal aspect" on the interpretation of legal norms and normative statements. The basic idea is that any account of legal reasoning that missed the significance of *norms* in reaching legal decisions would be as pointless as an account of chess without the notions of winning and losing. The ontological point, though implicit in Hart's writings, is drawn far more starkly in ITL, where it is made to play a significant role in the foundations of legal reasoning: If normative theses are not *understandable* solely in virtue of behaviorist (or other nonnormative) characterizations, then norms must exist, if at all, outside the realm of "brute" facts. This purely cognitive criterion thus delivers up exactly the epistemic warrant needed for recognizing as valid the existential assumptions present all the time in "dogmatic" legal argumentation (always granted the little extra assumption that the discourse *is* understood). Talk about norms as real "objects of thought" (as MacCormick put it) is therefore compatible with our legal knowledge.

These "internal" or *institutional* understandings provide the basis of ITL's account of our knowledge of the legal order. Since institutional facts are the semantic building blocks out of which ITL's philosophy of legal reasoning is fashioned, it is important to know exactly what they *are*. Fortunately, MacCormick and Weinberger are unusually explicit on the ontological characteristics of institutional facts; *un*fortunately, their opinions are ultimately divided as to what those characteristics are.[8] It will therefore be

8. The same goes for Searle, Morton, Hauriou and other proponents of ITL. Since this essay is an attempt to suggest what those characteristics *could* be (and, in more detail, *cannot* be), my argument should be understood as proffering a very general response to this central question.

necessary, notwithstanding their desire to highlight the unifying features of their positions, to consider each account separately to some extent.

III. WEINBERGER'S STRATEGY

In their joint introduction, MacCormick and Weinberger gave a fairly traditional account of the sort of thing an institutional fact must be in order to discharge its function as a theoretical posit capable of grounding our understanding of certain ranges of statements, without threatening to become something so far removed from ordinary experience that we are denied cognitive access to it. The most common way of accounting for so-called abstract objects such as contracts, marriages, or musical compositions, is to grant them existence in time independent of any concept we may have of spatial existence. Since this places abstract objects beyond our sensory ability to pick them out, we seemingly stand in need of an alternative account of how we can get acquainted with them. In ITL, the existence of institutions and institutional facts is inextricably linked to *rules* (*ITL*, 11).

Particular institutions are thus existentially linked to a system, as part of a set of rules and conventions that govern human practices (*ITL*, 11). Presumably, if the institution is a legal one, then the system will be a legal system; but since a legal system is itself an institution in this sense, the relevant grounds for its existence will lie in a system of *thought*. Our access to the objects of legal thought is, therefore, at least partly mediated by our conceptual knowledge of them: "It is not the concept 'contract', 'treaty', 'competition' or 'game' which exists in itself. The concepts are made meaningful and intelligible through conventions and rules" (*ITL*, 11). This evidently makes the normative (i.e., rule-governed) nature of institutions crucial to their existence:

> Institutions and instances of them do not exist as (so to say) free-standing objects in the world . . . they exist in the context of and for the purposes of norms or rules which (in complex sets) variously give sense to, justify, regulate or even authorise human conduct in social settings. (*ITL*, 14)

Any version of ITL that is more than an interesting metaphor for legal thought must therefore be able to state what "existence," in this sense, amounts to.

At the root of Weinberger's ITL is a semantic theory. In a sense, this is bound to be the case, since every legal theorist will have opinions on what legal statements mean, what it is to communicate the information such statements contain, and under which circumstances that information may be regarded as correct. But Weinberger is really the first positivist to attempt a systematic and penetrating analysis of the semantic assumptions on which legal reasoning rests. The semantic pineal gland of Weinberger's institutional ontology is the concept of *Verstehen*.[9] The idea that it is possible to

9. Roughly, cognitive command or understanding: a notion that runs parallel to Hart's internal aspect and Raz's internal points of view.

understand existentially quantified normative statements without a component of *Verstehen* is, for Weinberger, if not unintelligible, then at least false. Full access to ITL's institutional ontology is "entirely dependent on our being able to give some account of the nature and existence of norms and rules" (*ITL*, 14).

Because the central semantic notion fundamentally involves, not the idea of rules, but the rules themselves, it must be statable in terms of rules that are not institutional in the relevant sense. To avoid circularity in the explanation of institutions, "[t]here must be some account of the possible existence of rules or norms on a basis of pure convention or custom or at least some non-institutional foundation" (*ITL*, 17), which at the same time preserves their normativity. Weinberger's answer was to link norms with actions, and to construct a complex truth theory on the basis of the way normative statements discharge their referential function in relation to both the abstract and the concrete components of normative action so construed. The most significant ontological commitment this raises is the need for "norms . . . in the sense of meaningful thought objects [to be] distinguished from norms-as-realities—only norms [as they occur *in* actual actions] are facts, constituent parts of reality by contrast with purely linguistic entities or possible objects of thought" (*ITL*, 16).

This says something significant about the architecture of a Weinbergerian norm. A norm, in Weinberger's sense, is built out of two radically different semantic components: (i) its "ideal existence as a thought-structure," and (ii) its "real existence as a social phenomenon" (*ITL*, 32). This bifurcation in the structure of norms corresponds to a fundamental distinction between the information by which knowledge of normative states of affairs is conveyed, and their actual *normativity*:

> Legal knowledge is a matter both of "norm-logical" analysis of the legal "ought" and of recognition of its sociological reality. (*ITL*, 16)

Exactly what the relationship between these two components is, is a question of semantics. Weinberger has always maintained that there is no sense in which a legal norm could be a material entity (*ITL*, 33), and clearly any account of the abstract/concrete distinction that made norms qualify as concrete would be suspect as a result. Therefore, it is plain that legal reasoning cannot have its foundations in real-world events alone, even when it pertains to a purely customary legal regime. On the other hand, a legal system is clearly *linked* to human action because we cannot work out its entire content a priori, and, more importantly, the notion of normative action itself depends on there being *some* linkage between norms and actions. If the central notion of *Verstehen* is to have any substance at all, our account of legal reasoning must be able to give some account of the existence of norms, and our knowledge of them, that does not simply posit a supernatural faculty of intuition of abstract objects. Weinberger's solution

to the problem of cognitive access was to assume that the whole issue rested with the notion of *existence*.

