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## LAW IS NOT (BEST CONSIDERED) AN ESSENTIALLY CONTESTED CONCEPT

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## LAW IS NOT (BEST CONSIDERED) AN ESSENTIALLY CONTESTED CONCEPT

## ABSTRACT

I argue that law is not best considered an essentially contested concept. After first explaining the notion of essential contestability and disaggregating law into several related concepts, I show that the most basic and general concept of law does not fit within the criteria offered for essential contestation. I buttress this claim with the explanation that essential contestation is itself a framework for understanding complex concepts and therefore should only be applied when it would yield a greater understanding of uses of the concept to which it is applied. I then show that, even if law meets some basic criteria of essential contestation, applying the appellation does not helpfully illuminate the most general concept of law and therefore it should not be used, while allowing that it might be more useful for the related concept of the rule of law.

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## 1. INTRODUCTION

Some of the important contemporary debate in legal philosophy has been over methodology. One part of that has been over the degree to which we can understand the concept of law by describing it, and what such an explanation would entail. While some maintain that law is a matter of social fact, others say that our conceptions of law are themselves controversial interpretations that embody value commitments. If law is a concept about which controversy is endemic, perhaps like justice or democracy, then a theory purporting to explain the concept may in reality be an attempt to persuade others to adopt a certain set of values. Any claim to descriptive neutrality within such a theory would then be best understood as a rhetorical move in the persuasive project. On the other hand, if the concept of law is more like the concepts of social institutions understood without such controversy, then we should be able to understand it by a similar descriptive explanation.

I use the phrases ‘descriptive method’ or ‘descriptive account’ somewhat loosely and do not mean to imply that any account is completely devoid of value judgments. Rather, descriptive theorists are those who seek to develop their accounts without depending on value judgments that are an integral part of the practice they are trying to understand, although they may (or must) still make value judgments as a part of their theory, such as determining what elements are important to include in the theory and answering why it is an important subject to study (see generally Dickson 2001). While there is an ongoing debate over just how neutral a descriptive method can be (see, for example, Marmor 2006), I will generally adopt the view that a descriptive method still allows for some value judgments on the part of the theorist, seeing this as the target of the alternative view represented by the claim that theories of law are interpretive attempts to persuade others to adopt the theorist’s values. If a descriptive method so understood

can help to rebut claims that law is best seen as interpretive, then a more strictly descriptive method (if viable) will benefit from the same argument.

Additionally, we should not make the mistake of thinking that our concept of law can be analyzed independently of the practices that instantiate it. Talking about the ‘concept’ of law is really just a shorthand way of talking about the nature of legal practices (Raz 2005 p. 324). Nevertheless, we organize and categorize those practices by developing an understanding of them. Perhaps even more importantly, we use that understanding to create, change, and perpetuate those practices. Since they are social practices, we increase our knowledge of those practices partially by examining that understanding of them and partially by investigating them empirically. When we analyze the ‘concept’ of law, we are simply doing the former. We could just as easily talk about investigating the ‘nature’ of law, but that runs together the two parts of the project (conceptual and empirical) as well as inviting the confusion that our investigation depends on controversial metaphysical assumptions. When I write of the ‘concept’ of law, therefore, I am simply using it as a shorthand way of talking about our conceptualization of a set of social practices that we see as interrelated, and as a way to avoid certain metaphysical assumptions about where those interrelations reside.

On the other hand, there is still a difference between the concept and the various ‘conceptions’ or ‘interpretations’ of it that various parties might have,<sup>1</sup> which emphasize some aspects of the concept over others as more important for understanding it. While there is some debate over exactly how to draw this distinction (Swanton 1985 pp. 812-13), the basic idea is

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<sup>1</sup> The concept/conception distinction is found in many places in the literature. (Prime examples are Gallie 1964/1968 p. 180, Rawls 1971/1999 p. 5 (crediting Hart), Dworkin 1978a p. 12, and 1986, and Swanton 1985 pp. 811-13 (noting that the distinction is necessary for understanding views of essential contestation and reviewing three versions of the distinction). (See also Koller 2006.)

that the concept contains either the essential properties of the practice or idea, or those that are common to all or most of the conceptions of it, or that belong to a paradigmatic exemplar. Conceptions are more complete understandings or theories of the practice or idea, but are likely therefore to contain controversial elements. Some would say that the concept is a complete correct understanding of the practice or idea, but that we cannot say much about it and still be sure of being correct, while conceptions are simply different takes on the concept. One often used example here is justice: the concept clearly contains some notion of giving people what they are due, but one conception might hold we do that by redistributing property, while another holds that we do that by protecting property.

One way to characterize some concepts for which controversy is built into any articulation of their meanings is to say that they are “essentially contested.” (This is a term of art apparently coined by W.B. Gallie (1964/1968, the subject article was originally published as 1955-56), and is not meant to invoke a given metaphysical understanding of essentiality.) The debate between those who explain the concept of law by describing it and those who say that it is fundamentally interpretive can be seen as a debate over whether the concept of law is essentially contested (Green 1987 pp. 18-19).

While Gallie’s original explanation of essential contestation included seven criteria that might lead us to see it as a descriptive property which is either true or false of concepts, the way those criteria are applied by him and subsequent theorists make it more appropriate to see essential contestation as a framework for better understanding some concepts and certain debates about them (Collier et al. 2006 p. 215). Since the point of characterizing a concept as essentially contested is to help explain its use, we can assess whether a concept is appropriately understood as essentially contested by determining how helpful it would be to do so. Hence Gallie’s criteria

are only a starting point.<sup>2</sup> While the general failure of a concept to meet most of them is prima facie evidence that it will not be useful to consider the concept essentially contested, even if the concept were to meet most or even all of them an additional analysis must be performed to determine the utility in viewing the concept through the lens of essential contestation.

I am not here interested in exploring whether calling concepts essentially contested is more useful or more problematic generally (and am open to the possibility that it is never helpful in understanding any concept). But I will argue that whether we decide to see the law as an essentially contested concept should turn upon whether to do so offers greater insight into the concept and the debates about it, or leaves us with more confusion. That is, the relevant question to answer when considering the essential contestation of a concept is not as much the nature of the contestation with regard to the concept (although that certainly will be relevant) as the usefulness for our theoretical enterprise in considering it to be essentially contested.<sup>3</sup>

There is an empirical fact about certain (usually heavily value-laden) concepts, that they are subject to endemic debates over their meaning, which nevertheless do not appear pointless. In these debates, each party is advancing its own conception or interpretation of the concept as the correct one. But whether our understanding of that concept is advanced by seeing it through the lens of that contestation requires an assessment of how the concept is illuminated by seeing it in that way.

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<sup>2</sup> But see Green (1987 p. 17), arguing that since Gallie came up with the notion of the essentially contested concept, it is not appropriate to alter his criteria.

<sup>3</sup> A similar point is made by Felix Cohen with regard to definitions of law (1935 pp. 835-36). (See also Green 1996 p. 1713: “A description normally is not thought of as being true or false, but as being helpful or unhelpful, illuminating or unilluminating.”)

The main argument of this paper is that essential contestation is not a useful framework for understanding the concept of law.<sup>4</sup> The main target of this argument is Ronald Dworkin's claim that law is an interpretive concept, but there are other analogs to his claim in the literature. In order to make the argument I must first explain the notion of essential contestability and disaggregate law into several related concepts. I then show that the most basic and general concept of law does not fit within the criteria offered for essential contestation. I buttress this claim with the additional explanation that essential contestation is itself simply a framework for understanding complex concepts and therefore should only be employed when it is useful to gain a greater understanding of the concept to which it is applied (for which I supply criteria for making judgments of usefulness of applying essential contestation). I go on to show that, even if law meets some basic criteria of essential contestation, applying the appellation does not helpfully illuminate the most general concept of law and therefore it should not be used, while allowing that it might be more useful for the related concept of the rule of law.

## 2. THE NOTION OF AN ESSENTIALLY CONTESTED CONCEPT

I begin by examining some of the relevant literature on essential contestation, to get a clear picture of what I reject for application to the concept of law. W.B. Gallie noted that there are concepts about which groups of people disagree, even when these groups are employing the concepts to serve different functions (1964/1968 p. 157). The surprising thing, he observed, is that when it becomes apparent that different groups are using the concept to serve different functions, the various groups do not simply say that the concept has multiple meanings. Rather,

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<sup>4</sup> In that, it can be understood as a development and refinement of a brief discussion to this effect in Green (1987 pp. 16-17), the need for which arises as a result of continuing claims by Dworkin and other interpretivists. It should be noted that Green has verbally disavowed this article, e.g., on December 3, 2010 during a BCL seminar at Oxford co-taught with John Gardner.

each group insists that its interpretation of the concept is “proper” or “the only important” use to which the concept can be put. These disputes, he notes “are perfectly genuine..., not resolvable by argument of any kind, [and] are nevertheless sustained by perfectly respectable arguments and evidence.” (Gallie 1964/1968 p. 158).

