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Conceptual Analysis in Science and Law

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Legal philosophy and cognitive science may seem like vastly different disciplines. The former deals with the airy questions concerning the nature of law and justice; the latter with empirical questions about the workings of the human mind. But these fields share a surprising, and little noted, affinity. Both employ a similar sounding methodology, commonly referred to as “conceptual analysis.”

For legal theorists, conceptual analysis lies at the very core of their discipline. Ever since H. L. A. Hart published his classic work, *The Concept of Law*, in the 1950s, theorists have treated conceptual analysis as the dominant methodology of jurisprudence. Since then, legal theorists have focused their efforts on exploring the concept of law; volumes have been written on this subject, with influential theorists—like Shapiro, Coleman and others—pressing forward with this approach even today.

Strikingly, the methodology of conceptual analysis has become a key tool within the field of cognitive science, as well. For researchers in that field, the goal has been to understand how
human beings form categories of thought. Though applicable to abstract concepts like “beauty” or “justice,” the methodology has been principally employed by scientists to analyze how human beings use relatively concrete concepts, such as “bird” or “fruit.” The research has flourished in recent years, with interesting and far-reaching insights into the way the mind uses concepts and categories.

One might suppose that legal theory and cognitive science use a similar name for disparate theoretical methods. But if that is the case, it is not immediately obvious how they differ. The two disciplines have broadly similar aspirations: Both seek to understand how human beings use and understand categories of thought. Both, moreover, have made similar findings about the nature of concepts and concept formation. Surely legal theorists and cognitive scientists are doing different things, but it’s not immediately clear in what way, or what is at stake in those differences.

The fault for this confusion, if we are to allocate the fault, lies with legal theory. The goals and methods used by cognitive theorists are quite clear and without much controversy. But the specific goals and tools used by legal theorists in the name of conceptual analysis is fraught with ambiguity. That contrast is also reflected in the degree of confidence that cognitive scientists and legal theorists seem to possess in the conceptual work they do.

Cognitive scientists have implemented their variant of conceptual analysis in a more or less self-assured way, without much self-doubt over the theoretical objectives and coherence of the methodology. Legal theorists, by contrast, seem to suffer from a persistent anxiety over their means and methods. Critics have increasingly raised questions about whether conceptual analysis in jurisprudence is a coherent or even intelligible methodology, and whether the approach yields anything interesting or useful. This debate is particularly heated today, with some theorists calling for a new approach to legal philosophy. With its central methodology questioned, the field of jurisprudence feels unstable, unsettled, unfocused.

The differences between the two disciplines are not due to a higher degree of neurosis among law professors than cognitive scientists (though that may be the case too); rather, the difference accurately reflects the underlying coherence of the method of conceptual analysis employed by each discipline. That at least will be the ultimate thrust of this paper’s analysis. I

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will suggest that the incoherence and instability of legal theory’s methodology becomes particularly apparent when it is contrasted with the more stable and solid approach adopted by the scientists. The comparison allows us to see where legal theory tries to borrow from cognitive science -- or at least share certain tools -- and where it muddies its methodological waters with incompatible goals and structures.

This argument is developed in several parts. Part One, which provides some ground clearing, examines a few basic issues regarding the nature of concepts and conceptual analysis. What, for example, do cognitive scientists and legal theorists mean when they speak about concepts? What does it mean to “analyze” a concept? And how does one determine if a methodology, like conceptual analysis, is coherent and valid?

Part Two then examines, in general terms, the way cognitive scientists have used conceptual analysis to achieve their goal of understanding the workings of the human mind. This approach is broadly consistent with the scientific method; indeed, I will refer to the approach as the scientific method of conceptual analysis (or “scientific analysis”). As this Part suggests, cognitive scientists employ conceptual analysis in a cogent and coherent manner: The tools used are well-suited to the theoretical ambitions of the researchers.

Parts Three and Four examine the use of conceptual analysis in legal theory, focusing on H.L.A. Hart’s influential application of the methodology. In contrast to the scientists, Hart and his followers have been far from clear about the details of their conceptual methodology. This makes it extremely difficult to evaluate the coherence of their approach. To address this ambiguity, Parts Three and Four consider a range of different interpretations of conceptual analysis to determine if any help make sense of Hart’s theoretical claims.

To begin, Part Three considers whether Hart adopts a form of scientific analysis comparable to the cognitive scientists. Perhaps surprisingly, several of Hart’s general claims about concepts are consistent with this approach. Nonetheless, Part Three ultimately concludes that scientific analysis is not capable of explaining Hart’s core claims about the concept of law and the rule of recognition.

Part Four then considers whether several alternative methodologies – including the hermeneutic approach and the philosophical approach – might make sense of Hart’s claims. Again, Hart’s analysis shows certain affinities with each of these methodologies. Yet, once again,
neither in the end is capable of explaining the logic of Hart’s analysis.

The implication of this analysis is that Hart’s theory is without a consistent methodology; that despite its surface appeal, his analysis is incoherent and muddled. This is a particularly troubling conclusion, since Hart continues to wield enormous influence over the work of legal theorists. In the concluding part of the paper, I offer some thoughts about the implications of this conclusion for the methodology of legal theory, and I offer some suggestions for putting jurisprudence on a firmer and more coherent methodological foundation.

I. CONCEPTUAL PRELIMINARIES

The methodology of conceptual analysis seems straightforward enough – to analyze and explain the meaning of concepts and crucially, for legal theorists, the concept of “law.” But to understand this methodology fully -- whether in the scientific or jurisprudential fields -- several preliminary questions need to be addressed. What sort of entity is a concept? Do concepts exist independently of human thought or are they the product of human imagination? How can one say that one method of doing conceptual analysis is better than another? This part addresses these preliminary questions, clearing the way for us to understand how conceptual analysis operates in the two fields.

A. What are concepts?

The philosophical study of concepts has an ancient pedigree, but it has experienced a resurgence in the early to mid-part of the 20th century. During this time, philosophy turned its attention to the way human beings used and understood language. Some have called this the “linguistic turn” in philosophy. Given this recent history, one might be tempted to equate concepts with the study of words. From that perspective, the concept of, say, “law” would be

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3 See Brian Leiter, Legal Realism, supra note 1, at 262 (“In its simplest form, the method of conceptual analysis calls for the explication of the meaning of concepts (‘morality,’ ‘knowledge,’ ‘law’) that figure in human practices.”).

4 Ronald Allen & Brian Leiter, Naturalized Epistemology and the Law of Evidence, 87 Va. L. Rev. 1491, 1493-4 (2001) (The linguistic turn is “the idea that traditional philosophical problems were best analyzed and conceptualized as problems about language and its relation to the world.”).
equivalent to the word “law.” Conceptual analysis, in turn, would represent a semantic exercise – an attempt to determine the proper linguistic rules for using a certain expression.

Viewing concepts as equivalent to language, however, is not consistent with the approach taken in either cognitive science or legal theory. Leading jurisprudences have repeatedly emphasized that conceptual analysis does not simply track word usage. And cognitive scientists similarly distinguish between words and concepts.

Joseph Raz, a leading legal theorist, explains the distinction. As he points out, a word like “law” can be used in many different senses. We can speak of scientific laws or natural laws or religious laws, as well as “legal” laws. These different categories overlap, and likely share certain features. But they are not identical. If the goal were to identify the linguistic rules underlying a word like “law,” one would need to identify and list the meanings of the term in each of these various contexts (including the use of the term in scientific, religious, and moral contexts). But theorists do not typically pursue that goal, which indicates that conceptual

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5 This temptation may be particularly powerful in the field of jurisprudence. Prominent legal theorists, such as Hart himself, were part of a broad philosophical movement influential at both Oxford and Cambridge, which came to be known as “linguistic philosophy.” That movement made the study of language a central part of its mission. See Nicola Lacey, A LIFE OF H. L. A. HART: THE NIGHTMARE AND THE NOBLE DREAM 144-6 (2004). According to Hart, this approach embraced the conviction, “that longstanding philosophical perplexities could often be resolved . . . by sensitive piecemeal discrimination and characterization of the different ways . . . in which human language is used.” H. L. A. Hart, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 2 (1983).

6 In fact, several theorists have suggested that Hart offers a semantic theory of law (and I have made the same mistake in past writings, as well). See, e.g., Nicos Stavropolous, Hart’s Semantics, in HART’S POSTSCRIPT 61 (Jules Coleman, ed. 2001) [hereinafter Hart’s Semantics] (“We should ask, not whether Hart thought semantics is important --- Hart says as much; rather, we should ask why he thought so; which particular semantic insights he thought were crucial to the study of law; and how semantic theory affected his theory of law.”). Stavropolous also emphasizes that, “[b]y semantics, I mean non-trivial, often controversial, theoretical claims regarding the structure and nature of language, and the character of concepts [used in language]. I mean the subject matter, in other words, of philosophy of language.” See id. at 60.

7 Brian Bix notes that it is unusual to come “across a conceptual theory whose ambition is not greater than to track usage.” BRIAN BIX, JURISPRUDENCE 19 (2d ed. 1999).


9 See JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 195-6 (1994).
analysis is not the same thing as lexography.

Rather, theoreticians in both disciplines are interested in analyzing the specific ideas to which the language refers. Legal theorists, for example, are not interested in exploring the term law in its religious or scientific formulation. Their focus is on the narrower, shall we say, “legal” formulation, concerning legal rules and legal systems and legal actors. Hart, in this light, was concerned, “not with the meaning of the word ‘law’, but with the content of one of the concepts associated with the word ‘law.’” To be sure, theorists like Hart believes that words are useful for understanding the underlying concepts, that we can understand concepts better by attending to the way we speak about them. But words are not the ultimate target, the ideas that underlie them are.

Of course, this hardly clarifies the matter completely. One would still want to know what sorts of ideas or abstractions are concepts like “law” -- or for that matter “chair,” “elephant,” or “beauty.” One straightforward answer is that concepts are a specific kind of abstraction.

10 Of course, this is hardly a clear explanation of the concept, and we will have more to say about the scope of the concept later. But even this suggestive answer is enough to underscore that we are utilizing the term in a narrow sense.

11 Michael Green, Dworkin v. the Philosophers: A Review Essay of Justice in Robes, 2007 U. ILL. L. REV. 1477, 1483 (2007). Hart himself makes absolutely clear that he is not interested simply in defining words. He acknowledges that traditional questions about the “nature” or meaning of “law” seem to call for linguistic answers, for definitions of a sort, but he affirms that this is not what legal theorists are interested in. See Hart, Definition and Theory, supra note 5 at 37 (1954) (although questions about the nature of law sound like questions about “the meaning of the word, ‘law,’ . . . these questions are not asking to be taught how to use these words in the correct way.”); H. L. A. Hart, Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer, 105 U. PA. L. REV. 953, 967 (1957) [hereinafter Analytical Jurisprudence] (responding “no” to the question: “Is analytical jurisprudence concerned merely with words?”). See also JULES COLEMAN, THE PRACTICE OF PRINCIPLE 177 (2003) (Hart is doing more than simply trying to understand how words are used); Stavropoulos, Hart’s Semantics, supra note 6, at 69 (Hart recognized that semantic analysis wasn’t simply an attempt to provide “rules for the correct use of words.”).

12 HART, CONCEPT OF LAW, supra note 5, at vi (“[T]he suggestion that inquiries into the meanings of words merely throw light on words is false. . . . In this field of study it is particularly true that we may use, as Professor Austin said, ‘a sharpened awareness of words to sharpen our perception of phenomena.’”); Hart, Analytical Jurisprudence, supra note 11, at 967 (“It seems to me that similarly in pursuing analytical inquiries we seek to sharpen our awareness of what we talk about when we use our language.”). See also Stavropoulos, Hart’s Semantics, supra note 6, at 72 (Hart believes that, “attention to use will sharpen our understanding of the concepts that figure in use, and so provide insight into the nature of the things that concepts designate.”).

To be sure, one might doubt that words can really tell us anything useful. Brian Leiter, AMERICAN PHILOSOPHICAL ASSOCIATION NEWSLETTER 2 (Spring 2001) [hereinafter APA NEWSLETTER] (suggesting that philosophers have come to doubt whether a “sharpened awareness of words” really can “sharpen our perception of phenomenon.”). In a subsequent section, I consider some problems that arise when looking to words to interpret concepts. For now, though, the point is simply that, when individuals speak of concepts, they mean something distinct from the word that is used to refer to that concept.
Namely, when theorists speak of concepts they are referring to categories or groupings.\footnote{This statement might be viewed as a conceptual claim itself; it is a statement or description of the concept underlying the term “concept.” That definition, of course, might be disputed. Nonetheless, I am simply stipulating this definition of a concept, which I assert (and assume) comports with common usage. To be sure, one can find idiosyncratic definitions of the term “concept.” For example, Stephen Perry sometimes uses the term “concept” to refer to a rational reconstruction of a claim. See Perry, \textit{Hart’s Methodological Positivism}, in \textsc{Hart’s Postscript} 350 [hereinafter \textit{Methodological Positivism}]. But this paper is not concerned with those idiosyncratic uses. One is free to explore a different concept of concepts, but they would be engaged in a different conversation.} Concepts divide the world into different classes of phenomena. Thus, the concept law is a category that divides the world into “laws” and “not laws.”

Concepts may apply to concrete objects like “table,” or more ethereal ones, like “Justice,” but in either case the concept itself is an abstraction; it is not equivalent to any of its specific members. The concept of a table, for example, may encompass an infinite range of existing and imaginary tables, but it cannot be reduced to any single table, real or imagined. The concept transcends specific examples; perhaps by picking out certain general features that all tables must have. This is a widely shared understanding of what concepts are: Abstractions that divide the world into various categories based on some, yet to be disclosed, metric.

\textbf{B. Two Views of Concepts}

So concepts are categories. But that doesn’t tell us much about their nature, content or structure. What sorts of entities are these categories? For example, are they “real” entities – categories that exist independently of human thought? Or are they simply products of human imagination; that is, are they “relative” to human thought? To put the question another way, do we hold a realist or relativist view of concepts?

Plainly, how we analyze a concept, or even whether analysis is possible, will depend on how we view the nature of concepts. So let’s consider the two possibilities in turn and explore which of these options seems plausible.

\textbf{1. Realist Concepts}

Consider, first, the “realist” view of concepts, the view that concepts are “real entities that exist independently of human thought.” They exist, in a sense, in the “furniture of reality.”
might seem like an odd idea, but the realist approach has an ancient and storied pedigree.

Plato, for example, believed that concepts existed on a separate metaphysical plane, as ideal forms or ideal types. From this perspective, when we speak about the concept of a table we are referring to the ideal form of a table. When we say that a specific thing is a table, we are saying that the thing is sufficiently like the ideal to deserve the label “table” (or it is a table to the degree it is like the perfect table). Concepts in this sense are “referential”: Claims about concepts are true or false depending on whether they match up with the “real” nature of the concept that exists “out there” in the world.

A related point is worth highlighting. Since, under this theory, concepts are universal and unchanging, concepts have features that are necessarily and always true. How do we identify those features? Since the Platonic forms exist in a transcendental realm, we cannot identify these features using empirical measures. The answer seems to be that we “intuit” their existence. Intuition provides insight into truths about the concept. In a sense, we must rely on a kind of “a priori” insight into the concept. So this form of conceptual analysis is an odd-sounding endeavor -- it is an endeavor that seeks that seeks out necessary truths about concepts through the use of intuition.

14 Typically, when we think of things that exist “independently of the human mind,” we think of physical entities, like tables -- not abstract entities, like “Liberty” or “Justice.” But concepts, even concepts about physical things, are always abstract entities in some sense. The concept of a table has some relationship to the physical object we call table. After all, the concept encompasses real, physical tables. But the concept of a table isn’t identical to its specific extensions; the concept refers to a category that includes all physical tables in existence and some that aren’t in existence. The concept refers to the “category” of tables -- which is an abstraction, an idea -- not to any specific table. This is true of law too. For example, an Austrian would claim that the concept of law encompasses certain real things in the world, such as judges or legislators (and specifically judges’ verbal or written pronouncements). But law is not equivalent to any specific claim or judicial pronouncement. It is an abstraction that cannot be reduced to any single law. See Leiter, Legal Realism, supra note 1, at 358 (law is also an abstraction, not the same thing as a thing in the world). The Platonic view is that these abstractions -- even abstractions about physical things -- have an independent existence in the world as ideal types.

15 Leiter, Legal Realism, supra note 1, at 358 (a concepts has “referential content -- it represents some feature of the real world”).

16 See Georges Rey, Analytic-Synthetic Distinction, STANFORD INTERNET ENCYCLOPEDIA Section 4 (“The most unsympathetic response to Quine’s challenges has been essentially to stare him down and insist upon some inner faculty of ‘intuition’ whereby the analyticity of certain claims is simply ‘grasped’ directly through.”).

17 COLEMAN, PRACTICE OF PRINCIPLE, supra note 8, 179 (“On the classic understanding of it, the aim of conceptual analysis is to identify an interesting set of analytic truths about the concept that are discernible a priori. The truths enable us to identify necessary or essential features of instances of the concept.”). An a priori truth is one “that does not depend for its authority upon the evidence of experience;” that is, it can be discovered without any observations of the world. This contrasts with a posteriori truths, which require observation of the world. See a priori and a posteriori, in THE OXFORD COMPANION TO PHILOSOPHY (1995).
 Needless to say, little about the “realist” approach commends itself to us today. As an initial matter, the idea of concepts as “real” entities existing in some other realm seems extremely odd, to say the least. In addition, the methods for identifying these features seems equally unsatisfying, and that is true whether such methods involve some special intuitive faculty, or a kind of a priori reasoning.

It is easy to be suspicious of any attempt to rely on intuition as a reliable measure of knowledge. As Brian Leiter says, “[p]hilosophy becomes unsatisfying . . . when it turns into intuition mongering and armchair sociology about what is really fundamental to ‘our’ concepts.” After all, as Leiter observes, for every claim that a concept seems to entail a certain meaning, one can always respond: “Well, that’s your view of the concept of law.” Leiter notes that there isn’t any reliable way to resolve debates about concepts when the debates turn on intuitions. “Intuition pumping” as a result is sterile kind of philosophical endeavor. A priori reflection has been subject to equally withering criticism, within and outside the academy. Quine, notably, dismissed the very idea of a priori knowledge, a position that today has become the dominant one, at least outside the field of legal philosophy.