The key to a successful characterization of the semantic pineal gland, Weinberger must have supposed, is a matter of supplying normative entities with the right kind of existence predicate, that is, of defining reality and existence in such a way that "ideal" entities can have it (*ITL*, 37, 86). Because, given Weinberger's beliefs about existence, a norm must consist of *two* radically different ontic components if it is to carry out its dual role as a unit of information and a constituent of real action, Weinberger must have seen that the most obvious way to a resolution of the whole set of problems, both ontological and epistemological, lay in the particular method of uniting these two elements of a norm into a single structure.

The essential first step in this direction is the realization that "the existence of ideal entities is not without connection to material existence" (*ITL*, 38). Any concept of the existence of norms must, therefore, be defined by (a) their composition as parts of real events, and (b) in virtue of their participation in those events, our ability to assign them temporal coordinates (*ITL*, 38). In this respect, in the sense that norms cannot exist without *some* action, they are not "pure" abstract objects: They stand to actions, we may, perhaps, say, as shapes stand to physical objects.

In his earlier writings on the subject, Weinberger had assumed that this aspect of a norm—its involvement in "social reality"—exhausted the content of existence claims concerning it: Its connection with action "corresponds to the existential aspect of the norm" (*ITL*, 44). The problem came when he then tried to explain the first aspect of the norm, its informational dimension. Once all existential commitments are confined to aspect (ii) (what Weinberger had previously called its "real existence as a social phenomenon"), claims made in the name of aspect (i) (its "ideal existence as a thought-structure") become ontologically much less straightforward. Now all the existence a norm can have, real or ideal, derived solely from its involvement in *action*.[10] But because a norm's ability to convey information is central to its utility in legal reasoning (otherwise we would not make ourselves understood when talking about law), Weinberger put himself in the uncomfortable position, upon which the fate of the legal dogmatic enterprise rested, of explaining the content of aspect (i) without the aid of auxiliary existence claims. Precisely what, then, *is* a thought structure?

The essence of a norm as a thought object is its ability to supply the intersubjectivity required for communication:

> The norm as thought-object must be viewed as the same thought-object . . . in the mind of the individual norm-issuer [and] the mind of the norm-addressee, in that of the duty-bearer or right-holder and that of the mere observer (for example, a legal scholar). . . . Understanding a norm is broadly

10. *See* MacCormick & Weinberger, *supra* note 5, at 38, where Weinberger explicitly claims that a norm's *ideal* existence is determined relative to its social component.

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> analogous to understanding an indicative communication. When the communication is flawless and its goal fully achieved, there must be an identity between the norm-as-thought-object which was uttered by the norm-issuing subject and the norm-as-thought-object in the recipient's understanding of it. (*ITL*, 34)

Because it is this understanding (which amounts to the ability to conceive of and talk about norms) that gives us access to ITL's ontology, Weinberger's account stands or falls by its ability to supply an answer to the following question: How is communication of that information possible? In fact, the account falls, largely because of Weinberger's attempt to account for knowledge of norms in terms of psychology and abstraction.

Weinberger's account of our knowledge of law begins by stressing the intimate relationship "norms" (presumably in the context of their informational component) enjoy with the thought processes in which they feature during legal reasoning:

> Norms are thoughts in the same sense as this expression is used in characterising logic as the 'analysis of thought'. That is to say, they are thoughts in the objective sense, derived by abstraction from the processes of consciousness. (*ITL*, 33)

The fact that Weinberger perceived norms and logic as arising out of essentially the same cognitive operations (namely, conceptual abstraction from particular thought patterns) is important, in that he took some form of logic to be the basic instrument of analysis of normative orders generally: "In the perspective of legal dynamics," he said, "the validity of law depends on the logical connections internal to the legal system" (*ITL*, 43). This makes "appreciation of the norm-logical connections" between norms the central task of legal science (*ITL*, 43). In the case of formal logic itself, "at least since Husserl's *Logical Investigations* (1900–1901) it has become clear that logical relations can only be studied by way of abstraction from psychic activity" (*ITL*, 33). In view of Weinberger's belief that the structure of a legal system is given by (some mode of) logical analysis, not only the content of the system, but also its structural properties and orderings (and thereby the whole project of legal reasoning), rest on basically the same kind of concept-forming cognitive operations.

The idea that logic analyzes thought stems from Kantian orthodoxy on the subject of analytic judgments. For Kant, as for most post-Cartesian philosophers, meanings are inseparable from experience, in the form of "representations," of which the most important are "intuitions." To understand the meaning of a word like 'obligation' it is essential, on this view, to have experienced the state of being under an obligation, and our understanding of the general concept is made more precise the more minutely we analyze those feelings. From there it is, as Coffa once put it, a small step to conclude that the meanings of those concepts are just the psychic

phenomena that are the targets of the analysis. They will mean something "only insofar as, and to the extent that, they relate to human mental processes. Number expressions, for example, may be thought to derive their meaning from the mental processes in which they are involved—the natural numbers through the process of counting, geometric objects through acts of measurement, and so on."[11]

We might have expected Weinberger, who believed in the law's factuality, to say something similar: If the law of contract is something about which I have a poor understanding at the start of my studies, but a decent understanding subsequently, then what changes is not the law, but merely my perception of it. If Weinberger's remarks are taken at their face value, he must likewise be understood as tacitly endorsing a distinction between the mental acts in which we conceive of normative concepts, and the concepts themselves. Unfortunately, when called upon to account for the ontological status of such entities, Weinberger (like Kant)[12] seldom acknowledged the distinction with any consistency. As with Kant, the notion of analysis Weinberger was working with demands preserving a strict distinction between the concepts *duty*, *permission*, *obligation*, and so on, themselves, and the mental acts in which they are involved. As Coffa put it:

> If our understanding of the concept *virtue* can be bad at one time and good at another, those two different acts or states of understanding must somehow concern the very same concept . . . that is both the target of mental episodes and distinct from them. This concept need not be extra-subjective, but it must at least be intersubjective, since the very same conceptual representation is involved in different . . . psychic acts of representation, in the same or different persons.[13]

Weinberger was also committed to intersubjectivity, largely for the same well-motivated reasons; but the machinery required for supplying it depends upon recognition of a crucial distinction between three very different semantic categories: the "representations" (or mental acts), which are essentially subjective and personal, the concepts themselves, and the objects they denote. Since intersubjectivity is vital to Weinberger's project (as we shall see), it is important to know the conditions under which it can be guaranteed.