There are a variety of possible ways in which contestation might be associated with a concept. Initially, we need to distinguish among concepts: those that are candidates for essential contestation, those that just happen to be in dispute (but about which consensus is possible), and those about which we are simply hopelessly confused. Essentially contested concepts must be those concepts for which contestation among all different possible uses is heavy, but nevertheless the concepts are still of high value in ordering and explaining the world.<sup>5</sup> If the contestation is not deeply associated with all uses of the concept then it would seem that the contestation is simply a matter of contingent fact and it would not be appropriate to call the contestation “essential” to the concept.<sup>6</sup>

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<sup>5</sup> This does not foreclose any possibility of agreement. Certainly there will be agreement from within a given conception and adherents to the same theory will agree on usage. Additionally, it should be noted that essential contestation is not necessarily a permanent condition; once agreement is substantial among different uses, then the concept is no longer to be seen as essentially contested. This buttresses my claim that the essential contestation appellation is simply a tool useful (if at all) for understanding the nature of and disagreements over certain important concepts.

<sup>6</sup> “[E]ssentially’ is not just an intensifier.” (Waldron 2002 p. 149 distinguishing essentially contested concepts from vague concepts or ones with ‘open texture.’) When Jules Coleman grants that law is an “essentially contestable concept” (2001 p. 183, emphasis added), his explanation that users disagree about the criteria of application makes it appear he means that its contestation is only contingent empirical fact. This distinction is supported by Gallie (1956 pp. 113-114), which is cited with approval by Collier et al. (2006 p. 214). (See also Clarke 1979 p. 124, Green 1987 p. 17). (But compare, Lukes 1974b p. 177, arguing that all moral concepts are “essentially contestable.”)

Christine Swanton explains Gallie's point by breaking it into two claims. The first, which we can call the contestability claim, itself has two parts: "(a) that [the] concept admits of a variety of 'interpretations' or 'uses' and (b) is such that its proper use is disputable and conceptions are deployable both 'aggressively and defensively' against rival conceptions." (Swanton 1985 p. 813, whom I follow in seeing "conception" and "interpretation" to be synonymous.) The second we can call the essentiality claim: "that contests about proper use are 'inevitable' and 'endless.'" (Swanton 1985 p. 813).<sup>7</sup> Notice that all of these elements are themselves descriptive. Hence calling a concept essentially contested is to explain something about it, although it might still involve normative judgments and predictions about which contests are relevant for consideration in forming the explanation.

Consider the concept of a building. Disputes might erupt as to whether a given structure (such as the CN Tower in Toronto) is a building. But in most cases its use is unproblematic. Furthermore, if the criteria for its application were made explicit, that would likely settle most disputes over its application. If we did find a dispute once those criteria were made explicit, we would not expect it to be deep or widespread since we do not expect people to be very attached to the criteria by which they use the concept of a building. Hence the concept of a building might meet the contestability claim, but not the essentiality claim.

On the other hand if the contestation is endemic to the use of the concept but can be traced to the fact that users are talking about entirely different things, without any robust family resemblances among uses, then the use of the concept is likely hopelessly confused. Generally,

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<sup>7</sup> Again, "endless" only so long as the concept is essentially contested (Green 1987 p. 18, arguing that when debate ceases over an essentially contested concept it makes more sense to say we have lost the concept).

this is a result of a single term being used for very different referents.<sup>8</sup> Usually in such cases, more sense can be made of the discussion by jettisoning the confused concept-word in favor of more subtle distinctions in other existing concepts. Once those distinctions are made and agreed upon, we might be able to reintroduce the original term as a way of picking out only the agreed upon references, dissolving the confusion.

Gallie originally introduced the notion of essentially contested concepts as a way of explaining why some concepts only seemed usable in the midst of an ongoing argument. In Gallie's original understanding: 1) the concept must be "*appraisive*", signifying a valued achievement; 2) it must be "internally complex"; 3) that complexity must be reflected in an estimation of the comparative worth of each of its parts, where different conceptions of the concept will rank the worth of those parts differently; 4) the concept must be 'open' in that it can be modified to fit changing circumstances; and 5) each user must recognize that his or her use of the concept is contested by other users and be able to appreciate that the other users are employing different criteria for the use of the concept (Gallie 1964/1968 p. 161). Any concept that displays these five conditions might just be "radically confused," so Gallie adds two more conditions: 6) all the current users of the concept in their various purposes must acknowledge that the concept derived from "an original exemplar whose authority is acknowledged"; and 7) that the continuing competition over usage among the current users somehow sustains or develops the original exemplar's usage (1964/1968 p. 168).

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<sup>8</sup> Unlike Gallie, I limit discussion of confusion in concepts to their use and the terms with which we attempt to refer to them. I do this simply in an attempt to avoid controversial metaphysical commitments represented by a claim that the concept itself is somehow 'confused.'

Beyond simply distinguishing between essentially contested concepts and radically confused concepts, these last two conditions will help us see the characterization of essential contestation as one best understood in terms of its usefulness rather than simply as an empirical fact. To see a current debate over a concept as linked to its own intellectual history and to see it as developing an evolving understanding helps us to evaluate the debate itself. Whether that debate represents a healthy contribution to the understanding of the concept or idle semantic jousting will be crucial to any use of the concept in a larger theoretical enterprise.

I do not mean to suggest that the notion of essential contestation is unproblematically as Gallie originally proposed with these seven criteria. Most subsequent uses of essential contestation have jettisoned at least some of them. (For a helpful canvass of subsequent uses and the impact of their rejection of selected conditions, see Collier et al. 2006 pp. 216-22, but see Green 1987 p. 17, arguing any change to Gallie's criteria no longer describes essential contestation.) Indeed, we will see that the fact that subsequent theorists often reject one or more of Gallie's conditions in arguing for the application of essential contestation to a given concept is further evidence that essential contestation itself is simply a "framework" for the better understanding of certain concepts and their intellectual histories, rather than an empirical fact about those concepts (Collier et al. 2006 p. 215, discounting Gallie's own occasional misprision that he was offering an "hypothesis," in favor of his acknowledgement that it instead represents a "schematization", Gallie 1955-56 pp. 168, 170). If Gallie's criteria were supposed to be seen as dispositive of whether a concept is essentially contested, as a property of the concept, then we would expect that a failure of the concept to meet one or more of his criteria would show that the concept is not essentially contested. Instead, theorists routinely discount one or more criteria when discussing certain concepts, arguing all the while that they are best understood as

essentially contested (and even endorsing Gallie's understanding of the notion notwithstanding that rejection).<sup>9</sup> Hence if it is ever a useful way of explaining a concept, its usefulness can at least sometimes be supported without the subject concept meeting all of Gallie's criteria. Nevertheless, failing to meet many or all of his criteria is a *prima facie* reason for rejecting the essentially contested appellation as unhelpful, since we can understand those criteria as guidelines for determining when the essential contestation appellation would be helpful.

Jeremy Waldron notes that if a concept is essentially contested, the issue is not merely an argument about hard or penumbral cases; rather it is a dispute that goes to the very core of the concept itself (1994 p. 529). Waldron suggests three characteristics of essential contestation: The dispute is at the concept core or "central meaning" of the concept; the contestation itself is a part of the meaning of the concept; and the contestation is what makes the term useful to its users (Waldron 1994 pp. 529-30, 2002 pp. 149-50).

An example used by both Gallie and Waldron is democracy (Gallie 1964/1968 pp. 178-81, Waldron 2002 p. 149, it is also used as an example by Connolly 1974 p. 10, and Collier et al. 2006 pp. 222-28). It is a concept with a rich and highly value-laden history. It is also a concept in which putative component values are tested, modified, and understood through a process of debate over the meaning of the concept itself. It is in the various competing conceptions of democracy that the important value debate takes place and by which we gain greater insight into

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<sup>9</sup> I realize that these facts about the application of essential contestation might lead some to wonder whether the concept of essential contestation itself is essentially contested. While I don't think that we would be tempted to call it a "valued achievement" (nor can I see how it could possibly be useful to apply the descriptor to itself), I leave this consideration aside as beyond the scope of this paper. Similarly, for any who might be led by such or similar considerations to reject the sense in calling *any* concept essentially contested, I welcome their agreement that this rejection be applied *a fortiori* to law.

our culture and our commitments. For example, some might say that direct popular participation in government is necessary for an application of the concept, while others will say that it precludes an application of the concept (Waldron 1994 p. 529). Notice that we can wade into these debates, for example by making claims about the undemocratic character of judicial review, or we can attempt to canvass the debate as a way of understanding our culture's intellectual history. Of course, we can also combine these two methods, as most theorists of democracy do.

If one is advocating a particular conception of an essentially contested concept, hoping to win adherents to one's conception, one way to do so is to canvass the historical usage, pointing out strengths and weaknesses and showing how one's own conception is derived from early historical exemplars (Gallie 1964/1968 p. 187, distinguishing the "higher-order" recognition that one is deploying an essentially contested concept from the "lower-order" recognition that one is using a conception both aggressively and defensively). But to characterize the concept as essentially contested is to step outside of one's own conception for at least a brief moment; it is a claim about the concept itself (in that it is a claim about all possible uses of the concept – all conceptions), and not any particular conception. To call something an essentially contested concept is to characterize the concept as a whole and not to engage or deploy it within a particular conception. This will be important when we assess Dworkin's arguments and the application of essential contestation to the concept of law. First, however, we will see that essential contestation can admit of degrees, another reason we should only deploy it when it is useful for characterizing the debate over a concept's usage.