Given these criticisms, it is difficult today to find cognitive scientists who fully embrace a realist view of concepts. For legal theorists, the matter is not so clear. At the very least, one can find echoes of the realist doctrine in writing about legal theory today. For example, it is not uncommon for legal theorists to speak about the “necessary” features of the concept of law. Thus, one frequently hears theorists suggesting that law is “necessarily” normative or that

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18 Leiter, Legal Realism, supra note 1, at 368.
20 Leiter, APA NEWSLETTER, supra note 12, at 3-4 (criticizing Raz’s “intuition pumping”); see also Leiter, Hart/Dworkin Debate, supra note 19, at 23 (The real problem with jurisprudence is that “it relies on two central argumentative devices -- analysis of concepts and appeals to intuitions -- that are epistemologically bankrupt.”).
21 Brian Leiter observes that Quine’s attack on a priori knowledge marks the death knell for standard methods of conceptual analysis. Thus, Leiter says, “if analytic statements are gone, then so too is conceptual analysis: since any claim of conceptual analysis is vulnerable to the demands of a posteriori (i.e. empirical) theory construction. . . .” Brian Leiter, Hart/Dworkin Debate, supra note 19. Leiter notes, further, that attempts to develop a priori understandings of concepts have failed to come up with anything akin to intuitively plausible descriptions. Id. at 27. (citing Quine for the view that “the philosophical track record of all forms of a priori analysis, conceptual or intuitive, is not especially encouraging”). See also Leiter, Legal Realism, supra note 1, at 369 (quoting Gilbert Harman). Leiter concludes: “if these ‘classics’ of conceptual analysis all failed for a posteriori reasons (or other a priori reasons), why in the world [should we] think conceptual analysis in jurisprudence will fare any better.” Id. at 369.3. See also Harman Gilbert, Doubts about Conceptual Analysis, in PHILOSOPHY OF MIND (Michael and O’Leary-Hawthorne, eds. 1994).
normativity is a conceptual truth of the law.\textsuperscript{22}

Now necessity is a highly controversial idea in the philosophical literature.\textsuperscript{23} Colloquially at least, the term seem to imply that the entity in question – here, the concept of law – has some kind of invariable and inherent form or structure.\textsuperscript{24} Thus, saying that the law is necessarily normative suggests that normativity is a fixed, inherent, unchanging part of the law.\textsuperscript{25} In other words, claims about the normative necessity of the law seem wed -- consciously or not -- to a

\begin{quote}
\textsuperscript{22} See, e.g., Coleman, \emph{Incorporationism}, supra note 1 at 105 (“Jurisprudence begins with the trutism that law is a normative social practice.”); Philip Soper, The Ethics of Deference: Learning from Law’s Morals xvi, 189 (2002) (noting that a core debate in jurisprudence concerns whether or how law is necessarily normative); Stephen Perry, Methodological Positivism, \emph{supra} note 13, at 331 (“the idea that the law purports to bind us by exercising authority over us is thus very plausibly regarded as an element of the concept of law. Hart implicitly makes this claim, and here too, he is on very strong ground.”)
\end{quote}

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Jules Coleman, disputes this characterization, affirming that “no serious analytic legal philosopher-positivist or interpretivist -- believes that the prevailing concept of law is in any sense necessary: that no other concept is logically or otherwise possible. Nor do we believe that our concept of law can never be subject to revision.” That is a somewhat surprising assertion from Coleman who, in the same work, affirms that the “descriptive project of jurisprudence is to identify the essential or necessary features of our concept of law.” Coleman later writes: “If this book stands for anything, it stands for the claim that we do not determine the content of our concepts from a priori reflection alone. Rather, we construct theories of our concepts, and those theories answer to the full range of norms--theoretical, epistemic, discursive, political, and practical.” Coleman, Practice of Principle, \emph{supra} note 8, at 210 n.36 (emphasis added). In Part II, I discuss the role of epistemic values in the descriptive analysis of concepts. What is notable in Coleman’s statement, however, is the implication that a priori reflection plays some role in the analysis of concepts. Given the critique of a priori reflection by Quine and others, what role does Coleman think remains for a priori reflection? How, moreover, are a priori insights combined with epistemic (or for that matter “political” norms) to generate an intelligible result?
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Consistent with the attack on a priori knowledge, philosophers have long questioned whether it makes sense to say that concepts have “necessary” features. W.V.O. Quine, \emph{Two Dogmas of Empiricism}, 60 PHIL. REV. 20, reprinted in W.V.O. Quine, From a Logical Point of View 20-46 (1980). Claims about necessary and essential truths, Brian Leiter observes, “depend on the assumption that Quine is fundamentally wrong about analyticity, an assumption that, at this late date, requires some explicit defense if we are to take the results of jurisprudential inquiry seriously.” Leiter, \emph{Beyond the Hart/Dworkin Debate}, \emph{supra} note 19 at 25. Interestingly, although Hart sometimes speaks of the necessary features of law, he also seems to acknowledge that little is to be gained by trying to identify necessary features of concepts. See Hart, \emph{Positivism and the Separation of Law and Morals}, \emph{supra} note 5, at 622 (the “pursuit of questions whether this necessity is logical (part of the ‘meaning’ of law) or merely factual or causal, can safely be left as an innocent past time for philosophers.”). \textit{See also id.} at 622 (theorists should avoid arid debate over ‘essences’ of law, and of definitions).
\end{quote}

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See, for example, Julie Dickson’s claims that a “successful theory of law” is one “that consists of propositions of law which are necessarily true,” and that a theory of law must “at least consist[,] of necessarily true propositions.” Julie Dickson, Evaluation and Legal Theory 17 (2001). Dickson asks: Why must we seek out propositions that are “necessarily, a opposed to merely contingently, true?” She responds: “The answer is that only necessarily true propositions about law will be capable of explaining the nature of law.” \textit{Id.} at 18.
\end{quote}

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See Dennis Patterson, \emph{Notes on the Methodology Debate in Contemporary Jurisprudence: Why Sociologists Might Be Interested}, 8 LAW & SOCIOLOGY 254 (2006), quoting Eric Margolis and Stephen Laurence, Concepts: Core Readings 18 (1999) [hereinafter Core Readings] (“Since Plato, philosophers have endeavored to develop accounts of concepts that unpack their content in terms of necessities. According to the so-called ‘Classical Theory of Concepts,’ most concepts are ‘structured mental representations that encode a set of necessary and sufficient conditions for their application . . . .’”).
\end{quote}
realist framework.

The prevalence of this sort of language does not make it any more reasonable as a philosophical position. Indeed, my sense is that few if any legal theorists would embrace a realist approach if they confronted the issue directly and reflectively. For that reason, let us put the realist doctrine aside and consider the alternative view of concepts -- the relativist approach.

2. **The Relativist Approach to Concepts**

If the realist approach to concepts is not satisfactory, the alternative seems much more appealing. According to the “relativist” approach, concepts do not exist independently of human thought. They are products of human thought. The world, on this view, does not come pre-segmented into categories. Human beings impose categories on reality.

This is a commonsensical view. After all, human beings plainly do make use of conceptual categories all the time, and it is not surprising that they do. It is extremely useful -- indeed essential -- to utilize categories in order to live. Without the mental concept of a tomato for example, every tomato we come across would be treated as a new phenomenon, unrelated to any other. So we need mental categories to live effectively. We also need concepts to communicate with each other. How much easier to be able to refer to the concept of a tomato, then to have to refer repeatedly to the “small, red, vegetable that is commonly used in salads.” Concepts are essential for productive communication.

The relativist approach acknowledges that concepts are human constructs, that concepts come in and out of existence as human practices change, and that the boundaries of these categories can change as well. Indeed, to the extent that human beings are confused and uncertain in their use or understanding of concepts, then the concept itself will be vague or ambiguous. Concepts, in short, are contingent phenomena, subject to change as people’s beliefs change. The implication further is that there are no necessarily true statements about concepts. We can’t say, for example, that the concept of law is necessarily normative, because there are no necessary features of concepts.

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26 *See Murphy, Big Book*, supra note 8, at 1 (concepts are essential for ordinary living); *Edward E. Smith and Douglas L. Medin, Categories and Concepts* 1 (1981).
Under this approach, the attempt to identify or describe a concept does not call for an investigation into some transcendental reality, but rather might simply call for looking at an individual’s psychology, into how an individual uses or understands a concept. This calls for tools of investigation that are entirely distinct from the realist’s methods.

Where the realist’s a priori analysis denies the relevance of observation and empiricism, the approach described here is fundamentally an empirical endeavor. Its goal is to model how individuals use categories when speaking about various phenomena in the world. These concepts might encompass concrete objects -- like the concept of a table or car -- or they might refer to more abstract ideas, such as the concepts of Justice, Art, or Law. But in either case we are not seeking out necessary features of the world, or relying on a priori analysis. We are, instead, exploring how individuals think, and we are relying ideally on empirical evidence. As we’ll see, this is not the only way of analyzing relativist concepts, but it helps illustrate how different tools might arise from differing conceptions of concepts.

C. Analyzing Concepts

The relativist approach is a straightforward and appealing way of thinking about concepts. From this perspective, concepts are categories used by individuals to group entities together, and these categories are products of human thought rather than mind-independent entities ("real" entities’). The task of conceptual analysis then is to “analyze” these relativist concepts.

But what does this analysis entail? What is the “proper” or “valid” or “best” way of analyzing human-constructed concepts? This is, plainly, an evaluative question, which means that we will need some standard for evaluating theoretical methodologies. That raises a critical methodological issue: On what grounds can one make evaluative claims about methodologies?

The answer begins with the recognition that there is no single way to do conceptual analysis. Different methods might be suitable and commendable, depending on the specific

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27 Because this approach is empirical and does not rely on a priori analysis, Quine’s critique of traditional conceptual analysis is no longer relevant. See Leiter, APA NEWSLETTER, supra note 12, at n.2. See also Brian Leiter, Rethinking Legal Realism, 76 Tex. L. Rev. 267, 302 n.153 (1997) (“Once one concedes the temporally and perhaps culturally relative character of the concepts to be analyzed -- as most contemporary philosophers do . . . then there is no reason to be worried about Quine’s attack.”).
goals of the theoretical endeavor. Theoreticians have questions they need answered, or goals they seek to advance. Methodologies can be understood as instruments or tools in a theoretician’s trade. As a result, theoretical methods are not inherently valuable; they are valuable as a means to some kind of accepted theoretical objective.  This also means that, since different disciplines may have different objectives, we might find that different methods of conceptual analysis are preferable in different contexts.

One can, of course, criticize a methodology by attacking the theoretician’s ultimate objectives, questioning its appeal or interest. But this is a highly contentious strategy, given the diversity of views about which objectives are worth pursuing. Another approach is to accept, for the sake of argument, the theoretician’s stated goals, and then to assess whether the chosen methodology is well-suited to promote those aims. This is a question of “coherence” — the focus is on the logical consistency between means and ends.

This standard, of internal consistency between methods and aims, seems like an easy standard for a methodology to meet. Nonetheless, demonstrating that a theoretical methodology actually advances a theoretician’s goals is not always simple to do, so I will employ an even more lenient standard, a standard of plausible coherence. The goal will simply be to address whether a plausible case can be made for the means-end consistency of conceptual analysis in either law or science. If it seems at least reasonable that a methodology will promote the theoretician’s stated goals, that will be sufficient for our purposes here. Again, this may seem like a very easy hurdle for a theoretical methodology to satisfy. But as we will see, even this rather modest standard will enable us to make important claims about the coherence of the method of conceptual analysis utilized by cognitive scientists and legal theorists.

With this background, the strategy should be clear. For each discipline, we will first identify the general goal of the theoretical discipline, and then ask whether the methodology employed by the participants plausibly advances that goal in a significant way. The test of

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28 Normative claims about method all have “suppressed antecedents, and they all have the same antecedent: it reads, ‘In order to attain the aims of science.’” Alexander Rosenberg, NORMATIVE NATURALISM AND THE ROLE OF PHILOSOPHY, 57 Phil. of Science 34, 35 (1989). See also id. at 41.

29 W.J. Waluchow, INCLUSIVE LEGAL POSITIVISM 6.3 (1994) (“We must be extremely careful to distinguish different kinds of legal theories and to realize that apparent differences of opinion in jurisprudence can often be traced to differences in starting points and aims, and resulting differences in methodology.”).

30 To put the point another way, claims about how one “should” analyze concepts are what might be called
plausible coherence will be our governing standard.

We will begin in the following section by examining the use of conceptual analysis in the field of cognitive science. We begin here, in part, because the methodology adopted by cognitive scientists is the more straightforward and easy-to-understand approach. The scientific research agenda reflects relatively clear goals and employs widely accepted methods. Moreover, as we will see, the insights made by cognitive science will help us understand some of the more obscure claims of legal theorists, like H.L.A. Hart, regarding concepts and, specifically, the concept of law.

II. CONCEPTUAL ANALYSIS AND COGNITIVE SCIENCE

For over 50 years, cognitive scientists have been engaged in a rich and fruitful research program examining how individuals use and understand concepts. In evaluating the coherence of this research agenda, our goal will be to assess the link between the method used by the researchers and their stated objectives. The first task, then, will be to identify the general goals of the endeavor.

A. The Goals of Cognitive Science

A bit of terminology will be useful in this discussion. Let us distinguish between two kinds of research aims, which I will call “descriptive” and “non-descriptive” goals. “Descriptive” projects attempt to model reality -- in this case, the psychological reality of concepts. This article is concerned with “pure” research concerning conceptual practices. It is worth noting, however, that practical research into conceptual practice is flourishing today, as well. For example, accurate web-searches require the ability to identify the concept associated with a given search query. A web search for “left bank,” for example, could refer to a range of different concepts (a financial bank, the left bank of Paris, a certain bank of water, etc.). Efforts to develop algorithms that can accurately predict the relevant concept are increasingly in demand.

32 This is not inconsistent with the claim that concepts are relativist entities. Concepts may exist only in the mind.
Thus, researchers examine how individuals actually use or understand concepts. So, for example, we might describe what most individuals mean when they use a concept like “triangle.” We might say that, according to public understanding, a concept of a triangle is widely understood to apply to a polygon with three straight sides. This is a descriptive statement.

This descriptive endeavor is fundamentally an empirical project in the sense that the ultimate test of a theory’s adequacy is its conformity with reality. Incompatibility with empirical evidence undermines a theory, while conformity with reality provides evidence of a theory’s empirical adequacy or truth. In this sense at least, facts trump theory.

By contrast, non-descriptive theories do not attempt to mirror reality. Instead, these make claims about concepts that are based on some alternative standard of validity or justification. Perhaps the clearest example of a non-descriptive theory is a prescriptive or normative claim. A prescriptive claim about a concept is a claim, not about what a concept is, but about how a concept “should” be used or understood. A prescriptive claim, as a result, is concerned with evaluating, criticizing or commending a certain conceptual understanding. As a contrast, a descriptive claim is neutral; it does not attempt to make these kinds of evaluative judgments. It attempts to identify what the concept is, not what it should be.

but we can still view concepts as having a reality as a psychological phenomenon.

33 Alan Chalmers, How To Defend Science, 40 BRIT. J. FOR THE PHIL. OF SCIENCE 249, 250 (1989) (“The aim [of science] is the production of knowledge of the world . . . Once we reject the possibility of acquiring knowledge of the world a priori we are led to the recognition that the adequacy of any knowledge claim must be gauged by pitching it against the world in some way.”).

34 This is certainly an oversimplification. Kuhn and others have pointed out that theory precedes observation, so that we never just have “facts.” Kuhn’s argument, however, has also been critiqued. See CURD AND COVER, PHILOSOPHY OF SCIENCE: THE CENTRAL ISSUES 220 (1998).

35 Other theorists have used slightly different terminology, classifying theoretical endeavors either as “descriptive” or “normative” theories. I employ the term “non-descriptive” to describe the latter category for several reasons. First, the term “normative” is often associated with moral or ethical theories. Non-descriptive is a broader term that can encompass not only moral standards that justify a departure from reality, but potentially non-moral standards as well. For example, Part II.D notes that certain “pragmatic considerations” – such as the limited time and patience of communicators – might provide a basis for departing slightly from reality. These pragmatic goals are not, strictly speaking, “moral,” but they still generate non-descriptive results.

Second, in common usage, the term “normative” often applies to claims that endorse or commend a given result. However, this usage is confusing in the current context, since a scientist engaged in a descriptive endeavor might commend a theory that fully captures reality; she would be making a “normative and descriptive” claim. In this sense, the category of claims that are “normative” and those that are “descriptive” overlap to a degree. Since my goal is to identify two mutually exclusive categories of claims, I use the terms “descriptive” and “non-descriptive” to classify theoretical endeavors. Which term applies turns on whether the theory does, or does not, attempt to mirror reality, not whether or not the theorist is commending or endorsing the theoretical claim.

36 Of course, to say that the theoretical goal is descriptive, not normative, says nothing about whether the concepts are comprised of moral terms or elements. Attempts to describe a concept can sometimes invoke moral terms. For
Given this terminology, the theoretical goals of the cognitive sciences are relatively clear. Researchers are plainly pursuing a descriptive enterprise. In studying concept formation, they are attempting to determine how, in fact, individuals construct, use, and understand concepts, not how individuals should use them. Cognitive science in this sense is an empirical, not normative, endeavor.37

We can be even more specific than this. Much of the work of cognitive scientists in this area is focused on trying to understand the mental processes by which individuals come to group phenomena into categories. A person looking at a piece of wood with four legs concludes: “This is a table.” How does she know this? She has never seen this specific wooden object before, and yet she is able to conclude that it is part of a category called “table.”

It is not sufficient to say that the individual has “learned” from his family or friends or community what counts as a table. That just begs the question: What has she learned? And how does she utilize that information? For example, has she learned a definition or algorithm that lets her determine what counts as a table and what does not? Does she compare the specific table before her with other “prototypical” tables in her mind and then conclude, somehow, that this is similar to the paradigmatic table? Or is there some other mechanism (or combination of mechanisms) that might plausibly explain the determination?