Kant's failure to resolve the confusion among his (largely tacit) semantic categories—between concepts and the mental acts that contain them, and correspondingly, between concepts and the objects they "represent"— had a lasting and devastating effect throughout the nineteenth century. This culminated in the work of Husserl, on which Weinberger avowedly based

11. Alberto Coffa, The Semantic Tradition from Kant to Carnap: To the Vienna Station 9 (1991).

12. *See id.* at ch. 1. I am greatly indebted to Coffa's book for providing insights in the construction of this part of the argument.

13. *Id.* at 12.

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his semantics for ITL (*ITL*, 33),[14] and which was based on Kant's tendency, whenever specificity was required, to embrace the subjective elements of his theory of judgment.[15] Abstractionism of the kind Husserl promoted was arguably based on what might be called a "multiple reference theory." The idea is that the essence of a concept is its ability to refer to more than one thing, and that, *therefore*, it must be understood by reference to the number of things that make it up. Generalized concepts are thus formed by abstraction from those particulars:

> [C]oncepts originate through a comparison of the specific representations that fall under them. Disregarding the characteristics (*Merkmale*) that differ, one holds firmly to the ones that are common; and these latter are the ones which then constitute the general concept.[16]

Husserl had intended to apply this to the concept of *number*, in order to explain how we form the concept of *unit* and, ultimately, the whole edifice of Cantor's Paradise. But as Frege pointed out, with great irony, no such concept (indeed, no concept at all) can be formed on such a basis:

> [Detaching our attention] is particularly effective. We attend less to a property and it disappears. By making one characteristic after another disappear, we get more and more abstract concepts. . . . Inattention is a most effacious logical faculty; presumably this accounts for the absentmindedness of professors. Suppose there are a black and a white cat sitting side by side before us. We stop attending to their colour and they become colourless, but are still sitting side by side. We stop attending to their posture, and they are no longer sitting (though they have not assumed another posture), but each one is still in its place. We stop attending to position; they cease to have place, but still remain different. In this way, perhaps, we obtain from each one of them a general concept of Cat. By continued application of this procedure, we obtain from each object a more and more bloodless phantom.[17]

14. In fact, the work of Husserl's that Weinberger cited is *not* a work of psychologism, nor, especially, of abstractionism (the deeply flawed empiricist theory of concept formation): *see* Michael Dummett, FREGE: PHILOSOPHY OF LANGUAGE xlii–xliii (1983); Coffa, *supra* note 11, at 102–3 especially. Husserl temporarily renounced psychologism after Frege's damning review of his *Philosophie der Arithmetik* (1894), though he later apparently returned to it. Weinberger's views, however, *are* psychologistic, whether or not he really got them from Husserl, as I intend to show.

15. Coffa, *supra* note 11, at 13–14.

16. Edmund Husserl, ÜBER DEN BEGRIFF DER ZAHL 299 (1887); quoted in Coffa, *supra* note 11, at 68.

17. Gottlob Frege, Review of Husserl's PHILOSOPHIE DER ARITHMETIK (1894). This translation is from Coffa, *supra* note 11, at 69; others may be found in TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE 84–85 (1960) and in Dummett, FREGE: PHILOSOPHY OF MATHEMATICS 85 (1991). It is interesting to compare Berkeley's sarcasm towards Lockean abstractionism in DEFENCE OF FREE-THINKING IN MATHEMATICS: "Mr. Locke acknowledgeth it doth require pains and skill to form his general idea of a triangle. He further expressly saith that it must be neither oblique nor rectangular, neither equilateral or scalenum; but all and none of these at once. He also saith it is an idea wherein some parts of several different and inconsistent ideas are put together. All this looks very like a contradiction. But to put the matter past dispute, it must be noted that he affirms it to be somewhat imperfect that cannot exist; consequently the idea thereof is impossible or inconsistent." (The relevant passage in Locke is ESSAY IV vii 9; both quoted in Douglas Jesseph, BERKELEY'S PHILOSOPHY OF MATHEMATICS 24–25 (1993); on Berkeley's attack on abstractionism generally, see 9–43.)

The purpose of abstractionism was to grapple with the so-called problems of multiple reference. Husserl's neo-Kantianism led him to assume that all concepts are *general* representations and that conceptual analysis consisted in identifying (preferably, exactly) the number of constituents in some proposition that went to make it up. The emptiness of Weinberger's appeal to "psychological abstraction" can best be seen if we consider what it says about mathematics.

According to a psychologistic reading of number theory, the natural numbers are constructed through the process of counting. The number 1, for instance, is what results from considering what is common to all one-membered collections: in other words, what is left over once we have disregarded all particular features of various (single) objects which do not pertain to their *number*. What we are left with is what Husserl called a "featureless unit."[18] Consider what this says about the number 2 (or indeed any natural number > 1). Initially, this is just what emerges from all two- (or *n*-) membered collections once the particular features of their member objects are disregarded as before, leaving only their number. The problem is, how can such a number be composed of *featureless* units?[19] On the face of it, we need to say that 2 is composed of *two* featureless units. But if those units are indeed featureless, then they cannot be told apart: They are the *same* unit, identical by Leibniz's Law ($\ulcorner a = b \Leftrightarrow \forall P\ [Pa \Leftrightarrow Pb]\urcorner$). If they are distinguishable, this can only be by retaining some distinguishable feature which tells them apart; if this is so, these feature(s) can only come, via the abstraction hypothesis, from below (from the objects). Universality of counting is thereby destroyed.[20]

In invoking the abstractionist theory, of course, what interested Weinberger was not mathematics, but the objects of legal thought. In both cases however, what sparked the theory off was the "problem" of multiple reference, the realization that a single concept is involved on successive occasions of our thinking of it. Weinberger's psychologism undermined the intersubjectivity crucial to his legal vision. In order to see this, recall the problem that Weinberger wanted the theory to solve. This was to show how something as apparently private as a thought structure could serve as the basis of our (collective) knowledge of law. His promotion of that theory

18. Edmund Husserl, PHILOSOPHIE DER ARITHMETIK, *e.g.*, 201–2 (1891).

19. Featurelessness is essential to psychologistic versions of counting. For the number 1 to enumerate tables as well as (say) giraffes, the number of tables must contain no features of a table except its "number." If that were not the case, the number of a single giraffe and that of a single table would be different entities with different properties, thereby making counting and numerical comparison impossible.