### 3. DEGREES OF ESSENTIAL CONTESTATION AND INTERNAL COMPLEXITY

William Connolly notes that the internal complexity of essentially contested concepts usually is a result of their character as what he calls "cluster concepts" (1974 p. 14, see also Collier et al.

2006 p. 217, Green 1987 p. 18). “To make [an essentially contested concept] intelligible we must display its complex connections with a host of other concepts to which it is related; clarification of the concept ... thereby involves the elaboration of the broader conceptual system within which it is implicated” (Connolly 1974 p. 14).

This suggests something important to note about the nature of essential contestation: some concepts may be best seen as essentially contested as a result of the competing emphases of a variety of otherwise clear and uncontested values. It may be that a concept is understood to involve other value concepts about which there is strong agreement regarding their meanings but not regarding their relative weights within the concept that is essentially contested. Other concepts may be considered essentially contested because the underlying concepts upon which they rely are themselves essentially contested.<sup>10</sup> Of course many concepts may combine elements of both of these facets. Democracy might be essentially contested partly because of the disparate emphases we place on direct participation (where direct participation is itself clearly understood) and partly because of the variety of meanings (and importance) we assign to the concept of equality, another good candidate for being understood as essentially contested.

These complexities also show that essential contestation is something that admits of degrees,<sup>11</sup> further buttressing the claim that it is a framework to be judged by its utility, rather than a hypothesis that is either true or false of concepts. Some concepts are better considered essentially contested than others. Consider the spectrum of possible essential contestation in the concepts of justice, democracy and government. If we think it useful to consider all three as

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<sup>10</sup> Gallie himself emphasizes this facet of essential contestation. (Gallie 1964/1968 p. 190).

<sup>11</sup> Compare Gallie’s remarks on religion (1964/1968 pp. 168-70) with those on art (170-78) and his claim that some concepts (including law) may not come fully under his articulation of essential contestation but for which an “adequate appreciation” requires some attention to his criteria (190).

essentially contested (a claim about which I have serious doubts), the list does exhibit a decreasing amount of essential contestation. To highlight another facet of essential contestation, consider how this list provides concepts the value of which is increasingly easy to doubt. Almost no one would doubt the value of justice, few the value of democracy, but quite a few will have misgivings about the value of government overall. Furthermore, as a result of the fact that essential contestation is a matter of degree, there are likely to be concepts that are themselves penumbral cases of essential contestation (Gallie 1964/1968 p. 190), borderline cases for the utility of the appellation.

Moreover, some concepts not themselves essentially contested may include or depend upon other concepts that are best considered essentially contested.<sup>12</sup> Clearly the concept of government involves the concept of power, which Steven Lukes claims is essentially contested (1974a p. 26), and the concept of politics, which Connolly tells us is essentially contested (1974 p. 12). However, it is not illuminating of the concept of government to call it essentially contested. We do not usually see the important debate over the concept of government as consisting in what a government is, or what counts as a government. We do see it with respect to what counts as a just government, but that is clearly a debate about the meaning of justice (a good candidate for essential contestation if there ever was one), not the meaning of government. To characterize the concept of government itself as essentially contested does not respect the kinds of disputes that actually arise around it, and it does not appear to clarify the disputes that do take place.

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<sup>12</sup> In support of this consider the claim by John Gray that the essential contestation of liberty does not make it impossible to arrive at a definition for liberalism that scholars can agree upon. (Gray 1978 pp. 385-388).

As mentioned above, Connolly's claim that essentially contested concepts tend to be cluster concepts can be seen as a more precise characterization of what Gallie had called the internal complexity of the uses of these concepts. In conjunction with this, David Collier and his colleagues point out that sometimes this internal complexity is a result of a concept being "over-aggregated," running together elements better understood as distinguished from one another (2006 p. 217). This point suggests that when a concept can be disaggregated into separate components, that should be tried first and then any remaining debate on the component concepts can be considered for an application of essential contestation. If disaggregation is impossible because the concept is not the kind of cluster that can be separated into its components, then that would be an additional point in favor of seeing the debate as essential contestation. We will return to this point when we disaggregate the concept of law.

If every conception of an essentially contested concept relies heavily upon other concepts, some of which are themselves essentially contested, it might appear that any attempt to articulate a descriptive understanding of the concept cannot get outside particular conceptions of at least some essentially contested concepts. If every conception of democracy involves the idea of equality to some greater or lesser extent, then it might appear impossible to offer a descriptive account of democracy (as in an intellectual history) without taking up a controversial conception of equality.

Connolly discusses this in attacking an operational approach to understanding the concept of politics (1974 p. 15). An operational approach would fix the meaning of a concept like politics for the sake of social scientific study by defining each concept upon which politics depends in a way that is testable and uncontroversial (at least for purposes of the study) (Connolly 1974 pp. 15-16). The problem with this approach is that either it is impossible, or it necessarily smuggles

in norms that are tied to the social scientist's project. That is, either the cluster concept is too dependent upon concepts that cannot themselves be operationally defined, or the operational definitions of those other concepts are too pregnant with the point or use to which the concepts will be put in the study (in which case the study is in danger of becoming self-verifying) (Connolly 1974 p. 16). Connolly's solution is to relax the operational requirement to fix the other concepts upon which the studied concepts depend. It is then sufficient to characterize the empirical data upon which one is generating one's theory employing concepts that may themselves be considered essentially contested (1974).

This solution suggests a similar answer for attempts to use a descriptive methodology to understand social practices like law.<sup>13</sup> If I am attempting to offer a descriptive theory of a concept that is usefully considered essentially contested (such as in the context of giving an intellectual history of the concept) I can articulate the ways in which the constituent essentially contested concepts function in the analyzed concept without offering robust conceptions for each and every one of them. This appears problematic only if we confuse concept and conception. If I am attempting to generate a descriptive intellectual history of democracy, cataloging various

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<sup>13</sup> Connolly does attack the descriptive/normative dichotomy, pointing out that "to describe is to characterize a situation from the vantage point of certain interests, purposes, or standards." (1974 p. 23) (this passage is emphasized in the text), preferring a framework based on perspectives of analysis. While I would agree that any description employs normative judgments, they need not be normative judgments internal to the practice being studied (see, e.g., Ehrenberg 2009 pp. 105-06). Hence the distinction is still useful, even if the term 'descriptive' is somewhat misleading.

conceptions of democracy through time,<sup>14</sup> it is likely that I will need to refer to the concept of equality repeatedly. However, in so doing I am not thereby forced to take up a particular conception of equality. Depending on the nature of the project, it might be sufficient to characterize equality as do the theories I canvass (to the extent that they do offer their own conceptions); it might also be sufficient to admit its essential contestation and leave it as an unexplored cluster of value, using the concept of equality itself somewhat vaguely rather than offering a robust conception. This is an important point in order to combat any impression that a concept must be understood as essentially contested if it contains others that are usefully considered as such. The fact that the concept of law arguably contains the concept of justice does not thereby make it as useful to consider law essentially contested as may be the case with justice.

Clearly there is something incomplete in this kind of canvass of a concept. But incompleteness will be a hallmark of any exploration of a concept that is understood as essentially contested or has elements that are usefully considered as such. To call a concept essentially contested is, in a sense, to offer an explanation (or justification) for the incompleteness of one's theory, yet another indication that the appellation is to be deployed only when useful for a better understanding of the concept. Either the theory will be incomplete in that it is somewhat one-sided in advocating a specific conception, or the theory will be incomplete in offering a comprehensive description that does not plumb the depths of every subordinate concept. To wish that incompleteness away is to wish for a grand unified theory of

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<sup>14</sup> It should be noted that, in so doing, I am not necessarily getting a history of democracies or democratic institutions. The link between these two projects again depends on controversial claims about the metaphysics of concepts.

all social concepts. Notwithstanding such a necessary incompleteness, this understanding of the role of the essentially contested appellation also leaves a descriptive analysis intact.

#### 4. THE DESCRIPTIVE PERSPECTIVE

Connolly does attack the possibility of a descriptive analysis, noting that descriptions are always characterizations from specific points of view (1974 p. 23). Here I wish to explore his arguments about the normative commitments inherent in adopting apparently descriptive perspectives. (I use the term “normative” in a broad sense, in which it is not limited to moral value.) The key point comes when a supposedly descriptive analysis employs normatively-laden concepts such as ‘mistake,’ ‘crime,’ and perhaps even ‘rule-governed’ or ‘reason-giving.’ For Connolly, to employ such concepts is not necessarily to deploy any specific normative judgment they suggest (except the one that is inherent in the concept itself); but it is to adopt the point of view from which such judgments are made (1974 p. 24). Hence the normative/descriptive dichotomy is useless to understand different ways of examining concepts that bundle elements of both. When we describe a move as ‘a mistake,’ we are describing it by deploying the normative judgments dependent upon the criteria internal to the system in which the mistake was made, even if we do not necessarily take the extra step and say that the mistake was somehow wrongful in a wider sense (Connolly 1974 p. 24, “mistake” is his example).