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37 Arguably, the same could be said for the goals of pure science in general. See Klemke, Introduction, in INTRODUCTORY READINGS, supra note 30, at 31 (Klemke et al, eds. 1998) (“[L]ogically considered, the aims of the pure, factual sciences are often held to be: description, explanation, and prediction . . . . However, we might mention that, here again, there is not unanimity with regard to the aims. . . .”); Philip Kitcher, Believing Where We Cannot Prove, in INTRODUCTORY READINGS, supra note 30, at 79 (“Scientific Investigation aims to disclose the general principles that govern the workings of the universe.”); ALBERT EINSTEIN, IDEAS AND OPINIONS (3d ed. 1995) (“Science is the century old endeavor to bring together by means of systematic thought the perceptible phenomena of this world into as thoroughgoing an association as possible. To put it boldly, it is the attempt at the posterior reconstruction of existence by the process of conceptualization.”).
Cognitive scientists want to understand that process better, and they want to describe the relevant mechanism (or mechanisms) that underlies our conceptual practice. The hope is that they will be able to identify certain basic patterns of thinking that individuals rely upon when using and interpreting concepts. Of course, it may turn out that no dominant sets of patterns exist, that individuals use different or perhaps inconsistent mechanisms in their conceptual practices. In the end, whether certain patterns exist and, if so, which ones, is ultimately a question that cognitive scientists attempt to resolve through empirical research.

B. **The Scientific Method of Conceptual Analysis**

Given the descriptive goals of cognitive science, we can understand the method researchers use to analyze concepts. It is the method of observation, theorizing, and prediction – essentially, the scientific method. Researchers create experiments to observe how individuals use and understand concepts, they develop theories about the mechanism that leads to this phenomenon, and they set up further experiments to test the predictions made by these theories.

More specifically, researchers closely observe how individuals use concepts in different contexts. What sorts of things are encompassed by the concept “bird” or “furniture”? A scientist could, of course, simply list the different things that fall within the relevant concepts. But obviously, creating such a list would not be particularly interesting or insightful (except as a starting point for further analysis). Instead, cognitive scientists tend to develop theories that attempt to explain why individuals place certain entities within one concept group and not another.

Developing such a theory can be challenging. One might suppose we could simply ask individual participants about the method they use to make a categorization. And no doubt in certain cases, individuals might provide clear answers. But as theorists have long observed, researchers use to analyze concepts. It is the method of observation, theorizing, and prediction – essentially, the scientific method. Researchers create experiments to observe how individuals use and understand concepts, they develop theories about the mechanism that leads to this phenomenon, and they set up further experiments to test the predictions made by these theories.

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39 For example, when a mathematician uses a concept like triangle, she is likely using a relatively clear set of criteria for the concept (a two dimensional form, consisting of polygon with three sides, etc.). Similarly, a zoologist likely uses a concept like “mammal” with very clear criteria (any of a class of warm-blooded vertebrates that nourish their young with milk, have skin usually more or less covered with hair, etc.). In both cases, the criteria are explicit; the individual is self-aware about his use of the concept.
this is not always a useful approach, for we use concepts all the time without being sure of the reasons or criteria that drive our usage. This is so even though we may feel quite competent using the concept and confident that others understand the concept’s scope and meaning. St. Augustine famously made this point hundreds of years ago, when he puzzled: “What then is time? If no one asks me I know, if I wish to explain it to one that asks I know not.”

For this reason, individual self-reporting is not always the best way to determine how individuals conceptualize the world. Instead, cognitive scientists have sought to explain conceptual practices by looking for what might be called “latent” factors or patterns of thought, considerations below the level of awareness. The ultimate test of a conceptual theory, then, is not whether individuals recognize these factors as determinant, but whether these theories are predictive of conceptual practice. In that sense, explanatory power serves as a core criterion for determining which theories are acceptable.

Consistent with this approach, cognitive scientists have devised experiments designed to test the predictive power of different theories and, in that way, narrow the field of acceptable theories. Stephen Perry refers to this general method as the “descriptive-explanatory” approach. Because this approach – involving observation, theorizing, and prediction – is used broadly in the sciences, I will continue to refer to this approach as the “scientific method” of

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41 Perry argues that, if the goal of theorists, like Hart, is to identify latent or implicit premises, then “elucidation of the relevant concept[] would have to be essentially uncontroversial . . . . it would have to be, once offered, more or less incontestable; it would simply point out what was there to be seen but had not, for some reason, been previously noticed.” Perry, *Methodological Positivism*, *supra* note 13, in 359. I see no reason to assume that this is the case. It may be that some individuals are completely unreflective about the factors that lead to our concept usage, even if those factors are highly determinative of usage. Or, we might be mistaken in our beliefs about what really drives our use of the concept, thinking criteria are significant in determining usage, when they really aren’t. This paper does not assume any level of awareness about the factors that underlie concept usage.

42 It need not be the only standard of justification. As discussed below, other epistemic values – such as simplicity, fertility and scope – will also be relevant in assessing which theories are acceptable. See Part II.D.

43 This is similar to the approach of, say, planetary astronomers, who “fit their models to past data and then use the fitted models to predict future events.” Malcolm R. Forster, *Predictive Accuracy as an Achievable Goal of Science*, 69 PHIL. OF SCIENCE 124, 132 (2002).

44 Although Perry does not go into detail about that method, the basic idea appears to be the same. As Perry explains, according to the “descriptive-explanatory” method, a concept’s meaning “would be determined by the relative explanatory power of accepting one way of categorizing and describing social practices over another, where explanatory power would in turn depend on such standard metatheoretical criteria as the following: Predictive power, coherence, range of phenomena explained . . . .” Perry, *Methodological Positivism*, supra note 13, at 314. Perry says that the “descriptive-explanatory method” is the “most straightforward understanding” of descriptive analysis, what he called “methodological positivism.”
conceptual analysis. 

C. The Conceptual Insights of Cognitive Science

With these preliminaries out of the way, we can take a brief look at the effort by cognitive scientists to understand how individuals think about and use concepts. Legal theorists have not always seemed aware of this research, which has flourished over the past half-century. But the work has led to a dramatic change in the way the scientific community views concepts.

Although space and time prevent us from going into great detail, a few salient points deserve mention here.

1. The Failure of the Classical Approach

One of the central insights of cognitive science has been a negative one. Research over the last several decades has undermined the so-called “classical” view of concepts, which held sway until well into the 20th century. The classical view affirmed that concepts are best described in terms of definitions.

In this context, definitions represent the necessary and sufficient conditions for the concepts use. The criteria embodied in the definition determined which entities fell within the concept’s scope and which did not.

45 This is not to suggest that there is a single accepted “scientific method.” See David L. Faigman, A Cross-disciplinary Look at Scientific Truth: What’s the Law to Do?: Scientific Realism in Constitutional Law, 73 BROOKLYN L. REV. 1067 (2008) (“The scientific method, therefore, is not one method. It is an orientation or approach to empirical exploration. Different subjects demand different modes of analysis.”); Andrew McLaughlin, Method and Factual Agreement in Science, in 1970 PSA: PROCEEDINGS OF THE BIENNIAL MEETING OF THE PHILOSOPHY OF SCIENCE ASSOCIATION, 459, 466 (1970) (“It is simply not the case that there is only one scientific method which is used in all scientific inquiries.”). I am simply using the term as a convenient label for the general method used by cognitive scientists, since it resembles a common approach used in the sciences.

46 For an excellent survey of the field, see MURPHY, BIG BOOK, supra note 8. See also MARGOLIS & LAURENCE, CORE READINGS, supra note 25; SMITH & MEDIN, CATEGORIES AND CONCEPTS, supra note 26.

47 See MURPHY, BIG BOOK, supra note 8, at 11 (“Philosophers have long assumed that definitions are the appropriate way to characterize word meaning and category membership. Indeed, the view can be traced as far back as Aristotle. In trying to specify the nature of abstract concepts like fairness or truth, or even more mundane matters such as causality and biological kinds, philosophers have attempted to construct definitions of these terms.”). See also id. at 15.3 (concepts seen as “mentally represented definitions”).

48 Definitions in this sense have two key parts. The first is “necessity.” That is to say, “The parts of the definition must be in the entity, or else it is not a member of the category.” Id. at 12. The second part is “sufficiency.” That is to say, “If something has all the parts mentioned in the definition, then it must be a member of the category.” Id. In this sense, the meaning of “law” would simply be the explication of its necessary and sufficient criteria.
This definitional approach had certain implications for how concepts were conceived. It meant that concepts had sharp edges – either something fell within the scope of the concept or it did not; there were no in-between cases, no ambiguity about the concept’s scope.\textsuperscript{49} Moreover, once an entity was deemed within the scope of the concept, that was the end of the matter. There was no sense in which some of these entities were more typical examples of the concept than others.\textsuperscript{50} Every member of the concept was on equal footing.

More recent research, however, has revealed that people do not actually use concepts in this way. It is extremely difficult, for example, to identify necessary and sufficient conditions for any concept, except in highly technical settings. Consider the concept of a “bachelor,” which is often cited as the paradigmatic example of a concept with a clear definition. A bachelor, after all, is simply an unmarried adult male. It is that simple.

Except it’s not. It is not difficult to come up with a number of situations where the definition seems to fall apart. What of an unmarried man who is living for many years with a woman (or a man, for that matter)? We probably wouldn’t call that man a bachelor. Or what about a recent widower? Is he a bachelor? Or to take the matters to an extreme, what about the Pope? Bachelor?

So that’s one problem with the definitional approach: It is hard to come up with definitions for most concepts that we use in ordinary conversation. But cognitive scientists studying concepts quickly came up with other problems as well. For example, another defect in the classical approach is the problem of indeterminacy. The classical approach, we said, holds that an entity must either fall within a concept-category or outside it. But researchers discovered that concepts are actually quite “fuzzy,” or inexact.\textsuperscript{51} There are numerous cases in which it’s not clear whether an example belongs to a category.

Are carpets “furniture”? One often buys carpets in a furniture store and installs them along with couches and chairs in the course of furnishing a home. So it might seem plausible to say that carpets are furniture. But it does not sound quite right either. The problem for the

\textsuperscript{49} See \textit{id.} at 15 (“[T]he classical view argues that every object is either in or not in the category, with no in-between cases.”).
\textsuperscript{50} \textit{Id.} at 15.
\textsuperscript{51} \textit{Id.} at 19.
classical approach is that it does not seem to allow for indeterminacy in category membership. Another problem with the definitional approach is what scientists call “typicality effects.” This problem was identified in the 1970s, when a number of psychologists began studying the question of whether individuals treat certain members of a concept as more “typical” than others. The research indicated that people do not, in fact, segregate examples “into clear members and nonmembers” as the classical theory predicted.

Rather, researchers found that “members and nonmembers formed a continuum, with no obvious break in people’s membership judgments.” In numerous studies, subjects had little trouble ranking items with respect to how “typical” they are as member of a category. To take a simple example, when asked to rank various fruits on a scale of 1 to 7 (with 1 being the most typical fruit) subjects assigned different scores to different fruits. In one study, apples received a ranking of 1.3. Pineapples received a 2.3. Figs received a 4.7. And olives (yes, a fruit) received a 6.2.

In short, researchers found that the definitional approach did not seem to work in practice. People did not segregate examples into clear members and nonmembers. And some entities were deemed more typical members than others. The definitional approach simply did not fit the evidence – it did not accurately model the reality -- of how people actually used concepts.

2. Two Models of Concepts

This scientific work confirmed what many probably suspected, that the mental processes that underlie our use of concepts are highly complex and often results in categories that are vague and indeterminate, with shifting boundaries. As a result, researchers over the past several decades

52 See MARGOLIS & LAURENCE, CORE READINGS, supra note 25, at 23.
53 MURPHY, BIG BOOK, supra note 8, at 20.
54 Id. at 20.
55 It is interesting to note that, even as cognitive psychologists were criticizing the classical approach to concepts, an analogous critique had already emerged in the field of philosophy. Some of the earliest critics of the classical approach were philosophers like Wittgenstein who rejected the idea that individuals employ definitions (either implicitly or explicitly) when using many concepts. These theorists relied less on empirical research than on their own generalized observations or intuitions about how concepts were used. For discussion of Wittgenstein’s attacks on the classical approach, see MURPHY, BIG BOOK, supra note 8, at 17-19.
have sought to develop more accurate models of conceptual practice. Today, a large and continuing debate exists within the field concerning the precise mechanism by which individuals develop and use concepts.\(^{56}\)

Rather than provide a thorough and detailed survey of the current debates in the field of cognitive science -- an endeavor for which I am not competent -- this section offers a flavor of that debate, highlighting two leading theories that have sought to supplant the classical approach. The discussion also provides the side-benefit of later helping us to understand the claims made by legal theorists about concepts.

The first approach, which I will call the “weighted factor” theory, emerged in the scientific literature in the 1970s.\(^{57}\) Researchers found that, for at least some concepts, individuals were using a kind of weighted checklist of factors to make assessments. The more factors that the entity had, the more likely it would be deemed a typical member of the group.

For example, individuals were asked to assess whether certain types of animals – such as robins, chickens and vultures – were birds. According to this model, individuals had in mind certain features or properties that birds often possess -- such as whether the animal flies, sings, nests in trees, lays eggs, etc. An entity need not have all of these factors, but must have enough, in some rough sense, if it is to be deemed part of the bird category.

Thus, when determining whether something is a bird, an individual assess how many of these features are satisfied, with perhaps some features receiving more weight than others.\(^{58}\) If a sufficient number and weight of factors are satisfied, then the concept-label is extended to the entity. According to researchers, this model explained why subjects generally found that robins, chickens, and vultures were all birds. It also explained why subjects distinguished among these bird-types, concluding that robins were seen as a typical bird, while chickens and vultures were

\(^{56}\) And indeed, some question whether only one model applies, or whether different models are used for different types of concepts. See, e.g., EDOUARD MACHERY, DOING WITHOUT CONCEPTS (2009) (arguing against a single model of concepts).

\(^{57}\) Cognitive scientists have used various labels to refer to this theory. For example, Gregory Murphy uses the term “prototype theory” to refer to the “weighted factor” approach. See MURPHY, BIG BOOK, supra note 8, at 41. Smith and Medin call this approach the “featural” approach, a subcategory of the “probabilistic” view. SMITH & MEDIN, CONCEPTS AND CATEGORIES, supra note 26.

\(^{58}\) See MURPHY, BIG BOOK, supra note 8, at 43-4 (“Essentially, one calculates the similarity of the item to the feature list. For every feature the item has in common with the representation, it gets ‘credit’ for the feature’s weight . . . . After going through the object’s features, one adds up all the weights . . . . If that numbers is above some critical value . . . the item is judged to be in the category.”).
The theory clearly avoids some of the problems of the classical approach to concepts. The factors used in deciding the scope of the concept are not necessary and sufficient conditions. An entity can fall within a concept’s scope even without meeting all the criteria. Moreover, this approach helps account for a sense of indeterminacy and typicality found in the use of most concepts. Thus, at first glance, the weighted factor test seems to model the reality of concept usage better than the definitional approach.

Nonetheless, the weighted factor approach is not the only theory competing for attention. The “exemplar” view takes a slightly different approach. Under this approach, a concept is linked to a set of examples, which represent entities that an individual already believes falls within the concept-category. Thus,

[A] person’s concept of a dog is the set of dogs that a person remembers. . . . [Y]our concept of dogs might be a set of a few hundred dog memories that you have. Some memories might be more salient than others, and others might be incomplete and fuzzy due to forgetting. Nonetheless these are what you consult when you make decisions about dogs.

Essentially, to determine whether a creature is a dog, you compare the creature to all the examples of things you already know are dogs (as well as examples of things you know are not dogs). If you conclude that the creature is more similar to the dog-set than the non-dog set, you conclude that it is a dog.

The difference with the weighted features test is subtle. The weighted features test suggests that individuals synthesize the exemplars they come across, creating list of abstracted features that together could be said to represent a general description of the concept. The exemplar approach rejects this view, suggesting that individuals keep individual examples of a concept in mind and loosely compare new phenomena with each of these examples. As Gregory Murphy puts it, “the question is, then, when you have seen a few dozen llamas, are you forming

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59 MARGOLIS & LAURENCE, CORE READINGS, supra note 25, at 25.
60 See MURPHY, BIG BOOK, supra note 8, at 44.
61 Id.
62 Id. at 49 ("Basically, what you do is (very quickly) consult your memory to see which things it is most similar to. If roughly speaking, if most of the things it is similar to are dogs, then you’ll conclude it is a dog"). Of course, how this similarity decision is made is a critical issue itself, one that cognitive scientists have debated. The contours of that debate are beyond the scope of this paper. For further discussion, see id. at 51-7.
a general description of the llamas – as the [weighted factors] view says – or are you just getting a better idea of what llamas are like because you have more memories to draw on – as the exemplar view says?"  

Like the weighted factor approach, the exemplar approach addresses some of the shortcomings found in the classical approach. For example, as Murphy points out, this approach “has a natural explanation for the typicality phenomenon. The most typical items are the ones that are highly similar to many category members.” Some research suggests that individuals take less time to categorize highly “typical” members of a category compared to less-typical members. That is, individuals are faster in concluding that an apple is a “fruit” than a fig is a fruit. The exemplar approach is consistent with that view too. Because “typical” cases are “very similar to a large number of category members, . . . it is very easy to find evidence for their being members.”

Both the weighted factor and exemplar tests have their appeal. Researchers have searched for evidence to determine which more closely tracks conceptual practices– or whether some other theory does an even better job. And of course, it is possible that a more complex mechanism that combines several different approaches at once (or in different contexts) might operate as well. The point is not to resolve that debate here, but simply to offer a taste of the kinds of research projects that are pursued in the field, and to underscore the general cogency of the theoretical goals and methods.

D. **Reconsidering the Descriptive Goals of Science**

The discussion thus far suggests that scientific conceptual analysis has a clear descriptive goal, and that the method is plausibly well-suited to promote that goal. In this sense, scientific

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63 Id. at 51. To be sure, the line between these two theories might not be as firm as this discussion suggests. For example, even the weighted-factor theorist must admit that “at the very initial stages of learning, . . . you remember individual exemplars, or else you would have no basis on which to form generalizations.” Id. at 51. See also id. at 64-5 (discussing overlap of theories). Murphy concludes: “for real-life concepts, we would do best not to assume that a single form of conceptual representation will account for everything.” Id. at 65.