20. Such problems are compounded when we are forced to consider very large numbers (including infinite cardinals), and collections such as the irrational, the complex, and the imaginary numbers. In the former case, how are we to account for the 10^6 mental acts needed to construct that number? In the latter, we cannot even conceive of where in nature we may find the roots of the exotic processes of abstraction that would lead to them. Neo-Humeans will, of course, be tempted to raise the same question vis-à-vis our construction of *norms*.

ensured that this problem could never be solved within the confines of the strategy he pursued.

Weinberger's strategy was based on the assumption that a concept is a "general representation" consisting of an abstraction from all those singular representations which make it up, so that the explanation of its power to refer on more than one occasion comes from gathering up all the individual instances of its use. We have just seen, however, that the basis of collective understanding does not rest upon our ability to grasp any kind of *collection* (either of objects or, as Weinberger sometimes held, mental acts); rather, it rests on *concepts*. To put it another way, when someone understands a sentence, what he understands is its *content*, not what it may say about any mental representations produced in the course of its making. Accordingly, the essence of the *generality* lies in the *predicative* nature of the concept. This does, of course, require that the corresponding notion of "object" be an unproblematic one, as it was for Frege, for whom objects are simply the everyday furniture of the world of experience, the classes and numbers of mathematics, and the norms of legal dogmatics. Part of Weinberger's immediate problem is his insistence on seeing norms as, not simply objects, but as complex entities which are both "constituents" of action in some "real"/"ideal" hybrid state and, at the same time, targets of the understanding in legal propositions. We shall see that, had Weinberger (or MacCormick) stood by their, largely Fregean, intuitions regarding the subject matter of legal statements, all their problems would have disappeared.

However, it is not merely that psychologism leads to a problematic picture of concept formation and epistemology. More importantly, it shows that Weinberger's strategy failed at two crucial points: communication of normative information, and knowledge of its truth.

Let us take the point about communication first. Weinberger had used the abstractionist theory in order to guarantee intersubjective communication of normative information. However, the essentially *subjective* character of representations provides no guarantee that the mental states associated with a given concept by *A* will be the same as those entertained by *B*. More importantly, there is no obvious means of telling whether mental states coincide, because we lack a criterion of identity for *subjective* representations. Had Weinberger realized that what is communicated is *content*, his problems would have vanished. But the reasons underlying the problems we have just been exploring had more serious consequences for legal knowledge. As we saw, in invoking psychological abstraction to explain how aspect (i) of norms (their informational component) allows us knowledge of normative states of affairs, Weinberger confused thoughts about the legal order with that of which they are thoughts, and he confused the thoughts themselves with the mental acts in which they figure. As a result, when the time came to demonstrate our access to the world of institutional facts—in the sense of the "real" constituents of reality under aspect (ii)—we find the way decisively blocked. We can see this as soon as we consider the role of truth.

Both MacCormick and Weinberger were adamant that facts about the legal order are facts "in virtue of being statable as true statements" (*ITL*, 10). Their adamance was natural, because we know the meaning of a statement quite generally if and only if we know what circumstance would make an utterance of it true. It is therefore essential to recognize the distinction between logic and psychology on the matter of truth and validity. Any philosophy committed to the existence of an external world (even if it is idealist in approach) must maintain a strict distinction between propositions that are true, and those that we merely *think* are true. Whether we think that, for example, $7 + 5 = 12$ is true does not affect its truth-value, the fact that it *is* true. In the same way, a theory which supposed formulas of logic to be built up from psychic phenomena would be powerless to account for logical necessity. Prior to distinguishing logical entailments from the mental processes in which they figure, we have no reason to judge that someone who does not, for instance, accept the validity of Peano's Fifth Axiom, is wrong, rather than judge only that he has different thought-patterns. Mental processes themselves are not true or false: They have, as Frege said, "no inherent relation to truth whatsoever."[21] Because, for Weinberger, propositions are created out of mental processes acting upon *subjective* representations, and because he confused logic with thought patterns, it is clear that the difference for Weinberger between a statement's truth and our belief in its truth is virtually nonexistent.

By failing to respect his semantic natural kinds, Weinberger not only made legal practice, in the sense of the communication of legal information, impossible; he also cut off our access to the truth of legal statements, and with it any means of deciding when the states of affairs denoted by such statements obtain. Weinberger's semantics led him to believe that the meaning of a normative statement is just an abstraction from a collection of mental episodes. In taking the notion of *Verstehen* and extending it, inadvertently, to the whole process of concept formation, Weinberger placed the objects of legal discourse in a world to which they do not belong. It is ironic that, at the end of an argument which was supposed to have shown us how we may speak of the existence of laws, Weinberger effectively gave voice to a thesis of the unreality of norms more radical than anything proposed by the Scandinavian Realists.

IV. MACCORMICK'S APPROACH

Weinberger had said that a norm is made up of two separate though related components: (i) an informational element, and (ii) a socially "real" aspect. MacCormick's thoughts on the ontological aspects of ITL are less explicitly semantic than Weinberger's, making it harder to attribute to MacCormick views as concrete (if problematic) as Weinberger's (i) and (ii). It does seem

21. Gottlob Frege, POSTHUMOUS WRITINGS 2 (Long & White trans., 1979).

likely that something in the neighborhood of (i) and (ii) was what MacCormick was after, with the important difference that, in the case of MacCormick, (i) and (ii) are not clearly distinct even from the start.[22]

MacCormick's starting point is familiar enough: The difference between "internal" and "external" aspects of rule following consists in the fact that the former, though not the latter, go beyond a description of the merely observable manifestations of behavior and refer to things that exist on the plain of institutional fact (*ITL*, 10). As already seen, institutional facts are facts "in virtue of being statable as true statements" (*id.*). However,

> what is stated is not true simply because of the condition of the material world and the causal relationships obtaining among its parts. On the contrary, it is true in virtue of an interpretation of what happens in the world, an interpretation of events in the light of human practices and normative rules. (*ITL*, 10)

Legal and other normative statements, on this account, are not connected, via their truth-values, to what happens in the world, but only to *an interpretation* of what happens there. As a result, the *senses* of those statements are not semantically connected to what we would normally have thought of as their referents—the (actual) matters of fact—but only to thought processes concerning them. If it is claimed, in addition, that such statements can be *true* in virtue of those thought processes, then this effectively says that truth and falsehood are a matter of mind-dependent fact, with all the now familiar consequences that this entails. What this shows is that the attempt to account for the factuality of institutions—their participation as the referents of semantic constituents in ranges of statements that are to be interpreted as being true or false—cannot be usefully furthered by extending the concept of *truth*. Rather, it is the notion of *existence* of institutions which must be faced. Part of this problem involves showing how such existence claims as can be made for institutions connect up with the notion of truth.