From this he concludes that there is no “descriptive point of view” from which to perform a normatively neutral description (Connolly 1974 pp. 24-25). This is because the choice of terms and concepts deployed in the description are not only pregnant with the judgments they express (even if the user is not herself making those judgments), but also are themselves the result of other normative judgments on the part of the describer: “If we subtracted the [normative] point from any of these concepts [used in our description], we would subtract as well the rationale for grouping the ingredients of each together within the rubric of one concept” (Connolly 1974 pp.

27-26, this passage is emphasized in the text)<sup>15</sup> In Connolly's terminology, there is an unavoidable interdependence between the criteria governing the application of the concept and its function or the point for which it is used (1974 pp. 26, 29-30).

As mentioned above, the 'descriptive theorist' may engage and use robust norms. However, they are norms that are internal to the point of the study or analysis being done, not the norms internal to the subject being studied (see Dickson 2001 p. 10, calling this "indirectly evaluative legal theory"). When it comes to analyses of key social practices like law, these are not just the epistemic norms of theory construction, but include elements that explain how users of the concept see themselves when they use it (Dickson 2001 p. 40, citing Raz 1994 p. 237). This is an additional meta-theoretical criterion for theories about concepts that are used by people to understand themselves (Dickson 2001 pp. 42-43, 48).<sup>16</sup> That is, because it is a concept that we use to understand ourselves, our society and culture, and our role in them, an adequate theory of that concept must highlight the way in which it is a facet of our collective (and individual) self-understanding.<sup>17</sup>

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<sup>15</sup> Connolly falls prey to using moral examples when he means to be talking about normative concepts more generally. Hence while the original quotation discussed "the moral point" of the concepts, the claim clearly applies to normativity more generally. (See Connolly 1974 p. 24, introducing the argument by noting that many concepts used to "describe or characterize are formed from a moral or, more broadly, normative point of view.") This distinction is particularly important when dealing with norms about which we can take a "detached" perspective (Gardner 2007 p. 7, citing Raz 1979 pp. 153-57). John Gardner argues that we can "apply" certain norms without endorsing them, while for moral norms we are committed to "following" them (2007 pp. 6-10).

<sup>16</sup> (See also Finnis 1980 pp. 13-18, Raz 1994 p. 236, Perry 1995 p. 97, noting that jurisprudence must both account for the reason-giving aspects of law and describe an existing social institution.)

<sup>17</sup> Joseph Raz has further developed this point in (2005 p. 331).

The ‘descriptive theorist’ can offer an account that is neutral among normative judgments internal to the concept being studied while making normative judgments at other levels of abstraction, such as those that govern the creation and elaboration of the theories themselves.<sup>18</sup> While I certainly would not consider him such a descriptive theorist, consider Steven Lukes’ discussion of the essential contestation of power in support of maintaining this distinction among different levels of abstraction (e.g., participating in a practice as opposed to theorizing about a practice). He notes that the ability of one person to affect another is a “primitive” (we might use Dworkin’s term “preinterpretive” (1986 pp. 65-66)) aspect of the concept of power (1974a p. 26). A particular conception of power can only be useful if it tells us what the significant ways are in which one person can affect another. That is, “what makes *A*’s affecting *B* significant?” (Lukes 1974a p. 26). The answer to this question yields a theory of power that pushes a particular conception of it. But consider the different conceptual levels at which a question of importance or significance can be answered. We can say that *A*’s particular effect on *B* is significant because those who use the concept of power ‘on the ground’ consider it to be significant. That is, we would be making the judgment that a given aspect of the concept is significant because it informs the self-understanding of those who are using it. On the other hand, we can say that it is significant because it is important for the sake of the theory being constructed. We might distinguish between ‘important to those who use the concept’ and ‘important to those who study the concept.’ This is not to say that these two are not intimately related. Of course they are. But the reasons for which and ways that they are important may be

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<sup>18</sup> This is the relationship between Hart’s internal and external points of view. (Hart 1961/1994 pp. 89-91). One can view the internal point of view from a perspective that is external to that practice; although doing so still requires one to make judgments about what is important to characterize in the behaviors and beliefs of the participants. *See also* Raz’s discussion of the “detached perspective” (1975/1990 pp. 175-76);, 1979 #3@155-57}.

different at the two levels of abstraction. In the case of concepts regarded as highly essentially contested like that of justice, or perhaps power, the theorist might not be able to make a judgment about what is important in studying the concept without also taking a position as a user.<sup>19</sup> But in other cases, the theorist may only need to take account of what users think is important without placing that importance on it herself.

To sum up the discussion thus far, we have learned that to call a concept essentially contested, we would expect the competition among multiple conceptions of it to be “endemic,” and for the concept to exhibit a high degree of internal complexity that cannot be easily or usefully disaggregated. In explaining this, I have given reasons along the way to support the claim that essential contestation itself is only valuable, if ever, as a tool for coming to a better understanding of value concepts and social practices. We have also seen that even when essential contestation is usefully applied to a concept, it need not threaten the possibility of a ‘descriptive analysis’ that is neutral among conceptions, even though such an analysis cannot be devoid of normative judgments. Now we turn to an application of these ideas to the concept of law and a fuller development of the claim that essential contestation be applied to a concept only when it is useful for a better understanding of it.

## 5. CONCEPTUAL CONTESTATION AND LAW

Christine Swanton noted that there are at least two different ways to claim that a concept is essentially contested: a “relativist” (or metaphysical) version that no interpretation or conception of the concept is the best one, and a “skeptical” (or epistemological) version that for any

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<sup>19</sup> I note this as a possibility since it would not apply to concepts that are not usefully considered essentially contested. However, I believe that this is even likely to be wrong about some concepts we wish to consider to be essentially contested, depending on the nature of the theorist’s project (e.g., it might not hold in an intellectual history).

interpretation or conception, there is never any “warrant for the belief that [it] is the best conception of” the concept (1985 p. 814). This distinction is not so useful once we admit that essential contestation is just a pragmatic tool for understanding the nature of debates over certain social practices (and hence about the concept of those practices). Whether that characterization is made in a metaphysical mode or an epistemic mode is not illuminating anything useful about the concept it explains because the distinction cannot have an impact that is empirically available.

This distinction is important, however, for understanding how Ronald Dworkin thinks law is an essentially contested concept. My purpose here is not an exegesis of Dworkin, but seeing how he can be understood to be making that claim will help provide a target for my refutation of it. We will see that, taking Dworkin’s own claims at face value, it might make more sense to say that his idea of what it is to be an essentially contested concept differs from some of those mentioned above. The question will then be whether there is any form of essential contestation that is still useful for law.

Dworkin has claimed that law is an interpretive concept for quite some time, and this perspective is central to his methodology (2006 p. 223 ff). Early in his writings Dworkin noted that social conventions are not sufficient to describe the decision of difficult legal cases precisely because they are “abstract, so that their full force can be captured in a concept that admits of different conceptions; that is, in a *contested* concept” (1978b p. 103, emphasis in original, citing Gallie 1955-56). But he does not there distinguish between essentially contested concepts and those that are just contingently contested. More recently he has written: “Lawyers share the concept of law as what I call an interpretive (or essentially contested) concept” (Dworkin 2002 p.

1686, claiming that Coleman shares this view).<sup>20</sup> This raises the possibility that the concept is essentially contested for lawyers and not for non-lawyers (see Dworkin 2006 p. 225). In making this claim Dworkin means (among other things) to say of the concept of law that there is no ‘right’ way to use the concept as agreed upon by those most adept at its use, although those who are using the concept will take themselves to be doing so correctly.<sup>21</sup> This can be seen as the primary reason that Dworkin is at pains to deny that he is analyzing the general concept of law at all, saying that there is nothing of interest left in a general concept denuded of all cultural or sociological specifics (see 2006 p. 224).

Dworkin might be said to depart from other notions of essential contestation in holding that there is a single best conception or interpretation, at least for law (1978b p. 81 ff, 1986 pp. 66-67). This might appear to be a view inconsistent with any claim of essential contestation. Essential contestation, if it means anything, implies that debates are necessary and ‘irresolvable’ regarding the use of the concept that is essentially contested (at least as long as it remains understood as essentially contested). Hence Dworkin’s claim that there is always a best interpretation in the application of law, or conception of the practice as a whole (he does not believe there to be a distinction in kind between these two levels of abstraction) would seem at odds with the claim that it is essentially contested.

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<sup>20</sup> It is not clear that Coleman embraces the claim (compare 2001 p. 183, granting that law is an “essentially contestable concept” and explaining that this means that users do in fact disagree on the criteria of its application). See my discussion of this above at n. 6.