64 Id. at 50.

65 Id. at 50.

66 A third major theory -- “the knowledge approach” -- is discussed id. at 60-64 & 141-197. The details of that theory are beyond the scope of this paper.
analysis appears to illustrate a coherent and well-structured approach to conceptual analysis. That may seem like an uncontroversial claim, but the conclusion is not quite as straightforward as it might seem. Before continuing, some attention must be paid to a subtle and sophisticated criticism of this conclusion, a criticism advanced by philosophers of both science and of law.

The criticism makes an ambitious claim. It asserts not only that the scientific analysis of concepts cannot be characterized as a descriptive enterprise, but that the scientific method in general is not a descriptive approach. According to this line of argument, all methods, including the scientific method, must ultimately rely on the theorist’s values. Indeed, according to some critics, these methods must ultimately rely on the theorist’s own moral and ethical values. This is a global attack on descriptive methodologies; if true it would mean that the scientific analysis of concepts cannot promote the descriptive goals of the cognitive scientists. Nor can any other method.

This argument might, at first, seem like a frivolous objection, given what seems to be the plainly empirical orientation of the scientific method. But although the anti-descriptive critics are ultimately mistaken in fundamental ways, they also have a point. To understand their point and its significance, consider briefly how researchers attempt to develop scientific models of reality in general.

That attempt typically requires a researcher develop a theory that fits experimental data. A central problem, as philosophers have long recognized, is that an infinite number of theories can explain any set of data. To decide which of these theories is worth considering (and which is “best”), researchers must make a value judgment. In doing so, researchers rely on what are called “epistemic values.”

Explanatory accuracy – how well a theory fits the available evidence – is a core epistemic value, one that seems relatively unproblematic given the descriptive goals of modeling reality.

67 In one trivial and uninteresting sense, all description involves a normative judgment -- the judgment that description is valuable. Nonetheless, the effort is still descriptive in the sense that I am using the term, so long as the objective of theorizing is to mirror reality rather than evaluate or prescribe a result. Typical scientific research illustrates this situation. An astronomer might believe that studying the stars is a good and worthy pursuit, but the claims he makes about the stars are value neutral (or aspire to be). He is not saying how stars “should” be, but how they are.
68 Many legal theorists have made the same claim, including Perry, Postema, and Stavropolous. See Leiter, Beyond the Hart/Dworkin Debate, supra note 19, at 12 (discussing these theorists).
69 See, e.g., Perry, Methodological Positivism, supra note 13, at 327 (“Any given social phenomenon can be accurately described in an indefinitely large number of ways.”).
But how should one distinguish between theories with comparable explanatory power? At one time, Kepler and Galileo’s theories both had comparable explanatory power. How should one decide which is “best”?

In practice, theorists typically introduce additional epistemic values -- such as simplicity and scope – to help decide which theories they favor. To be sure, epistemic values do not always resolve disagreements about the best theory, since individuals may interpret the values differently, and may give different weights to the various epistemic values. Nonetheless, theorists have little choice but to rely (implicitly or explicitly) on epistemic values of some sort in deciding which theory they deem most appealing.

Reliance on epistemic values raises questions about the descriptive enterprise. Even if these values are not “moral” principles, they are still values that are used to “evaluate” the different theoretical options. Doesn’t the reliance on these values as standards for determining the best theory make the scientific method non-descriptive?

The answer depends on the function of epistemic values like “simplicity” and scope. If epistemic values are thought to ensure that theories more accurately correspond to reality, then these values are consistent with the descriptive goals of science. Some have made precisely this

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70 See Thomas S. Kuhn, Objectivity, Value Judgment, and Theory Choice, in INTRODUCTORY READINGS, supra note 30, at 436 (discussing epistemic values of accuracy, consistency, scope, simplicity, and fruitfulness). Kuhn notes that accuracy ultimately “proves most nearly decisive of all the criteria . . . especially because predictive and explanatory power, which depend on it, are characteristics that scientists are particularly unwilling to give up.” Id. at 437.

71 As Waluchow writes: “There is no doubt whatsoever that scientists are guided by evaluative judgments of a variety of kinds in developing, choosing, and assessing scientific theories. The same is true in jurisprudence. The value [that] plays a crucial role is, as we have seen, something which no positivist, with the possible exception of Kelsen, would wish to deny.” W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 25 et seq. (1994). See also Perry, Methodological Positivism, supra note 13, at 323 (“The [descriptive-explanatory] method assesses theories by means of criteria that are properly called evaluative, such as predictive power and simplicity, but the values in question are applicable to all scientific theories, and they are not normative in character.”); Ernan McMullin, Values in Science, in INTRODUCTORY READINGS, supra note 30, at 528 (“[T]hese criteria operate as values do, so that theory choice is basically a matter of value-judgment.”).

72 A rationale for using epistemic values must exist, unless their use is arbitrary. But what rationale? Consider simplicity as an epistemic value. Why is the simpler of two theories the best one, absent some other assumptions about “truth” or about the objectives of the enterprise? Cf. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 19-20 (1994) (Waluchow asserts that it is not abundantly clear why, in the absence of more explanation, the simpler of two theories should be thought more likely true, not merely more useful. But the fact remains that simplicity is a value in theoretical inquiries of all kinds. It represents what we will call a ‘meta-theoretical-evaluative’ criterion: a criterion governing the assessment or evaluation of theories.”). Moreover, on what basis do we balance epistemic values against each other, or limit our pursuit of any single epistemic value. Einstein once famously said: “Everything should be made as simple as possible, but not simpler.” On what grounds should a simpler theory be endorsed?
argument, claiming that the reliance on epistemic values serve this instrumental purpose.\footnote{Epistemic values are “supposed to promote the truthlike character of science.” McMullin, \textit{Values in Science}, in \textit{INTRODUCTORY READINGS}, supra note 30, at 530. But cf. Philip G. Frank, \textit{The Variety of Reasons for the Acceptance of Scientific Theories}, in \textit{INTRODUCTORY READINGS}, supra note 30, at 466 (epistemic values are not able to explain why we chose Copernicus’ theory over Ptolemy).}

Values such as simplicity are thought to ensure that a theory is more likely to correspond to real phenomena or mechanisms in the world. To be sure, theorists can acknowledge that epistemic values are ambiguous, and that difficulty exists in determining how much weight to give to each. But that does not undermine the coherence of the endeavor. All one must believe is that a general fealty to epistemic values will help ensure that, over the long run, theories will be guided to the correct result (to the result most likely to correspond to reality). The approach is descriptive in the sense that it describes, or attempts to describe, real mechanisms that underlie concept formation.\footnote{This is not to suggest that these theories fully capture reality or that they are correct in all contexts. New applications and new questions inevitably arise that require modifications or clarification of a theory. Thus, Newton’s theory may have offered a relatively accurate representation of physical motion in certain contexts, but that theory fell short when it was applied to very small phenomenon or very fast motion. The theories of relativity and quantum mechanics were developed to account for those circumstances. A descriptive model, therefore, may never be a complete or comprehensive theory. But it must seek -- and hopefully move towards -- more and more accurate and comprehensive models of reality.}

We need not determine whether this conclusion is ultimately correct, for it is at the very least plausible.\footnote{And it is one that is widely shared. It is often associated with what philosophers of science call “scientific realism.” This is the view that scientific theories, even theories about phenomena that are not directly observable, seek to correspond to real processes or real entities. See Alex Rosenberg, \textit{A Field Guide to Recent Species of Naturalism}, 47 BRIT. J. PHI. SCI. 1, 5 (1996) (“[R]ealism” might be said to be the theory “that our scientific theories are approximately true, and increasing in their approximation to the truth.”); Roger Jones, \textit{Scientific Realism in Real Science}, 2 PSA: \textit{Proceedings of the Biennial Meeting of the Phil. of Science Ass’n} 167, 168 (1998) (realists “share the general hope that the scientific enterprise has the capacity to provide accounts of this nature of things itself that are true”); Chalmers, supra note 33, at 146 (realism says that “theories do or aim to describe what the world is really like.”). This view plainly preserves the descriptive orientation of the scientific method.} And that is enough to conclude that the anti-descriptivist critique fails here. The scientific analysis of concepts offers at least a plausibly coherent methodology, one well-suited to advance the descriptive goals of researchers in the field. That is true even if theorists must rely on epistemic values to develop their models of reality.

\section{III. LEGAL THEORY AND THE SCIENTIFIC METHOD}

We have suggested thus far that cognitive science offers a plausibly coherent method of
doing conceptual analysis. Whether the same can be said of legal theory is a more difficult question. The central obstacle in making an assessment of conceptual analysis in legal theory is the fundamental ambiguity of the jurisprudential method. Legal theorists tend to agree that their objective is to analyze the concept of “law,” but beyond that little definitive can be said. The precise subject matter, objectives, and tools of the enterprise all remain unclear. As Ronald Dworkin has observed, “it is difficult to find any helpful positive statement of what these methods and ambitions are.”

To simplify the analysis, the focus here will be on the work of H.L.A. Hart, and specifically his analysis of the concept of law. Hart is the most influential theorist in the field, and he is the individual most responsible for the spread of conceptual analysis in the law. Even this more limited focus does not solve all our difficulties. Hart himself was notably unreflective about his methodological commitments, and he failed to provide a clear description of his favored approach to conceptual analysis. As a result, it is not a simple matter to evaluate Hart’s method.

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76 Nicos Stavropoulos, Hart’s Semantics, supra note 6, at 69 (“What conceptual analysis is, however, is not entirely clear.”); Coleman, Incorporationism, in HART’S POSTSCRIPT (Although the importance of Hart’s work “is undisputed, there is a good deal less consensus regarding its core commitments, both methodological and substantive.”).

77 RONALD DWORKIN, JUSTICE IN ROBES 165 (2008). Fortunately, that state of affairs may be changing. Over the past several years, the “methodology problem” in jurisprudence has moved into the spotlight, with works on the topic by Dickson, Leiter, Bix, Perry, and others. See, e.g., Stephen Perry, Methodological Positivism, supra note 13; JULIE DICKSON, EVALUATION AND LEGAL THEORY (2001); Brian Leiter, Beyond the Hart/Dworkin Debate, supra note 19. Cf. Leiter, Legal Realism, supra note 1, at 357 n.9 (“Judging from recent work circulating in manuscript, it now appears the subject is attracting more attention from legal philosophers”).

None of these theorists, however, have offered a full-scale examination of what conceptual analysis represents, how it should be implemented, and whether it is a useful and appealing method for legal philosophy. The obstacle to analysis, as Stephen Perry observes, is that methodological issues may be “the most difficult and intractable questions” in legal theory. Stephen R. Perry, Interpretation and Methodology in Legal Theory, in LAW AND INTERPRETATION 97 (Marmor, ed. 1995).

I should also note that Brian Leiter frames the “methodology debate” in a focused way. For him, it is a debate not simply on the appropriate methodology for legal theory, but more specifically “about whether a theory of law can be a purely descriptive theory, or whether it must necessarily ask about the moral merits of particular kinds of laws and legal systems in order to have a satisfactorily theoretical account of its subject matter.” Brian Leiter, The End of Empire: Dworkin and Jurisprudence in the 21st Century, 36 Rutgers L. J. 165, 170 (2004). In effect, this paper is also focused on that question, since it asks whether any methodology can effectively promote Hart’s descriptive goals.

78 Hart repeatedly referred to his major work, the Concept of Law, as a work of conceptual analysis and analytical jurisprudence. See, e.g., HART, supra note 5, at 17 (The theory identifies “the central elements in the concept of law”); id. at Preface (“[T]he lawyer will regard the book as an essay in analytical jurisprudence, for it is concerned with the clarification of the general framework of legal thought.”). See also, Perry, Methodological Positivism, supra note 13, at 314 (“Hart states, as the title of his book in fact suggests, that his primary methodology is conceptual analysis.”). Analytical jurisprudence is widely understood as involving the study of concepts. See Brian Bix, On Philosophy in American Law: Analytical Legal Philosophy, in ON PHILOSOPHY IN AMERICAN LAW (F. J. Mootz, III, ed., Cambridge University Press, 2009) (discussing role of conceptual analysis in analytical philosophy).
At best, his claims rely on an unstated, implicit methodology; at worst, his arguments are muddled or unintelligible.

To determine if Hart embraces an implicit methodology, the following sections consider a range of conceptual methodologies in an attempt to see if any help make sense of Hart’s core claims. This Part explores whether the scientific method helps make Hart’s claims intelligible. Part Four then turns to look at several alternative methodologies, including hermeneutic and philosophical analysis.

A. Hart the Scientist

It may seem odd to suggest that Hart adopts scientific analysis in his study of concepts. Hart is not a scientist, nor is he engaged in empirical research in any traditional sense. But rejecting scientific analysis out of hand is a mistake.

Hart, after all, certainly saw himself as an expert on legal thought. Although he did not set up controlled experiments to study the way individuals use the concept of law, he did have broad experience in legal practice and in the academy. Hart may have felt comfortable drawing upon his wealth of experience to assess how the concept of law was used and understood in the legal realm. Moreover, whether this was Hart’s conscious thought or not, Hart’s claims about his goals and methods are surprisingly similar to those of cognitive scientists.

Consider, as an initial matter, Hart’s theoretical ambitions. While Hart makes both normative and descriptive claims about concepts in his work, he is fairly explicit about his goals. Like the cognitive scientists, Hart affirms that he is engaged in a “descriptive” project – what he calls a work of “descriptive sociology.”

He speaks of “description” in a familiar way; his project embraces “morally neutral and non-justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law.”

A range of commentators has similarly concluded that Hart is engaged primarily in a

79 HART, supra note 5, at vii. See also id. at 239 (“My aim in this book was to provide a theory of what law is which is both general and descriptive”).

80 HART, supra note 5, at 240. See also H. L. A. Hart, Comment, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H. L. A. HART 37 (R. Gavison, ed. 1989) [hereinafter Comment] (“[T]here is a standing need for a form of legal theory or jurisprudence that is descriptive and general in scope.”).
Not only are Hart’s goal’s similar to the cognitive scientists but, even more strikingly, many of his general claims about concepts are consistent with scientific analysis. Like the cognitive scientists, Hart recognizes that individuals are often unreflective about the concepts they employ and are influenced by factors they may not consciously recognize. Referring to Augustine’s observation about the inscrutability of the concept of time, Hart draws an analogy to legal theory. “It is [exactly] this way that even skilled lawyers have felt that, though they know the law, there is much about the [concept of] law . . . .they cannot explain....”

That is why, Hart argues, conceptual analysis requires “philosophical elucidation.” By that, he means that the theorist should seek out the implicit or latent criteria that determine why individuals believe certain phenomenon fall within a concept’s scope and others do not. Like the cognitive scientists, Hart suggests that the effort will be guided by the “explanatory power” of the analysis.

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81 See DWORKIN, JUSTICE IN ROBES, supra note 77, at 140 (Noting that Hart’s project is descriptive and “aims to understand but not to evaluate the pervasive and elaborate social practices of law”); Perry, Methodological Positivism, supra note 13, at 312 (Hart’s statements represent “very good evidence that he meant to adopt a framework of methodological positivism.”); W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 64 (1994) (Hart’s approach “is entirely descriptive”).

82 Hart, Analytical Jurisprudence, supra note 11, at 964 (“We may know how to use concepts, but we cannot say how or describe how we do this in ways which are intelligible to others and indeed to ourselves.”); H. L. A. HART AND TONY HONORE, CAUSATION IN LAW 24 (2nd ed. 1985) (“The ordinary man has a quite adequate mastery of various concepts within the field of their day to day use, but along with this practical mastery goes a need for the explicit statement and clarification of the principles involved in the use of these concepts.”).

83 See Hart, Concept of Law, supra note 5 (discussing Augustine’s time example).

84 See Hart, Analytical Jurisprudence, supra note 11, at 965 (“This surely is a predicament which makes the philosophical elucidation of concepts necessary.”).

85 See Hart, Concept of Law, supra note 5, at 215 (“[T]he extension of the general terms of any serious discipline is never without its principle or rationales, though it may not be obvious what it is. When, as in the present case, the extension is queried by those who in effect say, “we know that it is called law, but is it really law?, what is demanded – no doubt obscurely – is that the principle be made explicit and its credentials inspected.”); Stavropoulos, Hart’s Semantics, supra note 6, at 74 (Hart contends that the “actual usage of general terms is guided by implicit principles or rationales that need explicit articulation.”).

86 As he writes, the analysis, must itself be guided, in focusing on [certain] features rather than others, by some criteria of importance of which the chief will be the explanatory power of what his analysis picks out. So his analysis will be guided by judgments, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values. But again there is nothing to show that this analysis is not descriptive, but normative and justificatory.

Hart, Comment, supra note 80, at 39. In contrast, Stephen Perry takes issue with this conclusion, arguing that Hart does not give us any reason to believe that his theory of law is superior, in terms of its explanatory power, compared to other theories. Perry, Methodological Positivism, supra note 13, at 321. Thus, Perry concludes that, while Hart
The similarities with cognitive science go further. Perhaps most intriguingly, Hart makes statements about the structure of concepts that seem to foreshadow the empirical work and insights of cognitive scientists decades later. For example, Hart rejects the classical approach to concepts, which assumes that concepts are best understood in terms of formal definitions. Instead, Hart notes that concepts are often vague and without clear boundaries, and thus should not be defined in terms of necessary and sufficient conditions. Indeed, he recognizes that most concepts typically have an “open texture” -- a boundary of vagueness, an ambiguous penumbra. And he bemoans the wasted efforts of theorists seeking to identify the common features that all people using general terms -- like law -- must share.

This does not mean that Hart believes that ordinary or legal concepts are entirely indeterminate or vague. Rather, Hart says, concepts have a solid core of meaning, with

“does invoke the notion of explanatory power,” he does so “not in the ordinary scientific sense” Id. at 321.

As Hart puts it in an earlier essay,

a fundamental error consists in the belief that legal concepts are fixed or closed in the sense that it is possible to define them exhaustively in terms of a set of necessary and sufficient conditions; so that for any real or imaginary case it is possible to say with certainty whether it falls under the concept or does not; the concept either applies or does not; it is logically closed. This would mean that the application of a concept to a given case is a simple logical operation conceived as a kind of unfolding of what is already there, and, in simpler Anglo-American formulation, it leads to the belief that the meaning of all legal rules is fixed and predetermined before an concrete questions of their application arises.