Assuming that neither MacCormick nor Weinberger would wish to be knowingly involved in psychologistic semantics of this sort, the key problem remains that of accounting for the ontological status of institutional facts and our epistemic access to them. In regard to the first matter, we have an obvious lead in statements such as the following:

> ITL . . . regards the existence of law as an institutional fact, a matter of what is actually existent in social reality—and does so even when norms are con-

22. Years later, MacCormick issued what he took to be an elementary reminder that "[s]ome of us hold that rules and systems are 'thought objects', elements in what Popper has called 'World III'. To that extent it is an open question just how far any conceptually valid norm, system or institution achieves actual social reality in a given context. But the ideal existence is a separate question. It follows that it is possible to conceive the norm as a basis for evaluation of the actual. . . . It has always seemed to me a weakness in more "realist" accounts . . . that they seem to foreclose on this." MacCormick, Book Review, *supra* note 6, at 145.

> sidered as ideal entities available not to direct observation but only to the understanding. (*ITL*, 20)

In order to avoid psychologism and its idealist offspring, the reference to "social reality" here must be construed at least intersubjectively; presumably, this is something neither MacCormick nor Weinberger would have regarded as problematic. As MacCormick put it:

> If law exists at all, it exists not on the level of brute creation along with shoes and ships and sealing wax . . . but rather along with kings and other paid officers of the state on the plain of institutional fact. (*ITL*, 49)

This, of course, makes a rather robust existential claim, namely, that "many more things exist than can be accounted for in terms of physics, physiology and behavioural psychology" (*ITL*, 49). Combined with the idea that we have access to such facts (i.e., enjoy some sort of cognitive acquaintance with "ideal entities available . . . only to the understanding"), the claim that there is legal knowledge

> make[s] a strong claim. Knowledge is propositional and I can only know that *p* if *p* is true. So the claim that there is legal knowledge is the claim that there are at least some true propositions which are propositions of law. (*ITL*, 96)

The idea that legal propositions *can* be true presumably wants arguing on the basis of the availability of an argument to show that such propositions are underwritten by a truth-valued semantics. But assuming that this is the case,[23] how do we know if that is what legal expressions actually *do*? To understand MacCormick's answer, it is necessary to look more closely at his account of how legal statements connect up with truth.

The statement that there are matters of (institutional) fact that are "*available* . . . to the understanding" is, on the face of it, a realist one, if it is assumed that understanding, or rather intellectual operations in general, play no part in their construction. On such a view, the role of *Verstehen* is restricted to putting us in touch with abstract matters of fact existing mind independently and waiting for us to become acquainted with them. On the other hand, the psychologism discussed earlier stems from an extension of the concept of *Verstehen* to the point where existence claims are confined to reports on *it*. We cannot, in other words, conceive of the intellectual activity expended in thinking about institutions in such a way that reference is conceived of as being to those thought processess themselves rather than to that of which they are thoughts. Weinberger, as we have already seen, initially confined all existence claims to his aspect (ii) ("social reality"); but, in offering an explanation of it, his semantics refused to let him beyond the

23. *Cf.* Sean Coyle, *The Meanings of the Logical Constants in Deontic Logic*, 12 RATIO JURIS 39 (1999); *see also* Section IV of the present article.

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abstract thought processes which "constituted" the informational aspect (i). MacCormick's position is somewhat different, in that he never seems to have supposed aspect (ii) (or a version of it) to be other than an ontologically harmless offshoot of aspect (i).[24]

Notwithstanding the realism implicit in some of his remarks, MacCormick's tone is generally constructivistic. A willingness to believe in the unrestrictedly objective nature of even *some* institutional facts will, as Wright has observed, carry with it a certain conception of what it is to understand members of the class of statements that deal with those facts.[25] An understanding of such statements, on that account, will generally involve "possession of a concept of the fact which it putatively describes, that is, of the circumstances under which it would be true, of a kind not essentially reducible to a capacity to recognise those circumstances should they obtain."[26] MacCormick's willingness to concede that "[t]here may be valid legal rules really in existence that determine possibilities not yet realised by anyone's actions" (*ITL,* 11) raises the *possibility* that one may legitimately talk of the existence of certain (legal) rights and duties arising under rules which have not yet been fully articulated in the context of a given *kind* of case.

The extent to which we hold that legal provisions may exist for previously unactualized behavior depends on how far we accept the one-right-answer thesis. But clearly it is possible to reject that thesis without being forced to abandon totally the idea that there may be unexplored, but logically determinant, extensions of the legal system. MacCormick and Weinberger were clearly open to such an idea: "[W]e are," they said, "as profoundly convinced of the existence of logical entailments and implications in juristic thought as of the non-cognitive character of the personal convictions on which legal opinions are ultimately based" (*ITL,* 19). In addition, MacCormick's insistence that "Any analytic inquiry requires an analysandum, something to be explained analytically which is supposed to exist independently of the inquiry itself" (*ITL,* 94), is realist in tone insofar as one could hold that there are matters of law as yet uninvestigated, but whose subject matter may well exist.

It is hard to know how far MacCormick would have wished to take the realist elements of his theory, though it is safe to say that he carried a commitment to realism at least as far as acceptance of determinant outcomes to cases of "purely logical character" (i.e., "easy cases").[27] These are usually described as being outcomes which were, in some thus far unexplained sense, determined in advance of their actually being drawn.

24. We must again remember that MacCormick was working with *undifferentiated* semantic categories. Failure to keep this point in view will make it hard to see, in what follows, why MacCormick argued as he did.

25. *See, e.g.,* Crispin Wright, WITTGENSTEIN ON THE FOUNDATIONS OF MATHEMATICS 8 (1980).

26. *Id.*

27. *See* MacCormick, LEGAL REASONING AND LEGAL THEORY ch. 2 (new ed., 1994).