<sup>21</sup> This is not to be confused with the Wittgensteinian point that there can be no verifiably ‘right’ way to use a concept. The point here is that there is already, manifest in current use, so many ways to use a concept that an observer instantly appreciates the wide variety.

However, that conclusion is too quick. Dworkin's view is still consistent with Swanton's epistemological version of essential contestation if we understand Dworkin to see the kind of warrant demanded by Swanton as unavailable due to the lack of an external position from which to access it. Given Dworkin's distaste for any analysis from a supposedly external viewpoint {see \, 1986 #18@82;, 1996 #102;, 2006 #301 ch.6}, it is easy to see that he would have no problem with this explanation. Basically, Dworkin is trying to offer a kind of essential contestation that does not require (or even allow for) the external, descriptive viewpoint contemplated by Gallie's original criteria. To allow that there is no best conception is to step outside the advocacy for our own conception in order to describe the debate as a whole; that is something Dworkin does not believe is possible. From within our own conception, there has to be one that is best (and we will usually think it is the one for which we are advocating, or at least towards which we are moving). Otherwise there would not be any point in continuing the debate. Precisely because we cannot step outside our conception, there can never be any objective or externally verifiable warrant for our belief that it is the best conception; but because we cannot step outside it, any demand for such a warrant is inherently unreasonable (let alone unavailable). While there are ample reasons to believe that Dworkin's arguments in support of this claim are misguided (see, for example, Ehrenberg 2008, Bloomfield 2009), the key point here is that Dworkin's claim that different theories of law are really different and competing interpretations, is offered as evidence that the concept of law is essentially contested. Once we see essential contestation as a framework to be used (if ever) only when helpful to characterize the debate surrounding the use of a concept, then if the debate over the concept of law is not illuminated by that characterization, we have a reason to reject at least this element of Dworkin's theory. However, a more complete rejection requires a deeper examination of the concept of law,

specifically to see how useful essential contestation might be once we disaggregate the concept of law into its components.

## 6. A MULTIPLICITY OF LEGAL CONCEPTS

Gallie himself was in doubt about whether the concept of law qualifies as essentially contested {, 1968 #180}, citing law as a “possible candidate”@190;Green, 1987 #38@18}. Earlier, in discussing the idea of internally complex concepts as cluster concepts, I mentioned Collier’s suggestion that some such concepts are actually “over aggregated,” (2006 p. 217) and noted that disaggregation should therefore be tried before saddling the entire concept with essential contestation. Once the components are separated out, we may find that one or more are no longer concepts about which the dispute is helpfully characterized as essentially contested.

Turning to law, let us start by disambiguating among at least three admittedly related concepts, different in their levels of specificity: a) We sometimes speak of “the law” as in the locutions: “That is against the law” and “What does the law say about this subject?” b) We also sometimes speak of a “legal system,” referring to the body of law within a specific jurisdiction. It is clear that both of these concepts, dealing with specifics of one kind or another, are at a lower level of generality or abstraction than, c) law conceived as a general practice or institution that is present in a wide variety of societies (Gardner 2004 p. 169).<sup>22</sup>

In attempting to determine which of these three different concepts is at play, we cannot rely upon the presence or absence (in the language used) of an article, whether definite or indefinite.

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<sup>22</sup> In the posthumously published postscript to the second edition of his *Concept of Law*, Hart suggests a distinction between law at the most general level and law in the sense of what a specific system or rule requires or permits (1961/1994 p. 247). Earlier he had distinguished between “law” and “legal system.” I will sometimes refer to the most general and abstract concept as “law as such” as opposed to “legal systems” and “particular laws” or “particular legal actions.”

Consider: “the law says not to do that” as opposed to “the law of the land” as opposed to “I am interested in understanding the law.” Similarly: “Parliament passed a law today” as opposed to “this country has a developed body of law” as opposed to “what does it mean to be a law?”

It is tempting to see these three as one concept, the first as referring to an element of the set of all legal norms, the second as referring to a jurisdictional subset of those norms, and the last as referring to the set as a whole, represented by a mass noun. This, however, would be too hasty. Our wide variety of theoretical interests and manipulations of these notions is good evidence for seeing them as separate, although closely interrelated, concepts. Consider, for example, the differences in the way we approach the validity and normativity of law. When dealing with the first concept, that of a particular law, we investigate the particular actions prescribed or proscribed, or powers created, by that law. If questions about its validity arise, we perform an investigation into its validity by applying whatever validity standards we have (whether they are rules or principles, specific to the legal system or general values). When dealing with the second concept, that of a legal system, we look at the validity standards it contains, perhaps comparing the norms within that system to those of other systems, looking at the interplay between political structures and the resultant system-specific typology of legal norms. When dealing with the last concept we ask about the relation between law and morality, under what conditions (if any) legitimate legal authority is possible, the necessity of coercion to law, how legal norms come to be understood as providing reasons for action, etc. I am not claiming that these are unrelated projects or that one theorist cannot work on more than one at the same time. Rather, the distinction among the kinds of questions we ask about the different conceptual elements of legality is simply good reason for separating out those elements for theoretical purposes. But those theoretical purposes are the same ones we are trying to serve in deciding whether to see the

debate about law as essential contestation. Hence, there is good reason to disaggregate the concept of law.

The last, most general, concept is capable of a wide variety of applications, in some of which it appears as a part of another, distinct, concept. We might consider the notion of legality itself, that which gives certain acts or rules this character. We might consider law as an element of culture or as a consideration in social interactions. We might consider the legal mode of governance, calling it the “rule of law.” We might consider it as a psychological constraint or element of self-understanding, as in the phrase “law-abiding.” Each of these general and abstract uses of the concept employs a different set of the concept’s theoretical elements in a different way. As shown above, it is also possible for it to appear as an uncontested element of a concept that would be usefully considered essentially contested (as may be the case with the rule of law, to be discussed below).

A complete understanding of the concept of law requires an understanding of all three of these different concepts. However, when assessing whether law is an essentially contested concept, we are mainly interested in the most general and abstract of these three concepts: the law understood as a general practice or institution.<sup>23</sup>

The reason for this is clear from a closer examination of the three concepts of law just enumerated with an eye to finding Swanton’s essentiality claim (“that contests about proper use are ‘inevitable’ and ‘endless,’” 1985 p. 813), mentioned above. While it is certainly true and useful to note that many applications of the most specific concept are contested and contestable,

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<sup>23</sup> Dworkin, of course, would deny that there is anything theoretically interesting to be learned from a general and abstract concept of law (2006 p. 224). I leave it to the reader to decide which, if any, of the theoretical investigations suggested or discussed here are interesting.

there is no way to support a claim that those contests are inevitable or endless. There are simply too many applications that do not exhibit contestation for us to say that contestation is inevitable. For example, look at the disputes that might erupt over the claim that it is proper to say it is illegal to drive over 65 m.p.h. in the state of New York, or that a police officer has a legal (not moral) right to stop you if you do, neither of which admits any serious doubt. Disputes are possible about whether the law that provides for the truth of these claims is valid, which then calls into question the propriety of these claims. But that is not a dispute over the meaning of the narrowest concept of law. Rather it is a question of whether a given putative law has met its system's validity conditions. Doubts could also be raised about the propriety or value of that law. Again, that is not a contest about the proper use or interpretation of the concept, but a contest over the value or utility of that particular law. The essentiality claim requires that *all* possible claims about proper use are contestable. Similarly, while the membership of a given law within a legal system might be in doubt, this is not true of all laws of that system. Hence the application of the concept of a legal system is not usefully considered essentially contested. We might have debates about whether a given system counts as a legal system, but this is not enough to say that the concept of a legal system is essentially contested as that debate is more likely to be about the application of the most general concept of law to a given example of governance or system. So the only real candidate for essential contestation is the most general and abstract concept of law, since any debates about these other concepts are really debates about the application of that general concept, what it means to be a law or a system of law.

Dworkin also countenances a multiplicity among concepts of law. He claims there are at least four: 1) doctrinal (what the law of a specific jurisdiction requires); 2) sociological (as “a particular form of political organization”); 3) taxonomic (allowing us to classify some norms as

‘legal’); and 4) “the aspirational concept we use to describe a distinct political virtue” (2006 p. 223). It is significant to note that Dworkin does not discuss their interdependence, or which of these four are more abstract and which are less. From his analysis, it appears that the taxonomic and sociological are more general than the doctrinal. The generality of the aspirational concept will depend on how much specificity is placed upon the criteria with which it is applied. (For an example of this point see Fuller 1964/1969.)

It is clear that his divisions cut across the ones I draw above. Furthermore, his distinctions among concepts are somewhat *ad hoc* and seem tailor-made for his own arguments, rather than reflective of common usage. One might ask, for example, why the aspirational concept is conceptually independent from the sociological. It is precisely “a particular form of political organization” to which those who place a high value on law aspire. Similarly, there is such a close conceptual connection between the taxonomic and sociological that it is difficult to see them as separate concepts. We classify certain norms as legal when they issue from “a particular form of political organization.” While still interrelated, the threefold disaggregation I borrow from Gardner better reflects the distinctions in common usage, without obscuring key interdependencies as Dworkin’s do. Nevertheless, the realization that law is itself a cluster of at least three concepts leaves open the possibility that at least one of them is usefully considered essentially contested, while also reducing the number of a certain kind of disagreement that might otherwise be cited to support applying the appellation.