H.L.A. Hart, Jhering’s Heaven, supra note 1, at 269. See also Stavropoulos, Hart's Semantics, supra note 6, at 65 (Hart concludes, “there are no jointly sufficient and severable necessary conditions for the application of terms. Rather, a new semantic analysis is needed.”).

HART, CONCEPT OF LAW, supra note 5, at 252 (“Legal rules and principles identified in general terms by the criteria provided by the rule of recognition often have what I call frequently ‘open texture,’ so that when the question is whether a given rule applies to a particular case the law fails to determine an answer either way and so proves partially indeterminate.”); Id. at 270 (“This means that all legal rules and concepts are ‘open’; and when an unenvisaged case arises we must make a fresh choice, and in doing so elaborate our legal concepts, adapting them or socially desirable ends.”); Id. at 128 (discussing “open texture” of concepts). See also Hart, Analytical Jurisprudence, supra note 11, at 956 (“One of the results of analytical jurisprudence itself has been and is increasingly the demonstration of the open texture or vagueness of the periphery of the concepts used in the daily life of the law and the many ways in which rules of law involving such concepts fail to determine uniquely decisions in particular cases.”).

HART, CONCEPT OF LAW, supra note 5, at 279 n.15. To be sure, Hart recognizes that, for legal terms, courts can stipulate necessary and sufficient definitions of a term. But Hart suggests that, in practice, legal concepts embodied in legislation (and judicial opinions) have a degree of vagueness, since legislators (and courts) cannot envision all the possible scenarios that might arise. This is primarily because man’s predictive powers are limited, and hence individuals can only address the fact-situations they confront at any specific time. Id. at 129. See also id. at 275 (“[W]e have no way of framing rules of language which are ready for all imaginable possibilities. . . . Hence, there can be no final and exhaustive definitions of concepts, even in science.”).
vagueness at their periphery. Conceptual analysis, in this regard, should focus on the common core and identify the structure of the central aspect of the concept.

Some theorists contend that Hart even takes sides in the current debate over the appropriate model to explain concept formation. Several theorists have argued, for example, that Hart endorses something like the “exemplar” approach to concepts. Under that approach, statements about “the law” represent the claim that a given phenomena is sufficiently similar to paradigmatic examples of the concept of law to deserve the name.

The idea that Hart endorses the exemplar approach has some support in his writings; Hart frequently makes references to paradigms in his work. In Concept of Law, for example, Hart explains that our understanding of concepts is based on accepted paradigms, the “clear or plain cases of the law.” The plain cases are “familiar ones, constantly recurring in similar contexts, where there is general agreement.” Hart is quite clear that these paradigms are central to the way individuals use concepts.

Paradigms also anchor the way individuals think about other, less clear-cut cases too. As he writes, individuals often argue by “analogy” from these paradigms to hard cases. Thus, in hard cases, Hart says, “all that the person called upon to answer can do is to consider . . . whether the present case resembles the plain case ‘sufficiently’ in ‘relevant’ respects.” The precise process

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90 H.L.A. Hart, Positivism and the Separation of Law and Morality, 71 Harv. L. Rev. 593, 607 (1958) [hereinafter Positivism] (though concepts are vague, they are not completely vague); Hart, Analytical Jurisprudence, supra note 11, at 957.3.
91 HART & HONORE, CAUSATION IN THE LAW, supra note 82, at 25 (“As with every other empirical notion, we can hope only to find a core of relatively well-settled common usage amid much that is fluctuating, optional, idiosyncratic, and vague; but the study of this core, as in other cases, may be enough to shed light on at least the darkest corners. A conceptual investigation is served by the delineation of the main trends of usage, not by the compilation of a dictionary.”).
92 Hart, supra note 5, at 126.
93 Id. at 126.
94 See Hart, Comment, supra note 80, at 37 (“So I began my book with the assumption that at the point where the legal theorist raises and attempts to answer the question ‘What is law?’ any educated man would be able to cite as an answer to that question what Dworkin calls ‘paradigms’ of law (my example included rules forbidding murder and rules requiring payment of taxes) and would be able to specify the salient features of a municipal system.”).
95 Hart, supra note 5, at 126 (peripheral cases are those possessing “‘only some of the features of the plain cases’ and so produce[e] uncertainties.”).
96 Id. at 127. See also Stavropoulos, Hart’s Semantics, supra note 6, at 95 (Where there is uncertainty, “we choose to apply or withhold application, based not on criteria but on arguments of similarity to the exemplars.”); Thomas A. O. Endicott, Herbert Hart and the Semantic Sting, in HART’S POSTSCRIPT 43 (Jules Coleman, ed. 2001) [hereinafter Semantic Sting] (“[A]ll that Hart is claiming about concepts is that their instances must be linked together by resemblances to ‘plain indisputable cases’, to the clear standard case or paradigm for the use of an expression, to
by which individuals make this analysis is left unclear, but Hart leaves open the possibility that
the way in which we argue from core cases to peripheral uses might have its own logic.\textsuperscript{97} As we
will see shortly, Hart’s model of conceptual understanding is more complex than this description
suggests, but at least on this surface level, his approach is strongly evocative of the exemplar
model of concept formation.

B. The Complexities of Hart’s Concept of Law

So far, at least, Hart’s statements seem entirely, perhaps surprisingly, consistent with
scientific analysis. Many of his comments – his descriptive goals, his claim about the vagueness
of concepts, his search for latent meaning, his focus on underlying criteria – all track the views of
cognitive scientists. Some of his claims even seem to foreshadow insights made in that discipline
decades later.

If this were all Hart said about concepts, we might reasonably conclude that he is engaged
in a form of scientific analysis. But a closer look at Hart’s work reveals the difficulty in viewing
him as offering a coherent scientific analysis of the concept of law. The following subsections
highlight two key problems – Hart’s failure to clarify the specific concept of law under analysis,
and his strikingly implausible claims about the rule of recognition.

1. Law’s Ambiguity

\textsuperscript{97} Hart, \textit{Analytical Jurisprudence}, \textit{supra} note 11, at 968. Of course, the fact that Hart speaks of paradigms and clear
cases does not fully eliminate the possibility that he endorses the weighted factors test. Whether that is so depends on
how Hart views the structure of paradigms. Paradigms, as cognitive scientists appear to use the term, are
unstructured and undifferentiated anchors for concept formation. They are not reducible to individual criteria;
otherwise the paradigm approach would be reduced to the weighted-factors approach.

So does Hart believe paradigms are unstructured entities that cannot be analyzed into smaller factors or
criteria? Once again, Hart is not entirely clear on this score. At times Hart seems to view paradigms as fixed points,
which cannot be analyzed further. That seems to support the view that he adopts the paradigm approach. At other
times Hart speaks of the “features” that paradigms possess and suggests that the prevalence of these “features”
determines whether something is classified as being part of the same concept. Thus, Hart writes that where a term is
vague, we have two contrasting impulses -- one that “inclin[es] us to assimilate to the standard case those cases which
have only some of these features, . . . [and] a counter strain inclining us to withdraw the concept in the absence of
certain of these features. The analytical task . . . is to examine the various motives that may incline us one way or the
other in dealing with the borderline case,” Hart, \textit{Analytical Jurisprudence}, \textit{supra} note 11, at 968. This language
suggests Hart adopts the “weighted factors” test, not the paradigm approach.
The method of scientific analysis faces certain complexities when applied to the concept of law that do not arise – or at least do not arise to the same degree – in the work of cognitive scientists. The problem is what might be called “subject matter ambiguity.” This refers to the difficulty in identifying precisely which concept is the subject of analysis. Subject matter ambiguity is less of a problem for cognitive scientists in part because researchers tend to focus on concepts relating to physical entities – like tables, birds, or vegetables. Dealing with concrete phenomena -- which the theorist can touch, hold and point to -- eliminates much of ambiguity (though certainly not all) concerning the specific subject matter under analysis. 

But the concept of “law” is much more abstract, and one result of this abstractness is that the term “law” can refer to a host of different concepts. Earlier, we noted a few examples of concepts that fall under the label “law” -- such as religious law, natural law, scientific law. But even if we limit our focus to the “legal” realm, the term “law” can refer to a range of ideas, each with slightly different meanings. Ronald Dworkin, in his recent work *Justice in Robes*, touches on several different concepts in that realm to which the term “law” might refer. 

Dworkin, for example, distinguishes the “doctrinal” concept of law from the “sociological” concept. The doctrinal concept refers to the legal rules that are in effect at a given time. As Dworkin says, “we use the doctrinal concept when we say . . . that under Rhode Island law a contract signed by someone under the age of twelve is invalid.” By contrast, the sociological concept of law refers to “a particular type of institutional social structure.” Thus, we might say: “civilization emerged when law first appeared in tribal societies,” or “commerce is possible without law.” 

Actually, Dworkin may underestimate the complexity of the subject matter. Many of the concepts Dworkin mentions are themselves ambiguous. For example, the doctrinal concept

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98 I say “not all,” because at least a degree of ambiguity can exist even with respect to supposedly concrete objects. Quine famously describes an imaginary tribe whose members utter the word “gavagai” each time they point to a rabbit. Quine observes that we cannot be certain that gavagai refers to our concept of “rabbit.” It may, for example, refer to “brief temporal segments of rabbit” or “undetached rabbit parts” or something of the like. W.V.O. QUINE, WORD AND OBJECT 78 (1960). 
99 DWORKIN, JUSTICE IN ROBES, supra note 77, at 2-5, 140-86 (discussing various concepts of law). 
100 Dworkin also identifies several other concepts of law, including what he calls the “taxonomic” and “aspirational” concepts of law. *Id.* at 4-5. 
101 *Id.* at 2. See *id* at 263 n.1 (“The doctrinal concept collects valid normative claims and propositions.”). 
102 *Id.* at 3. 
103 *Id.* at 3.
(which refers to the specific rules of law) can itself be interpreted in at least two different ways. These might be called the “precedential” and “adjudicatory” concepts of (doctrinal) law. The difference between the two is significant.

To understand the difference, consider a recent Supreme Court case, *Graham v., Florida*. That decision held that a life sentence without parole is cruel and unusual punishment when applied to a juvenile convicted of a non-violent offense. Suppose that, in speaking about the case, one individual declares: “It’s the law.” The individual, we can assume, is using the term “law” to refer to the specific Supreme Court decision, a decision that has been promulgated by an authoritative institution (and remains in force). This is what we’ll refer to as the “precedential” concept of (doctrinal) law.

In contrast, a second individual, discussing the same case, affirms that “under *Graham*, the law is that juveniles can only be sentenced to life without parole for a homicide offense.” This is not a claim simply about the existence of a specific decision promulgated by the Supreme Court, but a claim about the valid scope of that ruling, its extension. Indeed, the “rule of law” that the individual is affirming goes a bit beyond the facts of *Graham* (which applies to non-violent crimes only). In making this claim of law, then, the individual draws upon various interpretive principles to determine the proper scope of *Graham*. In that sense, the reference is to a “law” that exists somehow beyond the specific ruling itself.

We might call this alternative version the “adjudicatory” concept of (doctrinal) law, since the concept puts the individual in the role of adjudicating the scope of the law. A judge ruling in a pending case is the classic kind of adjudicatory context. But any individual, lawyer, or official who makes a claim that about the scope of valid “law” based on his personal interpretive principles is using the concept of law in this way.104

The difference between the adjudicatory and precedential concepts is presented in sharp relief by considering a third statement: “*Graham v. Florida* may be the law, but it is unlawful.”

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104 The distinction between the adjudicatory and precedential concepts of law is subtle and perhaps not entirely clear-cut. When speaking about settled law, we often invoke interpretive principles to identify a decision’s scope and “meaning.” In effect, we interpret settled law by drawing out a rule of decision, and in doing so we imagine how that decision might be used in future cases. In this regard, settled law represents a key factor in adjudicatory decisionmaking. Nonetheless, these two concepts are distinct if we limit the precedential concept simply to the fact of the Court’s decision, without applying any interpretive principles. Thus, for any given case, we might simply say that the Court ruled for or against a given plaintiff without trying to generalize a rule of decision and without considering the Court’s rationale for its ruling.
The statement seems, at first glance, contradictory. Yet it makes sense to us. The reason it makes sense is that the speaker is using the term “law” in two different ways. When the speaker says that *Graham* is “the law,” he is using the term in the “precedential” sense (implying the decision represents binding precedent). By contrast, when the speaker says *Graham* is not-law (“unlawful”), he is using the concept law in the adjudicatory sense (implying the decision violates accepted principles of interpretation).

This distinction between the precedential and adjudicatory concepts of law highlights the variety of concepts that fall under the rubric “law.” To be sure, these various concepts of law might be related to each other, overlapping in different ways or representing different levels of generality. Nonetheless, the concepts mean different things, and scientific analysis will yield different results depending on which concept is the focus of analysis.

For example, consider the kinds of factors that might influence an individual to state that *Graham v. Florida* is valid precedent (that is, falls within the “precedential” concept of law). Such a claim invites an individual to consider which institutions have the authority to promulgate valid decisions, and to specify when those decisions remain in force. In contrast, a claim that *Graham v. Florida* is a justified decision (that is, falls within the “adjudicatory” concept of law) raises an entirely different set of considerations. Among other things, the claim invokes a range of interpretive principles – such as the relevance and weight given to text, precedent, morality, etc. Specifying the specific concept under analysis, in short, is a critical step in ensuring that scientific analysis yields coherent and intelligible results.

So which concept of law is Hart interested in analyzing? Unfortunately, Hart is virtually silent on that question; indeed, he shows little awareness of the range of concepts that fall under the label “law.” Hart’s silence raises questions about whether he is truly interested in using scientific analysis to explore individual attitudes about the law. To believe otherwise, we would have to conclude that Hart *implicitly* focuses on a specific concept of law. And to support such a claim, one would need to demonstrate that Hart’s theory of law makes sense if viewed as the

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105 This might not be entirely surprising. One might expect that for a term like “law,” different individuals – citizens, lawyers, judges – may all have slightly different views of the concept, or use the concept in different ways, depending on the context and reasons.

106 In a similar way, the concepts of “Liberty” in a general sense and “liberty of speech” might be related, such as in terms of their levels of generalization. Nonetheless, the scientific analysis of “Liberty” and “liberty of speech” would surely not be identical.
scientific analysis of a specific concept of law. Can such a demonstration be made? Does Hart adopt an implicit concept of law as the focus of his analysis?

Perhaps. At a general level, a plausible case can be made that Hart is interested primarily in the “doctrinal” concept of law. Key elements of Hart’s analysis – including his discussion of the rule of recognition and the normativity of “law” – support this interpretation. These elements, after all, focus on why individuals deem specific laws valid and binding. But this does not settle the matter entirely, for we have seen that the doctrinal account is itself ambiguous, encompassing both the adjudicatory and precedential versions of (doctrinal) law. Which, if any, of these more specific concepts is the focus of Hart’s analysis?

Any answer to that question will be largely speculative, since Hart says so little on the topic. Nonetheless, at least a plausible case can be made that Hart is primarily focused on analyzing the adjudicatory concept of law. Hart after all seems most interested in exploring the views of public officials about what counts as “valid” law, laws that are binding and obligatory. In this regard, Hart often writes about “the law” in the context of judges considering how they should decide cases.

This is particularly clear in his discussion of “hard” cases. For example, Hart writes, “[w]hen no law exists on a matter” -- because the rule of recognition is silent or ambiguous -- judges have discretion how to decide a cases. Hart uses the term “law” here in a broader sense than specific rulings of an authorized court; he is using the term to refer to the constellation of valid rules that lie, in a sense, beyond the specific decisions of the courts. This focus suggests his primary interest lies in exploring the “adjudicatory” concept of law. Assuming that this

107 In contrast to Hart, Ronald Dworkin makes absolutely clear that that he is interested in exploring the doctrinal concept of law. Id. at 2 (“The essays in this collection are mainly about law in what I shall call the doctrinal sense: The explore the concept of ‘the law’ of some place or entity being to a particular effect: we use the doctrinal concept when we say, for example, that under Rhode Island law a contract signed by someone under the age of twelve is invalid. . . .”).

108 In truth, Hart is not entirely consistent in this regard. At times, he appears to be discussing the sociological concept of law. Although space constraints prevent me from going into depth on this point, I do not believe that the ultimate conclusion of this paper would change if one were to view Hart’s analysis as focusing on the sociological, rather than the doctrinal, concept of law.

109 This conclusion is certainly debatable. In the Postscript to the Concept of Law, Hart seems to retreat from this position somewhat. He suggests he is actually interested in examining the “law on the books,” which seems akin to the precedential concept of law. Thus, in responding to Dworkin’s critique, he writes that the “starting point for the identification of any legal principles to be brought to light by Dworkin’s interpretive test is some specific area of the settled law which the principle fits and helps to justify. The use of that criterion therefore presupposes the identification of the settled law, and for that to be possible a rule of recognition specifying the sources of the law and
interpretation is correct, a key ambiguity in Hart’s analysis is rectified. But the ultimate question remains: Does this interpretation help make Hart’s specific claims about the law intelligible. The answer, as the following section suggests, is no.