MacCormick's *constructivism* about law stemmed from his empiricist philosophy of institutions. Constructivism, like its rivals, has both an epistemological and an ontological dimension, though it is typically seen as being epistemologically motivated. It is characteristic of MacCormick's argument in *ITL* that he began instead with ontology. "Strictly," MacCormick and Weinberger had said, "it is only particulars that exist" (*ITL*, 11). In other words, as far as ontology is concerned, only individual contracts—as opposed to a general notion of contract—may be said actually to exist. This still involves the need to "argue for the reality of ideal entities or thought-objects (as distinct from material entities)" (*ITL*, 11), but the order of construction is from the material world of facts to the institutional world, and not vice versa. The question that naturally arises, assuming MacCormick and Weinberger are not psychologistic logicians, is: How do we get from the material world to the world of institutions? MacCormick's answer was that because "[t]he existence of an institution as such is relative to a given legal system, and depends upon whether or not that system contains an appropriate set of institutive, consequential and terminative rules" (*ITL*, 54), our access to it must be via such rules and the ability to assign it temporal coordinates. "Most importantly," he wrote, "[legal concepts] all denote things which for legal purposes we conceive of as existing through time" (*ITL*, 52).

The point about system membership is straightforward enough. Concepts do not 'exist in themselves', that is, do not exist independently of human knowledge of them: There are no matters of institutional fact about whose obtaining we are unaware. Rather, they "are made meaningful and intelligible through conventions and rules" (*ITL*, 11). In other words, there is no more to a concept than the way in which it is used in language, or, in the case of technical terms, within some framework. The point about temporal involvement is less straightforward. According to the constructivist tenor of MacCormick's remarks, our access to the world of institutional facts is *from* the material world (i.e., from an interpretation of it), because it is only particulars that exist. As we saw, MacCormick and Weinberger regarded only *particular* contracts, for example, as worthy of being the subject of existential claims, and not any general notion of "Contract." But, said MacCormick, "it is clear that the institution as a concept is logically prior to any instance of it" (*ITL*, 55). This is because

> [t]he existence of an institution must have antedated by some space of time the existence of any instance of it. Just because we are dealing with abstract institutional concepts and facts, the institutional concept must be logically prior to any factual instance of the concept. (*ITL*, 55)

This, on the face of it, reverses the order of construction outlined (*ITL*, 11).[28] A first response might be to point out that, while generalized institu-

28. In fact, the point about logical priority (which concerns meaning) and the point about temporal priority (which concerns the order of construction of the legal rules) are formally separate. Both, though, are valid.

tions of the appropriate sort provide the conditions under which particular instances of them are meaningful, they do not themselves actually *exist*; they are merely abstractions. But this is no serious response at all. For one thing, an abstraction from given institutional facts could hardly be used to explain anything about their existence or our cognitive access to them. For another, it in any case wholly undercuts MacCormick's idea, which is probably essential on any sane view, that a concept must exist prior to any institutional embodiment of it. It can, after all, only be in virtue of the existence of that concept that the relevant institutions are instances of *that concept*.[29]

MacCormick's own criteria do not, in any case, allow him a means of denying existence to "general" institutions such as "Contract," "Unjust enrichment," and so on. He had said that involvement in some system and assignation of temporal coordinates (i.e., involvement in time) are *necessary* conditions for the existence of an institution. Just as specific contracts, exercises of the right to free speech, and so on, meet these criteria for the appropriate systems, so too do the general concepts of which they are instances. The law of contract is part of the law of Scotland, for example, and has been for some time. We do not yet know whether these criteria are also *sufficient* for institutional existence, and, on that basis, there may be grounds for doubting whether the general concepts to which MacCormick wanted to deny existence exist according to more refined criteria. But it is not at all obvious that any such criteria could be specified which would not also rule out the admissible (particular) institutions, because there seems to be little in the way of relevant semantic distance between the two types of institution *except* level of generality. As MacCormick put it:

> On the one hand, we can break down complex bodies of legal material into comparatively simple sets of inter-related rules; and yet on the other hand we can treat large bodies of law in an organised and generalised way, not just as a mass of bits and pieces. (*ITL*, 53)

Clearly then, it is not just "particulars" that exist. Despite the rather heavy-handed expression of the issue in *An Institutional Theory of Law*, it seems likely that MacCormick intended not to deny *existence* as such to abstract matters of institutional fact, but, rather, to provide them with an existence predicate not essentially similar to that which does service for "brute" facts. Weinberger's method had been to tie in normative entities with actions coupled with an informational component. MacCormick's blueprint followed the same general pattern, but in a much stronger way.

Weinberger had been concerned to show that the "social reality" of norms under aspect (ii)—the way they connect up with the real world—could be explained by reflecting on the means by which normative information (aspect [i]) is conveyed. Unfortunately, his understanding of

29. *See* Saul Kripke, NAMING AND NECESSITY, Lecture I (1980).

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those procedures led to a position which was not, in the end, sustainable. For MacCormick, on the other hand, it is exactly those procedures which define the facts:

> My point, you see, is to deny that it is an oddity of legal facts or other institutional facts that they are rule-defined. What is admissible as a fact in any sphere of activity or inquiry is dependent not only on what really happens but also on the rules for the conduct of that activity or inquiry. (*ITL*, 102)

If this were meant merely to deny the existence of a clear abstract/concrete distinction in classifying matters of fact, objects, and so on, then it would be clearly true. Unfortunately, MacCormick's semantics gave him no clear viewpoint from which to say this.

Because of his tendency to exaggerate the role of *Verstehen* in the construction of meaning, Weinberger often failed to distinguish between three general elements in the meaning of an expression, or proposition, elements whose separation is crucial to an intelligible account of the sense of those expressions or propositions: (*) the subjective act of "representation" of a state of affairs before the mind's eye (that is, one's state of mind as one apprehends an object); (**) the "objective representation" (to borrow the Kantian terminology), that is, the intersubjective content of those thoughts or acts of representation; and (***) whatever is represented, that is, what the thoughts are about. Presiding over a similar retreat in the direction of idealism, MacCormick had announced that:

> Legal knowledge is knowledge of what *for the committed participants* are the norms of [legal] order, and of the institutional facts *constituted by the interpretation* of natural events within the [framework] which the norms provide. (*ITL*, 105, emphasis added)

The resulting confusion of (**) and (***) led MacCormick to the conclusion that all "facts" are intellectually constituted, that is, *all* facts are "institutional"[30]:

> If the objection is to my notion that there are norm-defined facts, my reply is: find me a fact that isn't so defined. It is not "institutional facts" which are problematic, but "brute facts". (*ITL*, 102)

In fact, more than being problematic, the class of brute facts, on this account of them, shrinks away to nothing. The root of the problem is that, in MacCormick's hands, "fact" is being used to stand for *both* the worldly constituents with which Dr. Johnson was so familiar *and* the "meanings" of

30. A fuller version of MacCormick's views on reasoning processes, on which this belief is based, can be found in MacCormick, *Argumentation and Interpretation in Law*, 6 RATIO JURIS 16 (1993).

those objects as they appear in our linguistic expressions and thoughts. Because his semantics gave him no clear means of telling the difference between these two separate semantic categories, MacCormick was pushed into believing that the basic procedures by which we become acquainted with institutional facts hold in the case of all facts. The remaining steps of his argument must be traced carefully.