Dworkin himself claims that he meant to attack legal positivism for its account of the “doctrinal” rather than “taxonomic” concept of law (2006 p. 234). He claims that a failure to distinguish between these two may be at the root of much confusion in legal theory (2006 p. 235). However, his failure to appreciate the interrelation and interdependence of these

“concepts” (ignoring for the moment doubts about whether they are distinct concepts at all) appears to be at the root of his over-emphasis of law’s interpretive character. If we see that questions of validity (which underlie the “doctrinal” concept) make use of some elements of the “taxonomic” concept, we can relegate essential contestation to the more value-laden “aspirational” concept (since debates over the validity of given laws would not then be seen as evidence of essential contestation as we would be removing much of their value-laden character). Similarly, it will not be useful to consider the sociological concept to be essentially contested since the concept (once isolated as Dworkin proposes) is not deployed appraisively or aggressively. Without these two facets, it is difficult to see what use could be gained by characterizing a concept as essentially contested.

As I noted above, it is possible for a concept that is usefully considered essentially contested to contain, rely upon, or refer to other concepts that are not. Continuing with Dworkin’s distinctions for the moment, the “aspirational” political virtue of legality (or the rule of law, 2004 p. 24) may be usefully considered essentially contested without having to claim that any of the other concepts are essentially contested. We will see shortly that this concept refers to some (debatable) particular form of governance, involving some relation to law. It is the concept of that particular form of governance and its relation to law that is then usefully seen as essentially contested, not the general concept of law included within. But first let us return to the question of the appropriateness of applying essential contestation to the now disaggregated general concept of law as such.

## 7. APPLYING GALLIE'S CRITERIA

The reason to disambiguate among different legal concepts becomes clear when we attempt to apply Gallie's criteria for the essential contestation of a concept.<sup>24</sup> We have already seen that Gallie's criteria are not the final word on whether a concept is essentially contested, but they serve as a useful point of comparison, especially where the other theorists agree with a given criterion.

*Appraisiveness:* While it might be appraisive to say that a given action is against the law (implying that someone has done something wrong<sup>25</sup>), and perhaps even to say that a given society has a legal system (in the sense that it has thereby attained a certain level of sophistication), it is not readily apparent that the most general concept of law is always appraisive.<sup>26</sup> For example, if we are discussing a variety of reasons for action, it is not an additional appraisive judgment to say that one is a legal reason for action. That reason for action does not thereby get any extra special worth or status as a result of being characterized as legal, although it might get extra status once we invest legality with other considerations like legitimate authority, or threats of retribution for noncompliance.

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<sup>24</sup> Recall from above, these criteria are: the concept must be "*appraisive*," "internally complex;" that complexity must be reflected in an estimation of the comparative worth of each of its parts; it must be "open" to fit changing circumstances; each user must recognize that his or her use of the concept is contested by other users; all users must acknowledge that the concept derived from "an original exemplar whose authority is acknowledged;" and the continuing competition over usage among the current users somehow sustains or develops the original exemplar's usage (Gallie 1964/1968 pp. 161-68).

<sup>25</sup> This is not meant to indicate the presence of a moral wrong, only that a norm of some kind is being deployed.

<sup>26</sup> Green argued "The concept of law need not be appraisive at all. From the point of view of legal theory, 'law' is not an honorific term" (1987 p. 19). But it should also be noted that Green no longer thinks appraisiveness is necessary for the kind of debates associated with essentially contested concepts.

It is not sufficient to say that the law can generate its own norms to answer this claim. The law generates its own norms for use in situations where laws are applied, followed, and interpreted. It is therefore appraisive to call some specific rule a law, or to say that something is against the law, while the claim that the law generates its own norms is a descriptive claim about the law as such. Hence the reply that the law generates its own norms would be falling back on the more specific concept of law and we are here asking whether the more general and abstract concept of law is appraisive.

While one might want to use the general concept appraisively (especially in debating political philosophy), it is not necessary in all uses.<sup>27</sup> Recall, however, that the most general concept of law is itself usable in a variety of ways ('rule of law', psychological reasons, legal characterizations, etc.), some of which we might want to call different concepts. Some of these uses are appraisive and some are not. For example, the rule of law is an appraisive appellation ("aspirational" for Dworkin) that is tied to forms of governance. We think that to say that a governmental system or particular regime follows the rule of law is to say something is good or valuable about that government. However, this is an appraisal of that government and its relation to law, not of law itself. (While clearly law is seen as a valuable element of the rule of law, the debates over the meaning of the rule of law are about the relation of the government to law (and perhaps which kinds of law can be included), and not about the meaning of law itself.) If uses of the general concept of law as such are not endemically appraisive, then it would be difficult to maintain that the concept is usefully considered essentially contested.<sup>28</sup>

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<sup>27</sup> Gallie's conditions are about how to *use* an essentially contested concept (1964/1968 p. 161).

<sup>28</sup> Most theorists do not deny the relevance of the appraisiveness condition (Collier et al. 2006 p. 216). Green has done so verbally, but in the context of rejecting any utility for the notion of essential contestedness, thinking those kinds of debates are ubiquitous and uninformative for philosophical investigations.

*Reciprocal recognition of aggressive and defensive usage:* While I do not think that there can be too much quibbling about the concept of law in general being internally complex or that a description of what might make the law valuable must take into account those features that render it complex (e.g., that it can (or must) give reasons for action, that it can solve collective action problems, etc.), and while the openness of the law may simply be a result of its relation to and dependence upon rules, the application of Gallie's fifth condition to the general concept of law is more problematic. As Gallie puts this condition, "to use an essentially contested concept means to use it both aggressively and defensively" (1964/1968 p. 161). Once again, the aggressive and defenses uses of the law are limited to the more specific concepts. A simple example exchange highlights this: "Your honor, he can't do that, it's against the law." ... "Not under *my* interpretation; it isn't."

This condition is also behind Dworkin's insistence that the doctrinal concept of law is interpretive (2006 pp. 234-38). If every use invoking a particular law is offering an interpretation, then it is putting forward one interpretation as against other possible ones. Connolly (1974 p. 14), Lukes (1974a p. 26), and Dworkin (1986 p. 71) all see this condition as an indication, if not a criterion, of essential contestation. However, this criterion might apply to some uses of the specific concepts, but certainly not to every use, which would be needed to meet what Swanton calls essentiality criterion.

There is some doubt about the centrality of this condition. Michael Freedman and David Collier both deny that those engaged in the ideological debate must recognize that their usage of the essentially contested concept is necessarily disputed by the other sides of the debate (Freedman 1996 p. 60, Collier et al. 2006 p. 219, counseling that "Rather than question a concept's status as essentially contested, scholars seeking to apply Gallie's framework should recognize that this

criterion is not always pertinent”). However, their discussions make it clear that what throws the criterion into doubt is the need for the concept users to acknowledge self-consciously that their uses are offered against other uses. That is, Freedman and Collier do not deny the importance of the need to see aggressive and defensive uses in order for a concept to be a good candidate for essential contestation. What they deny is that the users themselves must appreciate the aggressive and defensive character of their uses of the concept. Instead, it would be enough for us, as theorists, to see the uses as aggressive and defensive, even if the participants in the debate are not aware of it directly.

One might think that by developing a theory of law, one is using the most general concept both aggressively and defensively. For example, if a legal theorist attempts to argue in favor of one function for law and against others, it might appear that such a use of the concept is self-consciously aggressive and defensive (see, for example, Dworkin 1986 p. 92). However, this is not the case if one is attempting to describe the essential properties of the concept or practice. For Dworkin, this is the essential part of law’s interpretive character, and a reason to claim that jurisprudence is interpretive (and normative) “all the way down.” However, it might have just so happened that the process of jurisprudential theory building was more collaborative and less competitive. If it turns out that the various essential properties for the concept of law offered by different legal theorists are mutually consistent, we might still see the enterprise as collaborative in nature and the contests over usage themselves as unnecessary.<sup>29</sup>

In additional support of this point consider another element of Lukes’ claim about the essential contestation of the concept of politics: “to engage in such disputes [over the proper use

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<sup>29</sup> Of course, this would not apply to whole theories as they stand now since many are directly contradicting each other.

of the concept] is itself to engage in politics” (1974a p. 26). What he is capturing is the centrality of the dispute to the concept itself. Now while we might be prepared to say that to dispute what counts as law is to engage in (the practice of) law, we would generally not say that to dispute about the *nature* of law is to engage in law (*pace* Dworkin). This difference goes to the different conceptual levels of the various concepts disaggregated above, suggesting that uses of the lower level concepts may exhibit essential contestation (although I have argued above that they are not usefully considered to do so) while the abstract concept does not.