2. The Criterial Concept of Law

The difficulty becomes clear when Hart begins to describe the detailed structure of the concept of law. We mentioned earlier that, in certain parts of the Concept of Law, Hart seems to embrace what cognitive scientists called the “exemplar” model of conceptual understanding. But although Hart frequently speaks of using paradigms to analyze the concept of law, he does not stop there. Hart suggests that the concept of law reflected in these paradigms has a deep and detailed logical structure. That conceptual core is structured by the so-called “rule of recognition.” As many have noted, the rule of recognition lies at the very heart of Hart’s theory of law, and it gives the concept of law its meaning.\textsuperscript{110}

Significantly, Hart makes clear that the rule of recognition is not comprised simply of a list of paradigms. Rather, the rule of recognition consists of a list of criteria that together determine what counts as valid law; it “sets out the conditions that must be satisfied in order for a norm to count as part of the community’s law.”\textsuperscript{111} As Hart recognizes, the specific criteria for determining what counts as valid law might, at times, conflict. Thus, the rule of recognition must offer a kind of priority list for resolving these conflicts. In that sense, the rule of recognition offers a master test for determining what ultimately counts a law.\textsuperscript{112} Partly for this reason, several theorists have

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\bibitem{} HART, CONCEPT OF LAW, supra note 5, at 266. In other words, the rule of recognition offers criteria for identifying the precedential concept of law. It is fair to wonder whether the following discussion might turn out differently if one were to focus on a different doctrinal concept, such as the settled law concept of law. The answer, I believe, is “no,” but I leave that discussion for another place.
\bibitem{} \textit{See, e.g.}, Stephen R. Perry, \textit{Hart’s Methodological Positivism}, supra note 13, at 320 (“The notion of the rule of recognition is the cornerstone of Hart’s theory of law.”).
\bibitem{} Jules L. Coleman & Brian Leiter, \textit{Legal Positivism}, in \textit{A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY} 245 (D. Patterson, ed. 2003) [hereinafter \textit{Legal Positivism}]. \textit{See also} HART, CONCEPT OF LAW, supra note 5, at 103 (“To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition as a rule of the system.”).
\bibitem{} HART, CONCEPT OF LAW, supra note 5, at 101 (“In most cases, provision is made for possible conflict [among authoritative sources of law] by ranking these criteria in an order of relative subordination and primacy.”). Hart thus seems to envision the rule of recognition as a unifying principle that resolves conflicts among possible sources of law. \textit{Id.} at 95.4 (rule of recognition “unifies” the various rules).
\end{thebibliography}
argued that Hart has adopted, not the paradigm approach to conceptual analysis at all, but an approach that might be called “criterialism.”\footnote{113}

On first glance, criterialism may sound similar to the classical view, which after all envisions concepts as being comprised of necessary and sufficient criteria. But the approach is not identical. Criterialism states that concepts are best explained by criteria (or “conditions”) that are “normally” necessary and sufficient to determine whether phenomena are part of the concept. But unlike the classical approach, the criteria are “defeasible in special circumstances, where a term may apply even though some of the criteria are not satisfied, and vice versa.”\footnote{114} That is, the criteria create presumptions that something is “the law,” but the presumption can be rebutted by other considerations.\footnote{115} Hart offers, in this way, a new model for concept formation.\footnote{116}

According to Hart, the rule of recognition is, or establishes, the “ultimate” rule of validity, in that no other source of validity supports that criteria. \textit{Id.} at 108; see also Liam Murphy, \textit{The Political Question of the Concept of Law}, in HART’S \textit{POSTSCRIPT} 376 (Jules Coleman, ed. 2001) (“The core of Hart’s description . . . is his explanation of how valid legal rules are identified by a hierarchy of criteria of validity that ends in the supreme criteria of validity as identified by the rule of recognition.”).

Certainly, the rule of recognition is not determinate in all cases. As Hart notes, in some cases, the rule of recognition is vague about what is or is not law (and in those cases, Hart says, judges have discretion on what the law is). But at least in typical cases, Hart suggests, the rule of recognition is clear.\footnote{113} RONALD DWORKIN, \textit{Law’s Empire} 31 (1986) (Criterial semantics claims that “we follow shared rules . . . in using any word: these rules set out criteria that supply the word’s meaning.”); DWORKIN, \textit{JUSTICE IN ROBES, supra note 77}, at 31 (“In \textit{Law’s Empire}, I suggested . . . that Hart assumed, in effect, that the doctrinal concept of law is a criterial concept and that analyzing that concept means bringing to the surface the criteria that lawyers actually use, even if unselfconsciously, in applying it). See also Stavropoulos, \textit{Hart’s Semantics, supra note 6}, at 65 (“This new semantics involves the notion of criteria . . . . The doctrine of criteria . . . is a genuinely semantic doctrine that is intended to replace the old doctrine of severally necessary and jointly sufficient conditions.”). For an in-depth discussion of Hart’s theory of criteria, see NICOS STAVROPOULOS, OBJECTIVITY IN THE LAW 62-8 (1996).

\footnote{114} Stavropolous, \textit{Hart’s Semantics, supra note 6}, at 65. But cf. Endicot, \textit{Semantic Sting, supra note 96}, at 44-5 (rejecting idea that Hart’s “theory of the law amount[s] to a set of criteria for the application of the word ‘law’”).\footnote{115}

Criterialism sounds very much like the “weighted factors” approach embraced by some cognitive theorists. Both focus on presumption-creating factors. Yet criterialism and the weighted-factors approach are not identical. The weighted-factors approach assigns a set of rough weights to each factor. To determine if a given entity falls within the concept’s scope, an individual assesses which factors are present, and then adds together the different weights to see if the entity surpasses the relevant threshold for applying the concept. This means that different combinations of factors might render an entity part of a concept category, depending on the weights assigned to the various factors. Thus, an entity with a beak, feathers and flies might be called a bird, but so might an entity with feathers, eggs, but does not fly.

Hart’s approach, which is reflected in his description of the rule of recognition, is different. The rule of recognition lists a range of criteria that generates presumption that an entity is “law.” The criteria, however, are not weighted factors. Rather, Hart conceives of the rule of recognition as providing a kind of hierarchical system of rules for determining what counts as law; rather than summing weights, the criterial approach offers a decision matrix for determining what sources of law or interpretive principles have priority when conflicts arise.\footnote{116}

To be sure, the idea that Hart has adopted criterialism isn’t without its detractors. Several theorists contend that Hart himself has rejected the criterial approach, pointing to his statement, in the \textit{Concept of Law}, that “nothing in my book or in anything else I have written supports such an account of my theory.” Hart, \textit{supra} note 5, at 246. See Einar Himma, \textit{Ambiguously Stung: Dworkin’s Semantic Sting Reconfigured}, 8 \textit{LEGAL THEORY} 145, 158 (2002) [hereinafter
This complex understanding of the rule of recognition grounds Hart’s explanation of the concept of law. The question, of course, is whether Hart’s claims about the criterial approach and the rule of recognition are correct. If we view Hart as offering a scientific analysis of law, the test is whether his criterial approach offers a plausible explanation for the way individuals think about the adjudicatory concept of law.

So does it? Unfortunately, the answer seems to be no. As an empirical matter, it seems highly unlikely that individual views about the scope of the law are, in practice, based on the kind of structured, internally consistent metric set out by the rule of recognition. Very few people have thought deeply on the kinds of interpretive and other considerations that underlie their judgments about valid law. Rather, claims about the justified scope of the law seem, in many cases, to be based on gut instinct, hunches, emotional responses. Hart, at the very least, gives us no reason to expect that the rule of recognition, as he describes it, plays a role in legal judgment.

Even less plausible is Hart’s adoption of the so-called “conventionality thesis.” This is the claim that, for law to exist, public officials must necessarily share the same rule of recognition. This is an entirely bizarre sort of claim from the perspective of scientific analysis. The thesis

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Ambiguously Stung] (denying that Hart’s “theory is a semantic theory and that it assumes a criterial approach”); Endicott, Semantic Sting, supra note 96, at 40.

The problem with this alternative interpretation is two-fold. First, Hart, in denying that he has adopted “such an account,” is responding to the criticism that he has adopted a “semantic” theory of law, one that seeks to identify criteria governing the word “law.” Thus, Hart’s response may simply highlight the point we have made previously that conceptual analysis is not the same as semantic analysis. See infra I.A. Second, as discussed further below, regardless of Hart’s conscious intent, the only way to make sense of certain key parts of Hart’s theory is to view him as adopting a criterial approach to the concept “law.” After all, if we reject the criterial approach, it is hard to understand what the rule of recognition represents. That, at least, is the conclusion shared by several other legal theorists, including Dworkin, Stavropoulos, and others. See DWORKIN, JUSTICE IN ROBES, supra note 77, at 31 (“I continue to think, as do other legal philosophers, that my original diagnosis [that Hart adopted a criterial approach] was correct and it has received fresh support” from recent works). See also Stavropoulos, Hart’s Semantics, supra note 6; Perry, Methodological Positivism, supra note 13, at 311.

117 Coleman, Incorporationism, supra note 1, at 115 (“Hart expresses the relevant notion of agreement in terms of a social practice comprising two elements: convergent behaviour and a critical reflective attitude toward that behaviour -- an acceptance of it. . . .”); Himma, Ambiguously Stung, supra note 116, at 147 (the rule of recognition requires both convergent behaviour and acceptance of rule as appropriate standard).

Some have interpreted the conventionality thesis to stand for the normative claim that the existence of shared principles generate obligations of obedience for individuals. Various commentators have questioned whether Hart really means to affirm such a claim. See Perry, Methodological Positivism, supra note 13, at 332-3 (questioning whether “Hart believes that acceptance of a social rule gives rise to an actual obligation,” and suggesting Hart merely meant that, “people regard themselves as obligated by the rule.”). See also JULIE DICKSON, EVALUATION AND LEGAL THEORY (2001). In referring to the “conventionality thesis,” I do not adopt this more controversial – and highly problematic – claim about the power of shared principles.

118 From one perspective, this is a claim about the necessary conditions for law to exist. Law can only exist when the rule of recognition is shared (by public officials). Hart, supra note 5, at 115 (“[W]hat is crucial is that there should be
asserts a controversial empirical judgment about the psychology of public officials -- that they share a concept of law, and that such concept is grounded in broadly accepted criteria of validity.

While such a claim might be intelligible, it is also wildly implausible. The fact that public officials frequently express disagreement with decisions, file dissents, speak about against opinions, indicate that they do not agree on the relevant criteria, or how conflicts among the criteria are to be resolved. This is Dworkin’s principal critique of Hart’s theory. As Dworkin says,

we argue for a particular principles by grappling with a whole set of shifting... standards... about institutional responsibility, statutory interpretation, the persuasive force of various precedents... We could not bolt all of these together into a single ‘rule,’ even a complete one, and if we could the result would bear little resemblance to Hart’s picture of a rule of recognition, which is the picture of a fairly stable master rule specifying ‘some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule.’

Further, one might expect that, if public officials actually share the same fundamental rule of recognition, it should not be difficult to identify the underlying elements. This is particularly

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a unified or shared official acceptance of the rule of recognition containing the system’s criteria of validity.”). This sounds very much like a realist position, akin to saying that water only exists when a compound is comprised of H2O. But certainly, there is no necessity for concepts to be shared. It is possible for an individual to hold an idiosyncratic view of concepts. In that case, we could just as reasonably say that individuals hold different concepts, and we certainly could proceed to analyze the idiosyncratic concepts into their idiosyncratic criteria. Claims about the necessary features of concepts thus seem to evoke the discredited realist picture of concepts.

These kinds of claims about the concept of law are pervasive in Hart’s work. For example, as discussed further below, Hart argues that the concept of law exists only if public officials consciously accept and use the underlying criteria for the concept to exist. Again, why must the criteria underlying concepts be consciously accepted by public officials? We have already seen that, for cognitive scientists, concepts exist in the minds of individuals without citizens consciously being aware of the factors or criteria used for their use. Thus, the concept of time or table or bird “exists” without conscious acceptance of a definition or meaning. Why should the concept of law be any different? Why can’t there be a concept of law without anyone being fully aware of the criteria used to define its scope? Hart offers no answer, and from the perspective of scientific conceptual analysis, none seems possible.

Similarly, Hart focuses on the psychology of a narrow subgroup in society (public officials). But Hart never explains why the concept of law depends on one group’s views at the expense of others. Indeed, for some defenders of conceptual analysis, the focus should be on the conceptual understanding of the community at large -- the folk meaning of the concept. FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENSE OF CONCEPTUAL ANALYSIS 32 (1997) (discussing conceptual analysis’s interest in folk theory).

119 See DWORKIN, supra note 113, at 37 (1986) (suggesting that Hart’s view implausibly implies that lawyers “are merely pretend[ing] to be disagreeing about what the law is”); Himma, Ambiguously Stung, supra note 116, at 159.2 (the empirical claim that individual’s share criteria “is so obviously implausible that it cannot charitably be attributed to any reasonably sophisticated theory of law.”).

120 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 40 (1978)
true since, for Hart, the rule of recognition is comprised of criteria that are consciously adopted. And yet, one of the most remarkable features of the positivists tradition is that neither Hart nor his followers have even attempted to identify the rule of recognition, nor is there an obvious candidate for it today.

C. **Rehabilitating Hart?**

Facing these challenges, one of Hart’s defenders, Kenneth Himma, has responded by offering several arguments why Hart’s conventionality thesis might be an accurate claim about the way individuals actually understand the concept of law. One of Himma’s suggestions is that Hart’s claims apply only to “easy” cases where little controversy exists regarding the outcome of the case. Hart, in this way, is really offering a deeper analysis of easy, or paradigmatic, cases of law -- those that benefit from near universal acceptance. Individuals, the argument goes, share criteria that explain why these cases are valid and justified.

But is that claim any more plausible than the last? Even in easy cases, officials rely on different criteria for justifying legal decisions. In many core constitutional decisions, judges employ different rationales – original intent, text, tradition, moral principle – in supporting their decisions. Indeed, even if we focus on cases that lie at the very heart of the legal system, individuals often possess differing justifying criteria.

Consider one of the central features of American law itself – the existence of judicial

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121 As Stephen Perry points out, if Hart’s goal is simply to identify criteria that are consciously adopted, then his theory, “would simply point out what was there to be seen but had not, for some reason, been previously noticed.” See Perry, *Methodological Positivism*, supra note 13, at 339.

122 Himma’s point seems consistent with Hart’s view that his conceptual approach attempts only to explicate paradigmatic examples of the concept. It is also consistent with the idea that concepts often have fuzzy boundaries and lack clear application to borderline cases. This approach makes it easier to defend Hart’s theory, since it suggests that “disagreement among competent speakers on borderline cases involving a general term is easily understood, disagreement on core issues is problematic.” Himma, *Ambiguously Stung*, supra note 116, at 151. Under this view, the rule of recognition does not provide criteria to address every case, only those that are paradigmatic. See Hart, supra note 5, at 134 (the “rule of recognition, as well as particular rules of law identified by reference to it may have a debatable penumbra of uncertainty. . . .”).

123 As Coleman says, “[d]escriptive conceptual analysis requires a core of agreement, not the absence of disagreement. . . . There is always disagreement because there are always potentially controversial cases. It does not follow from the existence of controversial cases that there is disagreement at the core, or that the core is empty.” Coleman, *Incorporationism*, supra note 1, at 101. See also Stavropoulos, *Hart’s Semantics*, supra note 6, at 61 (“[W]e can only disagree about borderline cases where the criteria provide inadequate guidance.”).
review. Here is one of the most basic features of our legal system, and yet there is today no agreement on why that decision was correctly decided. Is it supported by the text of the constitution? By original intent? By an accident of history? By morality? The fact that we disagree about source of something so basic as judicial review should raise questions about the idea that criteria of validity are shared even for easy cases.124

Himma offers an alternative strategy for salvaging the conventionality theory. This approach relies on a distinction between so-called core and application criteria. Core criteria represent general legal standards that are used to resolve a case, while application criteria apply that standard to the case at hand. According to Himma, the conventionality thesis asserts only that officials generally share the core legal criteria, not application criteria.125

Himma cites the debate over affirmative action as an illustration. Individuals differ in their view of the constitutionality of this policy, which seems to suggest a disagreement over justifying criteria. But, says Himma, the reality is that individuals tend to agree on the general standard of criteria – the 14th Amendment’s equal protection clause. They simply disagree on how that standard is applied in this case.126 Thus, the conventionality thesis is preserved, so long as it is limited to general standards of validity, not application criteria.

Even on its own terms, however, Himma’s claim is questionable. In many constitutional cases, public officials do not agree on which legal provisions serve as the general standards of validity. An obvious case is the Court’s privacy jurisprudence, where scholars and officials disagree over relevance of the 9th Amendment, the due process clause, and other provisions of the Bill of Rights.

To be sure, one might object that that privacy cases do not represent paradigmatic examples of law, and that the conventionality thesis is limited to general standards of criteria for core cases only. Thus, we may disagree on the legal standards for an issue relating to “privacy,”

124 In groundbreaking cases, like Marbury v. Madison, Hart said we should “see judicial behavior as extending the rule of recognition, not applying it.” Scott Shapiro, On Hart’s Way Out, in HART’S POSTSCRIPT 168 (Jules Coleman, ed, 2001), quoting Hart, supra note 5, at 153. What is the rule, then, that it being extended? What is the core?

125 See Himma, Ambiguously Stung, supra note 116, at 153. I say “generally” here because, according to Himma, the agreement need not be uniform. Modest disagreement over even core criteria in core cases would be acceptable. Only substantial disagreement in these cases would be problematic. See id. at 167.

126 Similarly, says Himma, we can agree that the Fifth Amendment is the relevant legal standard while disagreeing “whether compelling a defendant to undergo a psychiatric examination in order to increase her sentence is consistent with the Fifth amendment right against self-incrimination.” Id. at 150 (discussing Coleman’s views). Thus, the claim is that we agree at a general level on standards, even if we disagree on how they are applied.
but we share legal standards for more central cases of law. But what are these central cases? Federalism cases? The Incorporation of the Bill of Rights Against the states? The general practice of judicial review? Even for these central cases, it is not clear that individuals share general legal standards.

One response would be to raise the level of generality one step further. Even if officials don’t agree on the legal standards used in constitutional cases, they certainly agree that the Constitution is binding on us. Everyone agrees with that claim (well, almost everyone). Yet even this interpretation of the conventionality thesis is problematic. Hart’s aspirations, for one, seem much more ambitious than this banal claim. But beyond that, the claim that the Constitution is binding is simply insufficient to ground the concept of law.

Lest we forget, Hart is not simply making empirical claims about which beliefs individuals share. His claim is that these shared beliefs describe and explain our shared concept of law. But once again it is entirely implausible to suggest that a (shared) belief in the bindingness of the Constitution -- or, for that matter, the bindingness of the Equal Protection Clause -- is sufficient to explain what individuals mean when they utilize the concept of valid, adjudicatory “law.”