Since it is reasonable to assume that we know what various given facts *are*, in the sense of knowing what is meant by expressions that concern them, MacCormick seems to have concluded that access to them has to be via the notion of *Verstehen*, which plays an essential part in our ("propositional") knowledge of them. Since, presumably, we cannot be said to have knowledge of something of which we do not know the meaning, we do not, MacCormick supposed, approach those facts unmediated, but can only do so via *interpretations*. Thus, our *knowledge* of those facts is essentially *normative* rather than detached:

> I am asserting the primacy of "ought", "*sollen*", "*devoir être*". To define the sphere of the "is" relatively to some activity or inquiry, as with all such definitions, involves us in resorting to the "ought". That there is relativity here is important, yet little acknowledged. (*ITL*, 103)

What this signals is a retreat into idealist semantics. Earlier, MacCormick had robustly defended the need for an analysandum (even for the case of law) that "is supposed to exist independently of the inquiry itself." All that remained of this claim by this stage was a rather empty appeal to action:

> The analysandum of analytical jurisprudence is legal order as constituted by actions, words and thoughts of its committed participants. . . . Legal knowledge is knowledge of what for the committed participants are the norms of the order, and of the institutional facts constituted by the interpretation of natural events within the schemata which the norms provide. (*ITL*, 105)

Pressed about what constitutes action, MacCormick would have reminded us that our understanding of the meaning of that term, as well as of 'natural events', is dependent on our *Verstehen* of them, however else they may be fixed, and that such terms—which will correspond to the totality of available terms of the language—are simply unintelligible without it. Weinberger's philosophy places actions and events firmly in the real world (under aspect [ii]), rather than in the mental processes by which we comprehend them (that is, under aspect [i]). For MacCormick, however, the distinction is not sustainable. Because, MacCormick said, nothing can be known to us which is not also intelligible to us ('knowledge is propositional'), whatever is intelligible to us or known to us about the way things *are*, in the sense of aspect (ii), is therefore *already* present in, and meaningfully instantiated by, the intellectual operations which make up aspect (i). Indeed, if there are

elements of (ii) that are not also in (i), it appears that we cannot know of their existence.

MacCormick's unwillingness to put semantic distance between the constituents of what we say and the ultimate furniture of the world was largely the product of the Kantian background from which his views on the subject seem to have emerged. Kant had said that there can be no knowledge without a mixture of concept and intuition (what Russell later called acquaintance), and the Kantians had made it their main business to explore the role of intuition in the propositions and judgments that express our knowledge.[31] Accordingly, as Coffa has said, that tradition favored a tight link between those two elements:

> In all of these cases it is being assumed that a singular representation can represent its object only if it satisfies a condition that makes knowledge by description virtually impossible; for it is required that the source and the target of the referential relation be in some respect identical.[32]

Because the semantic pineal gland of MacCormick's institutional theory is, roughly speaking, knowledge by acquaintance, properly "external" or "brute factual" reports are not constructible in those parts of MacCormick's semantics with which we are concerned. For this reason he regarded these reports as "problematic." But neither are institutional facts thus constructible when thought to be as "real" as MacCormick, at various stages, wished them to be. In Weinberger's case, this conclusion is less harshly drawn; but the effect with regard to legal statements is the same: What they describe is not the law, but, in fact, our own subjective musings.

V. A FREGEAN STRATEGY

It is plain that neither MacCormick nor Weinberger would have wittingly subscribed to such a conclusion about the law. ITL's original goal had been precisely that of furnishing an ontologically robust account of the law's "reality," an account that would allow us to regard statements about the law as straightforward accounts of the way things are, legally speaking. One may get the impression that, despite a strong commitment to normative realism, MacCormick and Weinberger so badly wanted to avoid the pitfalls of Platonism that they were obliged to perform semantic somersaults to avoid positing a faculty of intuition of abstract normative objects. In fact, one of the great technical achievements of the Institutional Theory was to demonstrate how we can speak of the existence of norms, and of legal objects, relations, and concepts generally, in an epistemologically respectable, though nonreductive way. This achievement has been obscured, partly due

31. *See* Coffa, *supra* note 11, at 100.
32. *Id.* at 101.

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to its relatively unsystematic treatment in scattered remarks in the various papers which constitute *ITL*, and partly because when concern was focused on epistomological matters, the strategy associated with it took a backseat to its more outspoken psychologistic cousin.

The less-celebrated strategy began from the reasonable premise that facts about the legal order are facts ("institutional facts") in virtue of being statable as true statements. Part of the reason for the fairly minor role given to that principle in *explanation* of ITL's theses may have its root in certain prejudices about the character of Platonism.[33] MacCormick had suggested that the world of legal institutions may well be a haven for the Platonist. The fact that he immediately withdrew this revealing admission as a joke shows the extreme hesitation with which MacCormick allowed himself to be associated with that doctrine. The Platonistic assumptions of ITL were bursting out of his antirealist (and occasionally neo-Kantian) epistemology.

These assumptions embody a generalized version of Frege's argument that numbers are objects.[34] In the remainder of this paper, I will (very) briefly explore what seems to me to be a simple yet powerful argument, based on Frege's, that secures the conclusions MacCormick and Weinberger wished to assert, without threatening to make our knowledge of law look incredible.