*Historical exemplar:* Several of the theorists discussed above reject Gallie’s criterion that competing uses appeal to a historical exemplar (see Collier et al. 2006 pp. 219-20). At least when it comes to law, however, that rejection makes no sense at two levels. When it comes to the competing theories of law, whether we see the law primarily as a set of changing rules, or as an interpretive enterprise, or even simply as a mechanism for entrenching the power of an elite, the fact of its historical indebtedness is not really in question (even if only as a mechanism for establishing that elite’s power). Of course, such claims are not about the abstract concept of law itself fitting with a historical exemplar but about the particular token instantiations of its use. On the more abstract level, law, as an evolving social practice, is something that we invariably conceive of in comparison with its use in previous generations. Unlike other candidates for essential contestedness, about which we might entertain the possibility of a clean break with the past, all users understand the very notion of law in terms of a history of social practices with similar functions. No one seriously questions whether the Ten Commandments or Hammurabi’s Code are instances of law (although they may wish to qualify the term’s application to those instances in some way). The question is instead how the notion of law has evolved (if at all) from the notion of it exemplified by those early examples. Given Dworkin’s understanding of the

norms governing interpretation (i.e., the norms that govern how we develop and judge among competing conceptions), which places heavy emphasis on fitting with what has come before (1986 pp. 230-31), he would have to embrace the historical criteria for law as well.

As Gallie noted, “an adequate understanding of [these essentially contested concepts] requires some appreciation of their history – of how they have come to be used in the ways they are...” (1964/1968 p. 158). Historical understanding is exactly what is needed, especially for concepts of social practices to be labeled essentially contested. We can try to understand something about the concept itself by looking at the various conceptions of it that have been in tension over time. (A specific use of the concept is a conception of it, Waldron 1994 p. 531 n. 55.) Since disputes about *proper* usage are in principle insoluble, there can be no overarching criterion with which to judge among different competing conceptions when viewing them from an external, descriptive standpoint.<sup>30</sup> Rather, the only understanding one can achieve of such an essentially contested concept describes the variety of different conceptions that people have historically held and how those conceptions have changed, waxed or waned.

This sounds suspiciously like what H.L.A. Hart thought he was doing when he replied to Dworkin’s insistence that theoretically interesting jurisprudence must be about the sense in which a person uses the concept of law (Dworkin 1987, Hart 1987 pp. 36-37). From this we also see why Hart believed himself to be working on a different project from that of Dworkin (see, for example, Hart 1961/1994 p. 240). As just explained, Dworkin does not believe it possible to ‘stand outside’ all particular conceptions of the concept in order to understand the usage of the concept in a global fashion, while also treating all particular conceptions as equally valid and

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<sup>30</sup> Of course, the various conceptions compete with each other for adherents and it is possible to convince someone in the grip of another conception that your conception is preferable by appealing to shared values.

saying that there is no best conception (see, for example, 1986 p. 82). Hence all analyses of an essentially contested concept must be made from *within* a particular conception of it, perhaps recognizing that others have reasons for preferring their conceptions, but still maintaining that one's own is the best (Dworkin 1986 pp. 66-67). As Dworkin puts it, "a useful analysis of an interpretive concept – beyond the bare statement that it is interpretive and a very general account of the practices in which it figures – cannot be neutral. It must join issue in the controversies it hopes to illuminate" (2006 p. 225). Hart, on the other hand, sees himself as analyzing the concept of law from an external point of view that takes account of participants' various internal points of view, incorporating their significant similarities into a characterization of the concept itself (1961/1994 pp. 89-91, 239-42, see also 1987 p. 38, Perry 1995 p. 97). For Hart, there is enough in the practices in which the concept figures to fashion a whole theory.

While the criterion requiring a historic exemplar is inescapable for law to be a candidate for essential contestation, it might do with some emendation. Waldron suggests that this criterion of the original exemplar as articulated by Gallie is too strict (Waldron 1994 p. 532). Some remarks by Connolly suggest a similar viewpoint: that the essential contestation of a concept itself can pass through historical phases, perhaps obscuring an exemplar or otherwise undermining its use as a paradigm (see, for example, 1974 pp. 31-32, showing how a change in circumstance might alter the normative content of democracy, either by changing the criteria by which it is generally deployed, changing the point of its deployment, or casting it aside as outmoded).<sup>31</sup> We might wish to incorporate Connolly's teleological understanding of the descriptive elements of such

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<sup>31</sup> One result of assessing essential contestation as simply a theoretical tool ascribed for its usefulness in a wider theoretical endeavor is that, as society and its values change, the usefulness of the ascription may also wax and wane.

concepts (1974 pp. 22-23) into the idea of the original exemplar. Rather than concentrate on an original conception that everyone accepts as paradigmatically 'correct' but in need of further development and application, we are more concerned to understand the original point of the concept, the use to which it was historically put. In our modern conceptions we would be free to reject that point, but only if we were prepared to substitute our own, along with an account detailing both the relation with the original and the change in circumstances as justifying the change in focus. However, the existence of such a teleological debate, and the possibility that law meets this historical criterion in one form or another, are not by themselves sufficient to render it usefully considered essentially contested.

#### 8. THE FRAMEWORK AND ASSESSING ITS UTILITY FOR LAW

In explaining essential contestation, I have highlighted reasons to see it as a framework to be judged for its usefulness in understanding the use of certain concepts, rather than as a hypothesis to be accepted or rejected as highlighting a quality that is true or false of those uses (as noted before, in this I follow Collier et al. 2006 p. 215). Now it is time to collect those reasons detailed above, and show how they can be developed into criteria that suggest when the essentially contested appellation might be useful.

To call a concept essentially contested is to help explain its usage. It is a claim about the use to which the concept is put (Gallie 1964/1968 p. 161). Since we are trying to understand something about those uses, the question is whether to call the concept essentially contested helps to clarify those uses and the conflicts among them. Additionally, Gallie's last two criteria, that there be an agreed-upon historical exemplar and that the competing uses claim to sustain or develop that historical exemplar (Gallie 1964/1968 pp. 166-68), are questions about the debate and the intellectual history of the concept and hence also are about the usage of the concept. While some theorists may disagree with some aspects of these criteria, the criteria still help to

show that to call a concept essentially contested is to characterize that historical debate (possibly from outside of it). Hence the applicability of these criteria amounts to a claim that it is useful to understand the concept in light of that historical debate over usage and the characteristics one highlights.

In further support of this point consider Connolly's claim that essential contestation itself waxes and wanes (1974 pp. 31-32). He gives the example of democracy, showing how a change in circumstance (such as a differentiation of the species into groups with very different abilities, reminiscent of H.G. Wells 1895) might alter the normative content of democracy, either by changing the criteria by which the concept of democracy is generally deployed, thereby changing the point of its deployment, or by leading us to cast it aside as outmoded. This is best understood as a claim that essential contestation is simply a theoretical tool ascribed for its usefulness in a wider theoretical endeavor. As society and its values change, the usefulness of the 'essentially contested' ascription to a given concept may also wax and wane. If we were to understand Connolly's point in some way other than to imply that essential contestation is simply a framework for understanding the use of concepts, we would be saddling him with unelaborated and unsupported controversial views about the metaphysics of concepts.

We have also seen that subsequent theorists jettison one or more of Gallie's criteria in arguing for seeing one or another concept as essentially contested. Nevertheless, they do this while still claiming that they are using the notion of essential contestation. The potential viability of the appellation in the midst of rejecting some criteria points to an assessment based on its utility, which cannot be captured with an exhaustive checklist. That is, the theorists who are using the appellation while rejecting some of Gallie's criteria are thereby implying that they don't see Gallie's criteria as necessary and jointly sufficient for the application of the 'essentially

contested' appellation. Yet they still find the idea expressed by the appellation useful for their own theoretical purposes, even as they reject some elements of it deemed necessary by its creator. This supports the contention that Gallie's "criteria" are not really criteria for assessing the truth of a hypothesis that a given concept is essentially contested (see also Collier et al. 2006 p. 215). Instead, they are considerations to be weighed in assessing the usefulness of the appellation. Theorists who reject one or more of the "criteria" are asserting that the appellation is useful in their particular contexts even without their usage showing any element of the rejected criterion.

Another reason in support of seeing it as a framework to be assessed for its usefulness is seen from an examination of the use to which it is put by theorists: to call a concept essentially contested is to offer a rationale for the incompleteness of one's theory of the concept, or one's inability to overcome likely disagreements. Granted, it may also be used to justify the normative character of one's theory, but all these uses are offering essential contestation as a help in assessing one's theory of the concept, rather than as a quality independently possessed by the concept and cited as just another datum. Since it is generally seen as a reflexive comment on one's own theory, rather than one among many facets of the concept under discussion, it is more aptly understood as a framework for assessing that theory and hence to be deployed only when useful for making that assessment.

Once we admit that essential contestation is a framework to be used when it is a useful way of understanding the usage of a concept, the question turns to exactly when doing so would be useful. While by its nature, this question cannot be answered with the precision of mathematics, we can offer several considerations that aid in making a determination. First we turn back to Gallie's "criteria," which the usefulness condition can be understood as a way of applying. The

more the criteria are met by the uses to which the concept is put, the more likely it will be that seeing the concept as essentially contested will give us a better understanding of the debate amongst those uses.