A shared belief in our Constitution might be one factor in determining what counts as valid law. But that factor is plainly too ambiguous and indeterminate to explain why this is the law and not that. The bindingness of the Constitution, in other words, fails to give even a rough sense of the boundaries of the category of valid law. To use an analogy, two individuals arguing about the concept of a “human being,” might both agree that human beings are “living” beings who walk on two feet. But they might disagree on other criteria for the concept (e.g. human beings are rationale, have a certain brain chemistry, or are beings who can conceive of their death). Obvious, it would be a mistake to say that the concept of a human being is explained by the shared criteria – that a human being is a “living biped.” But that in essence is what Himma seems to be suggesting.

Himma himself suggests that both parts of his argument must apply together, so that the sharing requirement only applies to governing standards in core cases. As he suggests, this means Hart’s thesis faces problems only if we find “a malignant disagreement [a disagreement over the governing legal standard] about a core case.” Himma, Ambiguously Stung, supra note 116, at 154.

Even that claim may be too strong, since I assume even public officials can imagine situations where the Constitution is not binding (as in cases where civil disobedience is demanded). So the more accurate statement is that we agree that the constitution is generally binding on us.
The point is simply this: If the meaning, scope and composition of a concept (like law) are controversial, one can not escape that controversy by focusing on a few abstract shared criteria. Those criteria might be shared, but they don’t explain the meaning of a concept.

IV. HERMENEUTIC AND PHILOSOPHICAL ANALYSES OF LAW

This conclusion – that Hart fails to offer a plausible scientific analysis of law – may not be surprising. Legal theory is surely different from cognitive science, and we would expect the methodology of jurisprudence to be different, as well. But once we set aside the scientific method, we are left with the task of identifying an alternative methodology that can make sense of Hart’s claims about the law.

That is not an easy task. After all, any workable approach must satisfy at least three constraints. First, the methodology must be conceptual – that is, it must in some way concern how individuals form concepts. Second, it must serve Hart’s descriptive goals; that is, it must explain conceptual practices, not justify or evaluate them. Third, and most importantly, it must make Hart’s claims about the law intelligible. It must, in short, fit his philosophy.

Does any other methodology meet all of these criteria? The following sections consider two remaining possibilities -- the hermeneutic and philosophical analysis of law.

A. Hart and the Hermeneutic Approach

Stephen Perry is one leading theorist who rejects the idea that Hart has adopted the scientific analysis of law (which Perry calls the “descriptive-explanatory” approach). Instead,

129 That means that non-conceptual methodologies must be set aside. So, for example, sociological approaches that assess the social consequence of a legal decision are no doubt interesting, but they are not conceptual in aspiration (i.e. do not usually attempt to clarify conceptual meaning).

130 As a result, normative theories of conceptual analysis must be set aside. Thus, for example, prescriptive methodologies that dictate how concepts should be used will not be considered here. I hope, in a separate paper, to evaluate these conceptual theories.

131 Perry contends that Hart has rejected the scientific method. Perry points to the Postscript of the Concept of Law, where Hart states: “For the understanding of [law and other normative social structures] the methodology of the empirical sciences is useless; what is needed is a ‘hermeneutic’ method which involves portraying rule-governed
Perry argues that Hart endorses a different methodology, which he calls the “hermeneutic” approach. Although Perry’s description of the methodology is not itself free from ambiguity, the hermeneutic approach appears to focus on the factors that the individual recognizes as defining the scope of the concept-category. The methodology, in other words, seeks to identify how individuals consciously understand concepts.

The hermeneutic approach is clearly different from scientific analysis. Scientific analysis focuses on factors predictive of a concept’s use. Since many predictive factors are beyond the individual’s awareness, hermeneutic analysis will not take those considerations into account. Because of this, Perry observes, hermeneutic analysis will have a much more limited explanatory power than scientific analysis. No matter. The goal of the hermeneutic approach is not prediction, but the description of an individual’s conscious conceptual understanding.

behavior as it appears to its participants, who see it as conforming or failing to conform to certain shared standards.” Perry, Methodological Positivism, supra note 13, at 325-6 (quoting H.L.A. Hart, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 13 (1970). Perry acknowledges that the term, the “methodology of empirical sciences,” might be read narrowly to refer to “behaviourist or radically empiricist methods of inquire that forbid the theorist to take account of mental states and attitudes.” Id. at 326. In that view, Hart is not rejecting the scientific methods used by cognitive scientists, since those focus on human mental processes as an explanation for conceptual practices. That said, Perry ultimately concludes that “the better view” is that Hart is basically rejecting the scientific method altogether. Id. 132 Perry, Methodological Positivism, supra note 13. Brian Leiter, Beyond the Hart/Dworkin Debate, supra note 19, at 20 (Leiter notes that law is a ‘hermeneutic’ concept, in that it “figures in how humans make themselves and their practices intelligible to others.”).

133 See Perry, Methodological Positivism, supra note 13, at 325 (“The starting point of inquiry is the participant’s own conceptualization of their practice.”). See also id. at 326 (Hart’s “theoretical goal is to understand how the participants in a social practice regard their own behaviour.”).

134 See HART, CONCEPT OF LAW, supra note 5 (discussing Augustine’s time example).

135 As Stephen Perry writes, from the perspective of scientific analysis, the hermeneutic approach places an “arbitrary limit” on what factors to consider. See Perry, Methodological Positivism, supra note 13, at 325 (“from the perspective of the [descriptive-explanatory] approach, this is an arbitrary limit”). Thus, as Perry acknowledges, methods (like scientific analysis) that transcend “the participants’ conceptualization of their own practice” might “well have greater explanatory power in the usual scientific sense.” Id. at 322. Perry concludes that the descriptive-explanatory approach might yield results that “are potentially of scientific interest, but they will not necessarily track the participants’ own conceptualization of their practice, nor will they offer an elucidation of that conceptualization that speaks to them as participants . . . . [Descriptive-explanatory] theories are not philosophical in nature [and in particular they do not address the problem of the normativity of the law].” Id. at 354. Hart himself recognized that individuals are not fully aware of the factors that determine concept usage, see infra. So hermeneutic analysis necessarily will fall short of explaining conceptual practices fully.

136 The hermeneutic and scientific approaches may, in certain cases, generate similar results. That might occur, for example, when individuals have a clear understanding of the criteria for using a concept, and they use that criteria self-consciously and consistently. For example, when a person says that she applies a concept like triangle, she may rely on a clear set of criteria (a two dimensional form, consisting of polygon with three sides, etc.). Or someone might use a concept like “mammal” with very clear criteria (any of a class of warm-blooded vertebrates that nourish their young with milk, have skin usually more or less covered with hair, etc.). In both cases, the criteria are explicit; the individual is self-aware about his use of the concept. In both cases, the factors that “predict” a concepts use under the scientific approach, and the criteria that the individual embraces as underlying the concept will be the same.
1. **The Appeal of Hermeneutic Analysis**

As a possible way to understand Hart’s conceptual claims, the hermeneutic approach has appeal. It satisfies two basic requirements of such a theory: It is conceptual, since it examines one aspect of how individuals use concepts (i.e. how they consciously think about them). And it is descriptive, in that it seeks to describe psychological phenomena. That is, it seeks to describe the criteria individuals consciously employ when applying concepts.

The more difficult question is whether the hermeneutic approach makes sense of Hart’s claims about the concept of law. In at least one way, the approachh succeeds in that endeavor. One of Hart’s central goals in the *Concept of Law* is to criticize the traditional positivist account of the concept of law. Hart argues that Austin’s account of law as “orders backed by threats” is mistaken since it conflicts with the public’s conscious understanding of the law. That is, Austin fails to recognize that citizens view the law, not simply as a trigger for punishment, but also as a standard for proper conduct.\(^{137}\) In this regard, Austin’s failure is a failure to describe how individuals consciously think about the law.

Beyond that basic point, at least some of Hart’s claims about the rule of recognition might be interpreted as hermeneutic claims. Hart, for example, suggests that the rule of recognition is a conscious standard used by public officials to determine the scope of law. Thus, Hart argues that public officials not only share a common rule of recognition, they also “accept” it as a standard of conduct.\(^{138}\) For Hart, acceptance “is exemplified by appealing to [the rule] as a reason for acting and a ground for criticizing non-compliance.”\(^{139}\) At least in this sense, the Rule of Recognition is

\(^{137}\) Thus, Hart says, past approaches have missed a “whole dimension of the social life.” They ignore the fact that people view a traffic light not merely as a sign that others will stop but as “a signal for them to stop and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation.” See Hart, CONCEPT OF LAW, supra note 5, at 90. That is to say, people see the law in a normative light – as imposing obligations upon them. We’ve raised questions in previous sections of this paper about whether all concepts of law are normative in this regard. But what is clear is that Hart’s goal is to focus on how individuals understand “the law” in this sense.

\(^{138}\) HART’S POSTSCRIPT, supra note 1, at 194 (the rule of recognition is a “social rule whose validity consists in the fact of their acceptance by the pertinent community.”).

\(^{139}\) Coleman, HART’S POSTSCRIPT, supra note 1, at 115. As Andrei Marmor explains, “the idea of ‘acceptance’ consists basically of two components: (a) For most members of S, the existence of R constitutes reasons for action in accordance with R. (b) The existence of R is employed by members of S both as grounds for criticizing deviant behavior and as a justification for exerting social pressure on other members of S to conform with R.” Andrei
a claim about the conscious understandings of public officials.  It is rule that individuals are consciously aware of, and rely upon, when deciding what is or is not law.

2. The Shortcomings of Hermeneutics

These preliminary comments suggest that hermeneutic analysis is at least a possible candidate for making sense of Hart’s conceptual claims. But like scientific analysis, the hermeneutic approach ultimately proves incapable of making sense of Hart’s key claims about the concept of law.

Consider Hart’s claims about the rule of recognition. That rule represents a structured hierarchal system that explains what is valid law. But do individuals consciously hold such a system of belief when it comes to deciding the valid scope of the law? It seems wildly implausible.

Any master rule that can explain the scope of valid law would necessarily be extremely complex. Such a rule would have to account for an enormous range of considerations that individuals use to justify a decision, incorporating such things as text, precedent, tradition, and moral principle. Moreover, different methods of interpretation are likely employed to determine what these factors imply, and which are relevant in an individual case.

Few people -- judges included -- have a clearly worked out algorithm for calling something law. It is certainly possible that experienced judges have a more developed set of beliefs than ordinary citizens. But, even in cases before them, judges, I suspect, frequently lack a grand hierarchal ordering of principles. Moreover, in cases that are not before them, judges

\[ \text{Marmor, Legal Conventionalism, in HART’S POSTSCRIPT 195 (Jules Coleman, ed. 2001). Thus, the rule of recognition “must actually be the standard employed by the relevant officials.” Coleman, Incorporationism, supra note 1, at 118.} \]

\[ \text{This idea of “conscious awareness” is, of course, somewhat ambiguous. Must the individual have the rule formulated in her mind’s eye and refer to it each time she speaks about “the law”? Or does it simply mean that the individual would acknowledge the rule on reflection if presented with the rule? These complexities are not addressed in Hart’s theory, though they certainly make a difference in evaluating how plausible are Hart’s claims about the rule of recognition.} \]

\[ \text{Coleman and Leiter, Legal Positivism, supra note 141, at 258 (ordinary citizens can identify the law without “being able to formulate for themselves the relevant rule of recognition.”).} \]

\[ \text{Stavrropoulos’ comments about “folk theory” – the public’s understanding of concepts -- applies to the official view as well: “To attempt to articulate the folk theory is to assume a unique determinate theory underlies ordinary use, rather than many conflicting theories.” Stavrropoulos, Hart’s Semantics, supra note 6, at 77. Indeed, one might suspect that individuals are not always consistent in the principles that they apply to specific cases.} \]
almost certainly have only partially formed beliefs about the law. It would defy belief to suppose that individual judges, officials or citizens, necessarily hold fully coherent and systematic standards of belief.143

Even more implausible is the conventionality thesis -- Hart’s claim that officials share the same rule of recognition. If this is a statement about the factors that an official consciously holds, it seems patently false. The unending debates about the correct way to interpret the constitution or the justification for judicial review highlights the enormous division over those criteria.144

Of course, one might again attempt to rehabilitate Hart by suggesting that individuals consciously adopt and share only very general criteria – such as the criteria that the constitution is (generally) binding on citizens. But once again, this tactic salvages the conventionality thesis at the expense of Hart’s conceptual ambitions.145 Broadly shared criteria – such as the idea of a binding constitution – cannot plausibly be said to represent an “analysis” of the concept of law, at least within accepted understanding of what the analysis of a concept means.146 This move would make the rule of recognition extremely general, and it would be inconsistent with the idea that the rule of recognition represents a coherent, intelligible, system for determining what is or is not the law (by prioritizing competing legal claims).147

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143 Hart also seems to suggest that officials consciously adopt this rule (or standard) of validity. But it’s not clear why, if Hart is employing philosophical analysis, he feels the need to make such a claim. Philosophical analysis looks at the implicit premises of a conceptual claim, whether or not an individual accepts or is even influenced by the premise. The implicit premises generated by philosophical analysis, thus, might not actually play any role in an individual’s conscious understanding.

144 As Perry puts it, “a rule of recognition is not, after all, one of those ‘salient features’ of a modern municipal system that Hart says would be known to any educated person. Indeed, the originality of Hart’s substantive theory of law might be said to consist in part in the claim to have brought to light a previously unnoticed empirical fact about modern municipal legal systems, namely that they all contain a rule of recognition.” Perry, Methodological Positivism, supra note 13, at 329. As discussed in later sections, public officials do not consciously share the criteria of the rule of recognition, unless the criteria are interpreted at the most general level (e.g. the constitution is binding). And if it is interpreted as this general level, the rule of recognition cannot fully explain our use of the concept.

145 See infra Part III.C.

146 When we say that something is “the law,” we usually don’t mean simply that the phenomenon reflects a general agreement that the constitution is binding. Rather, we hold a host of assumptions about more detailed issues, such as what the constitution means, how it should be interpreted, and how it should be applied in specific legal cases. Focusing only on broadly shared premises undermines the goal of illuminating the premises of the concept. If there is some other reason to limit the analysis to such broadly shared views (assuming that they are broadly shared), Hart never says why.

147 Another interpretation of the “hermeneutic” approach might also be considered. Under this approach, the objective is to look at the way “law” is used in practice, to identify how it relates to other concepts. Are laws
In the end, it seems highly implausible to imagine that citizens or public officials tend to view the law as involving the marriage of primary and secondary rules, or that they have any conscious understanding of the rule of recognition. Hermeneutic analysis, in short, is unable to make sense of key claims that Hart makes about the rule of recognition and the underpinnings of the concept of law.

B. THE PHILOSOPHICAL ANALYSIS OF LAW

One final method of analysis might be considered as a way of making sense of Hart’s claims. This alternative, which might be called “philosophical analysis,” also has ancient roots, which can be traced back to Socrates himself. The approach encourages individuals to be reflective about their beliefs, by forcing them to examine the implicit premises of their claims and convictions. Specifically, the method seeks to identify what assumptions an individual must hold for their beliefs to be valid.

Consider, as an example, Hart’s belief that the law has normative force, that it imposes obligations upon us. Philosophical analysis asks what assumptions must be held true for law to have this quality. Note that philosophical analysis does not attempt to prove that the law really has normative force, nor does it attempt to argue that individuals consciously embrace the implicit premises of their belief. Rather, it is a rationalizing methodology; it assumes the validity of a claim and uses logical analysis to uncover the underlying premises of the claim. In doing so, it encourages a greater degree of self-awareness, and it allows individuals to reflect on whether they really accept these underlying premises.
Philosophical analysis is clearly distinct from both scientific and hermeneutic analysis. In contrast to scientific analysis, the premises identified by philosophical analysis need not predict the use of a concept. And in contrast to hermeneutic analysis, the factors may play no role in an individual’s conscious deliberation. The goal of philosophical analysis, in other words, is rationalization, not prediction or the clarification of consciousness.  

1. The Possibilities of Philosophical Analysis

Does philosophical analysis meet our requirements for an appealing methodology of conceptual analysis? Consider the three requirements any such method must satisfy. Is the theory conceptual? It is not inherently so, since philosophical analysis can be used to explore any claim or belief, conceptual or otherwise. But the methodology can be viewed as a conceptual approach if it is used to analyze claims about concepts (such as claims that the law is necessarily normative).

What about the second requirement? Is the methodology descriptive? That is a more difficult to say. Certainly, philosophical analysis is a morally neutral approach, since it does not take a stand on the ultimately correctness of the underlying premises. But moral neutrality is not enough to make a methodology descriptive.

Descriptive analysis, we said, seeks to mirror or capture some underlying reality (about legal claims or about the world at large). It’s not clear what reality philosophical analysis is capturing. Individuals, after all, don’t necessarily hold the premises identified by the methodology; nor do these premises necessarily play even a subconscious role in the use of the concept. In a sense, these factors only exist in a hypothetical realm; they are factors that one would have to accept if one were to believe a claim true. Given the hypothetical nature of the premises, it is much more difficult to argue that philosophical analysis ultimately serves descriptive goals.  

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148 It is, of course, conceivable that philosophical analysis might lead to the same results as either scientific or hermeneutical analysis. That would occur if the criteria used to justify a result also happened to be the same as the criteria that is predictive of the result, or the same as the factors that individuals consciously recognize as driving conceptual use. Nonetheless, even if the methods might in special circumstances produce similar results, they will not in every (and, probably, most) cases.

149 The methodology more properly called a hybrid theory that has both descriptive and normative features. In a
Even if we assume for the sake of argument that philosophical analysis is descriptive, the third requirement remains. We must ask if the methodology help make sense of Hart’s claims about the concept of law. At least at first glance, the philosophical method appears to offer a way of making sense of two of Hart’s key claims, claims about the normativity of the law and about the conventionality thesis. But as we will see, appearances can be deceiving.

2. The Premises of Normativity

Philosophical analysis helps make some sense of one of Hart’s central claims in the *Concept of Law*. This is the claim that the rule of recognition serves as the source of law’s normativity – law’s tendency to impose obligations upon us. This claim has been the source of quite a bit of confusion, for Hart never really proves this to be a necessary feature of law. Nonetheless, the claim becomes intelligible if Hart’s enterprise is viewed as a product of philosophical analysis. That methodology does not attempt to prove that law really is normative in any objective sense. Rather, it assumes law’s normativity, and then considers what must be true for law to have this feature. It asks: What are the premises of law’s normativity?

a. Normativity and the Rule of Recognition

This sounds very much like the questions asked by philosophical analysis, which tries to identify the assumptions underlying an individual’s beliefs. The endeavor relies upon logical analysis to expose the premises of belief – in this case the belief that law imposes obligations upon us. What must be true for law to have this distinct quality?