According to Frege, an object is just anything that is the target of reference of a nonvacuous singular term. Because there is no end of nonvacuous singular terms (number expressions, for example), there are, in this sense, abstract objects corresponding to them:

> [A]sking whether there are objects of a certain general kind is tantamount to asking whether there are, or at least could be, expressions functioning as non-vacuous singular terms of a certain kind. When the domain of objects is understood as including at least the referents of all genuine singular terms, it is anything but obvious that it does not include abstract objects of various sorts; rather, there is quite a strong prima facie case for believing that it does.[35]

It was from this reasonable premise that the institutional theory had started out. Accordingly, to know whether or not something is an *object* is just to know whether a certain expression for it is capable of standing as a singular term in a range of true propositions. Something similar appears to have been MacCormick's thought when he said that institutional facts exist "in virtue of being statable as true statements" (*ITL*, 10). This characterization of objects is not as controversial as MacCormick might have supposed: As Hale has noted, it merely acknowledges the fact that there is no fully general account of what various types of entity are save by reference to the

33. *See, e.g.*, MacCormick & Weinberger, *supra* note 5, joint introduction at 11.
34. The Fregean argument used here is due to Hale: *see* Bob Hale, ABSTRACT OBJECTS (1987).
35. *Id.* at 4.

logical category to which expressions for them belong in propositions about them.[36] Since names for normative objects clearly do so feature in everyday contexts of legal argumentation, no further qualms can be entertained about admitting existence claims about them. This means, of course, giving up the idea that norms are objects in the same sense as tables are; but, as Hale observed, the same goes for other pedestrian objects such as musical compositions, moves at chess, or holes in the ground.

MacCormick and Weinberger had said that "institutional" facts are different from ordinary facts about the tables and chairs of everyday experience; but, according to the dominant strategy recounted in the previous sections of this paper, our mode of *access* to the targets of legal propositions is basically the same as our access to the rest. The basis of both theorists' writings is the assumption that knowledge of law must be via *intuition*, or (to use Russell's term) acquaintance. Once this assumption has been granted, it is easy to conclude that nothing can correspond to the second term in the relationship between knower and known where the objects "known" are abstract. From here, it is a short step to conclude that the objects in question are identical with the beliefs which *appear* to concern them, and, therefore—pursuing the logic of the argument—that the law is "unreal" in the sense outlined in Section IV above. The turning point in the argument is the implausibility of the proposition that we have a direct faculty of intuition of abstract objects. On the other hand, no such implausibility infects the claim that that access is via knowledge by *description*. Such knowledge, in the appropriate contexts, amount to no more than our ability to frame meaningful propositions about legal entities.

Viewed this way, the claim that there are no legal entities rests on the proposition that knowledge by description is impossible. This latter claim, in turn, must be based on the view that propositions about the law cannot be semantically valued as true or false—that is, that they are not in the market for truth at all. To show that they are *not* is to show, in effect, that some form of reductionism with regard to such statements is *true*. MacCormick and Weinberger argued against this possibility in terms of the "internal" nature of the statements in question, claiming that normative statements refer to (actual) norms because reduction to a set of brute factual reports will never do as an *explanation* of those statements. In fact, the argument could have been made more strongly in terms of semantic properties of the relevant sentences alone.[37] This is because the reductionist's claim, as Crispin Wright has shown, is essentially one about meaning: It asserts that some range of statements, *N*, containing reference to normative entities is meaningful only by virtue of being equivalent in meaning to some other range, *R*, that contains no reference to anything except non-normative objects or states of affairs. The apparent reference within any

36. *Id.* at 3.
37. The following argument is attributed to Crispin Wright: *see id.* at 25.

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particular *N*-statement is thus capable of being dismissed as an accidental surface-grammatical feature of *N*-expressions generally, which must be reinterpreted according to the more fundamental forms contained in *R*-expressions.

The difficulty for this sort of reductionism comes, Wright said, when justification is sought for treating the right-hand sides of the reductionist's equivalences (viz, the *R*-statements rather than the *N*-statements) as *fundamental*. Precisely because both kinds of statement are supposed to be equivalent, we have no reason, in the absence of any independent criteria, for holding one kind of statements as being semantically *prior* to the other. This is because we are free to argue, via the equivalence hypothesis, that the contextual paraphrases contained in *R*-statements are merely superficial forms of *N*-statements, and thus contain *implicit* reference to normative entities. If the reductionist insists on there being no such implicit reference, then it is hard to see what grounds there might be for clinging to the hypothesis of their equivalence in meaning. The attempted reduction of norms to some other kind of object, therefore, necessarily fails.

VI. CONCLUDING REMARKS

I began this article by asking what knowledge of law is knowledge *of*, and I suggested that there is an aspect to this question that transcends particular conceptions about the *character* of legal rules within a particular legal culture. The root of the question concerns the prima facie implausibility of the claim that *normative* entities can be involved in matters of fact that are in some sense external to the mind, and the difficulty of demonstrating that we can, in any event, come to know them. The Fregean strategy does much, I believe, to overturn the sense of implausibility infecting the first claim, and gets round the difficulty of the second, epistemological, question by furnishing a suitably down-to-earth explanation of our cognitive access to norms.[38]

In outlining the Fregean strategy, I have not suggested that either MacCormick or Weinberger would endorse it as a proper explanation of our knowledge of the legal order, though, of course, that is the strategy I think they *ought* to endorse. I would, however, make the following claims for the Fregean strategy. First, *elements* of the Fregean strategy are clearly visible in the fabric of *ITL's* main arguments, though its central insights are pushed aside in the pursuit of the psychologistic strategy. Second, a rigourous development of its central arguments gives us a powerful insight into our knowledge of law, an insight that is not essentially tied to legal positivism.

38. The explanation presented here, of course, takes much for granted and could be challenged at several points. For a more detailed treatment of the argument, *see* Sean Coyle, *Platonism About Law* (forthcoming). For an alternative take on basically the same set of issues, *see* Andrei Marmor, *An Essay on the Objectivity of Law*, *in* ANALYSING LAW 3 (Brian Bix ed., 1998).

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Since the Fregean strategy depends so much upon the role of *truth*, an obvious question to raise is what the notion of truth, in legal contexts, amounts to. The fact that the appropriate range of statements—those purporting to tell us about the law—*is* in the market for truth is, I hope, reasonably clear from the untenability of the only real alternative, reductionism.[39] Those engaged in the study of legal reasoning, therefore, have every reason to inspect the nature of claims that, though they relate to matters of fact having some fairly close relation with human intellectual activity, nonetheless describe (or misdescribe) states of affairs not, in the end, reducible to purely mental entities.

39. The other possible alternative, *deflationism*, I tackle in Part II of THE POSSIBILITY OF DEONTIC LOGIC (forthcoming) and in PLATONISM ABOUT LAW (forthcoming).

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