Building upon this insight as well as some of the considerations mentioned above, we can ask several questions in making an assessment whether it is useful to consider a concept essentially contested: Do we understand more about the use of the concept over time (does the essential contestation framework make the concept's use more intelligible)? Does it serve to obviate the apparent problem of any lacuna in a theory of the concept? Does it justify the lopsidedness of competing theories? Can we make better sense of the concept by disaggregating it rather than seeing all the debates as about the same thing? (If the answer to this is 'no' then that might be a good indication that it would be useful to see the concept as essentially contested.) Can a theorist make a judgment about what is important to study in the concept, without evaluating those elements in the same way that a user of the concept does? (A negative answer similarly argues in favor of seeing the concept as essentially contested.)

For the most general concept of law, the answers to these questions point away from applying the essential contestation framework. It would not be of significant aid in understanding the debate, e.g., between natural lawyers and legal positivists to say they were pushing competing conceptions of an essentially contested concept. While one side in that debate links law to morality in a very basic conceptual way, both are advocating explanatory theories. Furthermore, there is not the kind of disparity among referents for the term 'law' that the essential contestation framework would help to explain. While we do see some debate over referents (e.g., Did Nazi Germany have law?), most theorists (excluding Dworkin 1986 pp. 102-03) see this as peripheral and not a debate over the core of the concept (see, for example, Finnis

1980 pp. 351-52). Furthermore, holes in theories of the concept of law are problems for any of them and are not explained away by the essential normativity or complexity of the concept. If we can find instances of law that are difficult for a theory to accommodate (e.g., customary or international law for legal positivism (Hart 1961/1994 pp. 44-48, 213-37), the potential bindingness of wicked law for natural law theory (Finnis 1980 pp. 354-62)), each theorist sees this as demanding a theoretical apparatus to fill the gap and not as an occasion to deny the applicability of the concept outright. Finally, essential contestation would not help to excuse any bias within theories of law, the concept can be disaggregated as shown above, and we can see what is important to explain about the law without having to adopt the same attitude toward those elements as do those engaged in the practice of law.

## 9. ESSENTIAL CONTESTATION AND DESCRIPTIVE METHODOLOGY

Even if we could ignore problems with the application of essential contestation to the general concept of law, characterizing the concept as essentially contested does not help Dworkin's attack on a descriptive methodology for understanding law. That the use of a concept shows some empirical characteristics that fit with Gallie's criteria is necessary, but not sufficient for saying that it is useful to consider the concept as essentially contested. In order to tell whether the use of a concept displays these characteristics, we are supposed to examine the uses of the concept by various parties and determine whether they are appraisive, aggressive and defensive, etc. These determinations are not determinations of value but descriptions of fact.<sup>32</sup> It does not require a value judgment to tell that someone else is making a value judgment (at least, not one

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<sup>32</sup> I do not mean to insist on a sharp division between these two. As mentioned earlier, I understand that a description is something that involves some kinds of normative judgments, but not necessarily the ones at play in the value judgment being described. (See Green 1996 p. 1713.)

of the same kind). Hence empirical investigations of usage are important and useful for understanding the ways these concepts are used.

Indeed, there is an irony in my insistence that we determine whether it is useful to think of law as an essentially contested concept rather than simply whether it displays the characteristics of one. When they call a concept essentially contested, theorists such as Gallie, Lukes, Connolly, and even Dworkin appear to be making *factual* claims about the concepts themselves and not about any particular conception. They make these claims based upon descriptions about the way in which various conceptions of the concept are presented and debated. On the other hand, I am asking whether it is useful to interpret (or conceive of) the concept as essentially contested. What theoretical purpose does it serve? Does it help our understanding or hinder it? Only Connolly appears to appreciate the role of purposive judgments in such a characterization (1974 pp. 22-24).

Understanding the history of the concept's uses in order to understand the concept itself, would be a matter of describing how the concept has been used over time (and perhaps the significance of the concept to those who used it). Dworkin himself notes that the positivist social fact thesis is historical: the criteria that make a proposition of law true "turn on whether certain specified social and psychological events have actually occurred" (1987 p. 10). This sounds very much like the kind of descriptive analysis Gallie suggested was necessary in order to understand an essentially contested concept. Positivists do not deny that the specific concept of law is appraisive to those who use it in discharging legal duties. They deny that one must make robust evaluations of the concept itself in order to understand it. Again, such a descriptive analysis therefore contributes to an understanding of the sense in which the concept is used. Levels of essential contestation may have to do with how intimately the concept is tied to other values by

those who use it most. Hence, even if it were useful to consider some concepts of law to be essentially contested, this does nothing to undermine the descriptive project of understanding the most general concept.

#### 10. LEVELS OF CONCEPTUAL GENERALITY AND THE LOCUS OF CONCEPTION

What would happen if we denied that there was any real conceptual difference among the various levels of generality in law, i.e. between particular legal requirements, particular legal systems, and legality itself? Dworkin might have seemed to deny a conceptual distinction between the levels of generality when he wrote that “Jurisprudence is the general part of adjudication” and “Legal philosophers debate about the general part, the interpretive foundation any legal argument must have.... [W]hen rival foundations compete, a legal argument assumes one and rejects others” (1986 p. 90). If this were so, then it would be much easier to claim that the concept of law is an essentially contested concept and that every use of the concept (including a theoretical description of it) is an evaluative interpretation of it.<sup>33</sup> If there were no conceptual differences among the levels of generality, then the normativity and aggressive/defensive uses that are so common among non-philosophical uses make a descriptive philosophical explanation look like a confused pretense. But if (as I claim) the levels of conceptual generality can be seen as representing distinct concepts, then we can admit that some concepts or uses could be usefully seen as essentially contested, while others are not.<sup>34</sup>

Return for a moment to the distinction between concept and conception. If the different levels of generality of law did not represent distinct concepts, then a conception of the concept

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<sup>33</sup> “A conception of law is a general, abstract interpretation of legal practice as a whole” (Dworkin 1986 p. 139).

<sup>34</sup> I do not mean to imply that Dworkin fails to distinguish among different concepts of law (see 2006 p. 223f).

Rather his conclusions may seem to make more sense when those differences are ignored.

would have to incorporate all three (or four) levels.<sup>35</sup> If, on the other hand, these different levels of generality represent distinct but related concepts, then we also have distinct conceptions available for each level of generality. Hence, the availability of distinct conceptions for each level of generality – of individual laws, of legal systems, and of law as such – (which can be maintained simultaneously and consistently) is also further evidence that the levels of generality represent distinct concepts. I can conceive of a law at the most specific level as a piece of legislation, official determination by a court, and perhaps administrative interpretation of a codified rule (perhaps appended to some criteria for validity). This conception requires my use of the concept of law in the most general sense, but I do not need to provide (or even have) a conception of that most general sense in order to maintain my conception of law at the most specific level.

An understanding of the distinctions among the conceptual levels of law as distinctions among concepts helps to explain why it sometimes might seem useful to characterize law as essentially contested and sometimes does not. Such an understanding also leads to the conclusion that it is not useful to see the most abstract concept of law as essentially contested.

If we decide that law is best understood as only marginally essentially contested, or a non-essentially contested concept that involves other concepts that are themselves essentially contested, then good jurisprudence will expose the places essentially contested concepts come up within the concept of law and perhaps at least offer some ‘preinterpretive data’ about those concepts. This would require judgments about the relative importance people place upon those

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<sup>35</sup> One should not confuse the claim that there is no conceptual difference among the levels of generality of law with the claim that the concept/conception distinction is not itself a distinction of levels of abstraction. Dworkin himself claims “The contrast between concept and conception is here a contrast between levels of abstraction at which the interpretation of the practice can be studied” (1986 p. 71).

other concepts, but the theory itself would be in the midst of describing those evaluations, not advocating for a particular conception.

## 11. CONCLUSION

While the concept of law figures prominently in many value-laden debates, it is also frequently used in contexts outside of those debates or in ways that do not advocate for a particular evaluative stance. The prevalence of those less value-laden uses makes it all the more important not to assume that all uses are pushing a particular conception of law against others. I am not denying the importance of interpretation in law, or the role of evaluation in many assertions of law. Rather, I am pointing out that so much of the concept's use is not pregnant with the user's particular values that it cannot be very useful to pretend that all uses are advocating value-laden conceptions. But to say that the law is an interpretive or essentially contested concept is precisely to paper-over those less value-laden uses. On the other hand, one does not ignore the value-heavy uses by denying that the concept is usefully considered essentially contested. Just about any concept *can* be the focus of heavy contestation and value-laden debate. But if we start saying of those debates that they are necessary and central to the concept, when so many uses are not participants in those debates, we do more to obfuscate the concept than to understand it. When trying to understand the nature and practice of law, of course we should not avoid examining the deep value debates law embodies and inspires. But if we claim they are the essential facet to understanding all of law, we are missing much more than we are explaining.

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