Ever since Hume, many, if not most, philosophers have concluded that, as a matter of logic, claims of obligation cannot ultimately rest on factual premises. To put it another way, an “ought” can not come from an “is.” Assuming (as I believe) that this position is correct, then

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law’s normative force can not rest on an empirical or factual claim. It must be rooted in deeper, more general, normative principle.\textsuperscript{151} Philosophical analysis attempts to identify that implicit, obligation-producing principle.

This seems at first glance to be a feasible way of understanding Hart’s discussion of law’s normativity. Hart, after all, argues that the rule of recognition underlies the obligation to obey the law. Embodied within the rule of recognition, moreover, is an underlying normative principle: “Obey the Constitution.” This claim -- which I will refer to as the “core” claim -- provides the grounding for law’s normativity. Since (1) individuals are obligated to “obey the constitution,” and (2) the rule of recognition tells us what rules are valid under the constitution; therefore (3) we are obligated to obey valid laws.

This conclusion, moreover, seems to underpin another key component of Hart’s theory: His commitment to the belief that law and morality are conceptually distinct. Since, according to Hart, the rule of recognition generates law’s normative force, and that rule is not itself a moral principle, the normativity of law is distinct from morality. Thus, the rule of recognition seems to validate Hart’s embrace of the “separation’s thesis” – the idea that law and morality must be distinct -- that lies at the heart of positivist thinking. In this regard, philosophical analysis seems to explain the central role played by the rule of recognition in maintaining both the separation’s thesis and a belief in law’s normativity.

\textbf{b. The Morality of Normativity}

Unfortunately, the appeal of philosophical analysis is short-lived. A closer look at the approach makes clear that the methodology cannot make sense of Hart’s core claims about the rule of recognition or the concept of law, more broadly. Consider again the claim that law imposes obligations of obedience on individual citizens. This is a should statement, a statement for example that individuals “should” obey the law. Normative statements gain their force from deeper principles that explain the source of this obligation. The goal of philosophical analysis is,

\textsuperscript{151} Like everything in the world of philosophy, there are some – probably a minority – of theorists who reject the “is-ought” thesis. See, e.g., John Searle, “How to Derive ‘Ought’ From ‘Is’”, 73 Philosophical Review 43 (1964). For a brief overview of the debate, see GERHARD SCHURZ, THE IS-OUGHT PROBLEM 4 (1997). I find the minority position unpersuasive, though fully evaluating the is-ought debate is clearly beyond the scope of this paper.
in part, to identify the ultimate source of the claim’s normative force. This is a principle that
serves as the final source of justification in the chain of argument. As an ultimate principle, it is
not justified in terms of any deeper principle. Rather, the ultimate principle generates obligations
by its very nature. In the philosophical literature, this principle has a special status. Indeed, these
ultimate normative principles are typically called moral principles.\footnote{For example, aggregate utility is the source of normativity for a utilitarian. Aggregate utility generates
obligations by its nature, and thus represents the moral principle of utilitarianism. For an in depth discussion of this
point, and the methodology in general, see Aaron Rappaport, The Logic of Legal Theory: Reflections on the Purpose
and Methodology of Jurisprudence, 73 MISS. L. J. 559 (2004).}

Hart, we have seen, wants to identify the rule of recognition as the ultimate normative
principle. Thus, for Hart, the rule of recognition is the “ultimate” normative principle: It produces
obligations by its very nature, rather than by promoting a deeper moral principle.\footnote{Hart is not the only one who assumes that the core tenet of the Rule of Recognition (“Obey the Constitution”) is
(affirming that our Constitution is our basic norm, which we accept without requiring further justification).} But this
conclusion yields a problematic result for Hart. If one truly believed that the rule of recognition
generates obligations by its very nature, one would have to conclude that the rule of recognition is
a moral principle. Clearly, this conclusion undermines Hart’s support for the separations thesis.
If the rule of recognition is a moral principle, then law and morality are intimately connected.\footnote{To be sure, positivists may respond that they are using a different definition of morality. Without a clear
articulation of that alternative definition, however, it is difficult to evaluate this kind of strategy. It is worth pointing
out that, should the positivist succeed in identifying an alternative definition of morality, the debate between
positivists and natural lawyers over the separations thesis may dissolve. Since the two groups might be relying on
two very different concepts of morality, they would be discussing two very different understanding of the separation’s
thesis. This would be an example of Wittengstein’s point that many philosophical debates rest on semantic
misunderstandings that only become clear when the terms of the debate are clarified.}

Of course, no one thinks the rule of recognition is a moral principle, and that is because
the idea that the rule of recognition generates obligations by its very nature is so counterintuitive.
Take the rule of recognition’s core claim – that individuals should always obey the constitution.
Such an idea plainly conflicts with widely held intuitions about the bindingness of the
Constitution. We can all imagine how acts taken under the Constitution’s authority might lead to
great evil. Under those circumstances, a citizen should not obey the constitution; civil
disobedience would be obligatory. Contrary to Hart’s assumptions, therefore, the Constitution is
not inherently binding in each and every circumstance.

Given the difficulty in arguing that the Constitution itself is the ultimate source of
normativity, one might try to salvage Hart’s claim by arguing that the rule of recognition is an instrumental – not ultimate -- moral principle. Under this interpretation, the rule of recognition does not generate obligations by its very nature, but only because it serves deeper moral principles. This makes some sense of the broadly held belief that obedience to the constitution will typically promote moral goals -- even if we can imagine exceptional circumstances were disobedience would ultimately be obligatory.

This yields a much more plausible interpretation of the core tenet of the rule of recognition – to “obey the constitution” (in most cases). Yet it does not save Hart’s positivism -- his desire to keep law and morality separate. For the normative force of law, in this analysis, still rests ultimately on morality, for it is moral principle that gives the rule of recognition its force. In short, philosophical analysis provides no support for Hart’s core claims about the rule of recognition and the separations thesis. Either the rule of recognition is, counterintuitively, a moral principle itself, or it is an instrumental principle that gains its force from morality. In either case, Hart’s positivism is undermined.

3. **The Premises of the Conventionality Thesis**

The previous section describes how philosophical analysis, though initially promising, ultimately proves incapable of making sense of Hart’s support of the separations thesis. A similar result occurs when looking to philosophical analysis to explain Hart’s endorsement of the conventionality thesis. This is the assertion that individuals share the same rule of recognition, and hence share the same concept of law. We noted in the previous section that this claim seems implausible as an empirical matter, since individuals have very different views about the factors used to determine the valid scope of the law. But philosophical analysis offers an intriguing way of seeing how Hart’s understanding of the conventionality thesis makes some sense -- and where it goes wrong.

a. **The Plateau of Agreement**
Intriguingly, the most powerful argument in support of the conventionality thesis seems to come from one of Hart’s strongest critics, Ronald Dworkin. Dworkin’s basic insight is that all authentic arguments about the law must rest, at some level, on a shared understanding of what that concept means. Dworkin contends that if individuals lack a shared understanding of this sort, they will not be having a real debate, but instead will be talking past each other. Why is this so?

Imagine a debate about the constitutionality of executing someone who is mentally ill. One person asserts: “executing the mentally ill is against the law.” Another responds, “no, it’s not against the law.” Clearly, the two individuals disagree about what falls within the (adjudicatory) concept of “law.” One believes the concept “law” encompasses a prohibition on executing the mentally ill, the other thinks it does not. And yet -- and here is the counterintuitive point – if they are actually having an intelligible debate, they must agree, at some general level, on some concept of law.155

Consider what would happen if they held different understandings of the concept “law.” Suppose that one individual uses the term “law” to refer to a “prediction of how the court will rule.” The other individual, in contrast, uses the term law to refer to a “justified decision by a court.” In this scenario, it is possible that both individuals are making correct statements about the case, based on their own individual understandings of the concept “law.” The one who says capital punishment is against the law is merely saying that it is likely the court would rule against that sanction. The one who says capital punishment is lawful is saying that he thinks capital punishment is a valid and justified sanction. Rather than having a debate, they are really just talking past each other.156

The point is that true debate requires a core of agreement. It is upon this “plateau” of

155 Although couched in terms of “paradigms,” Hart seems to understand this point when he writes: “General terms would be useless to us as a medium of communication unless there were such familiar, generally unchallenged cases.” HART, CONCEPT OF LAW, supra note 5, at 126.

156 As Dworkin writes: “You and I can sensibly discuss how many books I have on my shelf, for example, only if we both agree, at least roughly, about what a book is. We can disagree over borderline cases: I may call something a slim book that you would call a pamphlet. But we cannot disagree over what I called pivotal cases . . . . Then the following dilemma takes hold. Either, in spite of first appearances, lawyers all do claim roughly the same criteria for deciding when a claim about the law is true or there can be no genuine agreement or disagreement about that, but only the idiocy of people thinking they disagree because they attach different meanings to the same sound. The second leg of this dilemma seems absurd. So legal philosophers embrace the first and try to identify the hidden ground rules that must be there. . . .” RONALD DWOR©IN, LAW’S EMPIRE, supra note 113, at 45. The problem, Dworkin notes, is that “much disagreement in the law is theoretical rather than empirical. . . .” Id. at 46.
agreement, that all disagreement must rest. Since individuals frequently debate what “the law” is and believe that they are making sense to each other, it would seem that they must at least assume that they have a shared concept called “law.” Of course, we might all be deluded in our belief that we are making some sense to each other. Perhaps we are not really having a debate at all. But if we assume that we really are making sense, then we can ask about what must be true of this concept of law for the debate to make sense. Here, then, is a proper place for the application of philosophical analysis. Assuming that we share a general concept of law, what must be true about that concept to make debates about the law intelligible?

b. Nested Concepts

To answer that question, we might begin by looking at Hart’s own explanation of how individuals might be said to share a concept of law. In the Concept of Law, Hart suggests that individuals share the concept of law by sharing the criteria of the rule of recognition, the criteria that determines what counts as valid law. But that assertion, we noted, is unconvincing. Given sharp disagreements about the content of the law, it seems implausible to assume that citizens share criteria in this way.

In fact, Hart himself retreats from this position in his later writings. Responding to criticism of the “conventionality thesis,” Hart embraces an alternative position in his posthumously published Postscript. There, he affirms a distinction between the “ground” (or “meaning”) of a concept and its “application.” According to Hart, public officials can share the criteria’s “meaning” even if they disagree on the concept’s “application” in specific instances.

157 Speaking about the concept of justice, Dworkin notes that philosophers of justice can “try to capture the plateau from which arguments about justice largely proceed, and try to describe this in some abstract propositions taken to define the concept of justice for their community, so that arguments over justice can be understood as arguments about the best conception of that concept.” DWORKIN, LAW’S EMPIRE, supra note 113, at 74. See also Raz, Two Views of the Nature of Law: A Partial Comparison, in HART’S POSTSCRIPT 14 (Jules Coleman, ed. 2001) [hereinafter Two Views] (“[D]isagreement, we are often told, presupposes a degree of agreement”).
158 This is not a difficult assumption to make. The sense that we have legitimate debates about the law is so strong it is hard to believe it is not true.
159 DWORKIN, JUSTICE IN ROBES, supra note 77, at 9 (“[T]he key question is this: what assumptions and practices must people share to make it sensible to say that they share the doctrinal concept so that they can intelligibly agree and disagree about its application?”).
160 Hart asserts that Dworkin adopts a similar distinction. See Hart, CONCEPT OF LAW, supra note 5, at 246 (claiming to rely on the “same distinction between a concept and different conceptions of a concept which figures so
This allows Hart to affirm the conventionality thesis, even while acknowledging that individuals have disagreements about the results in specific cases.\textsuperscript{161}

Hart explains his approach with an example: the concept of “winning a game.” Hart observes that this concept might have a general meaning, such as “obtaining more points.” Meanwhile, what counts as points “may vary for different games.”\textsuperscript{162} This is a distinction, then, between the abstract concept of a “game” and the most specific concept of “chess.” Hart implies that may agree on the general criteria (and the general concept) while disagreeing on the rules that apply to specific manifestations of that concept.\textsuperscript{163}

We might call this an example of a “nested” concept. The abstract concept is explained in a general way, but “nested” within it are the detailed criteria that apply the concept to specific circumstances. In this way, the general concept can be shared without sharing the criteria needed to apply the concept to a specific case.\textsuperscript{164} Law might take a similar form. We might have a general concept of law that does not require a commitment to any specific criteria of validity. Thus, we may be able to agree on the general concept while disagreeing over the specific criteria of application.

Before turning to specifics, it’s worthwhile noting the intuitive appeal of this approach. When we say that the United States, Great Britain and France all have law, we are using a concept of law that is not tied to the specific criteria of validity applicable in any specific nation; the general concept applies without geographical limitation.\textsuperscript{165} Similarly, when we debate whether executing the mentally ill is “the law,” we are agreeing on a general concept of law, even as we

\textsuperscript{161} Needless to say, this sounds very much like Himma’s distinction, discussed earlier, between core and application criteria. Yet it is not identical. Himma considers the core aspects of law to be the general legal sources that underlie the concept of law (e.g. the 14th amendment, the Constitution, etc.). However, as discussed in the text below, Hart speaks of the “ground” of law in a very different way.

\textsuperscript{162} See Hart, \textit{Analytical Jurisprudence}, supra note 11, at 968-9. Hart suggests that a similar approach can be used to analyze “Justice” or “Law.” \textit{Id}. at 973.

\textsuperscript{163} Similarly, Hart notes that we might have a general concept of justice -- say, equal treatment for everyone -- but still disagree on the specifics of what that general concept -- in this case, equal treatment -- entails.

\textsuperscript{164} This distinguishes the approach from Himma’s formulation, which rests on the assumption that individuals share some general criteria of validity. \textit{See infra} Pt. III.C.

\textsuperscript{165} By contrast, Hart’s discussion of the rule of recognition (and hence the concept of law) is geographically bounded. It represents what public officials believe are valid decisions in the United States. The rule of recognition for, say, the United States underpins the “law” of the United States, while the rule of recognition for, say, Great Britain underpins the “law” of Great Britain. In a sense, we can view Hart’s geographically bounded concept of adjudicatory law as a species of the more abstract genus -- the general concept of law -- we are discussing here.
disagree on specific criteria of validity for United States’ adjudicatory law.

So what might this nested concept of law look like? Joseph Raz offers an interesting possibility. According to Raz, the general concept of law can be defined as “rules” enacted according to “correct” standards or criteria of validity. This general concept encompasses a range of beliefs about what the correct standards of validity are. As a result, individuals might agree on this general definition, even as they disagree about the specific criteria or rules. The general concept represents the plateau of agreement upon which to have debates about the scope of the law.

Of course, this discussion is just preliminary, and one might want to fine-tune Raz’ description of the general concept further. For example, it might be appropriate to modify Raz’s abstract concept of law to distinguish “law” from other kinds of rules that might be enacted according to “valid” procedures (such as the rules of neighborhood association, company committee, or even gang organization). To do so, one might clarify that the general concept of law encompasses only rules promulgated by an authoritative institution, where an authoritative institution is one widely seen in the community as having the authority to promulgate standards of conduct that govern the conduct of large parts of society.

As might be obvious, this modification results in a concept of law that points towards an older positivist approach that Hart repudiated – Austin’s theory of law. Although the proposed definition is not identical to Austin’s -- which I believe focused more on the use of sanctions to enforce standards -- it is broadly similar in its focus on institutional rules. And it offers a plausible view of a general concept of law.

My contention is not that individuals actually share this general concept of law, or that this is the precise way to define it. Rather, my contention is simply that a nested concept of law like this is a plausible way to explain the existence of two features that we have assumed are true in our legal debates. First, we have assumed that individuals share a general concept of law that

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166 Raz refers to these as “embedded” concepts. According to Raz, we often define concepts in terms of other concepts. Thus, we might all agree that a just society is a society that allows the greatest number of people to satisfy the good life, but we may disagree over the nature of the good life. See Joseph Raz, Two Views, supra note 157.

167 Raz, Two Views, supra note 157.


169 See Himma, Ambiguously Stung, supra note 116, at 164 (noting that Austin’s type of explanation is broadly shared and so “makes a plausible criterial account of how people use the concept-locution “law.”).
permits intelligible debates over the scope of the law. Second, we have assumed that, even as individuals agree on the general concept, they disagree over the specific criteria of validity that might apply in any case. Given these assumptions, this nested approach offers a plausible way to rationalize both assumptions.

At the same time, it is worth emphasizing that the nested approach does little to salvage Hart’s claims about the rule of recognition and the concept of the law. The reason is that the nested approach views the shared, general concept of law as being entirely distinct from the criteria of validity used to determine specific legal claims. Hart’s rule of recognition is not defined in these general terms. It is defined in terms of specific criteria that determine what counts as valid law in a given community. The nested approach offers no basis for believing that individuals actually share this kind of rule of recognition, or any a rule comprised of the specific criteria of validity.

V. CONCLUSION

Our endeavor to make sense of Hart’s theory has reached a dead end. Neither scientific, hermeneutic, nor philosophical analysis has proved effective in making sense of Hart’s claims about the law. Although these methodologies can make sense of discrete parts of Hart’s theory, none are capable of supporting his core claims about the law. So we are left to wonder: Does any other methodology exist that can save Hart from incoherence?

One certainly hears off-handed comments that Hart is engaged in a different kind of analysis -- say, a “formal” analysis of our legal system. But commentators never seem to go beyond vague claims and certainly never explain how these methodologies make sense of what Hart is doing. There is, in my view, little reason to believe any other methodological approach would make Hart’s claims intelligible.

If that is so, significant questions arise about the state of legal theory today. H.L.A. Hart,

170 For example, when Hart speaks about the open texture of concepts, he seems to be embracing the scientific analysis of law. When he discusses the public’s understanding of the law as having normative force, he seems to be adopting a form of hermeneutic analysis. When he explores the implicit premises of law’s normativity, he appears to embrace the philosophical analysis of law. None of the methodologies, however, can explain more than a small piece of Hart’s writings, and none succeeds in making sense of key claims Hart makes about the concept of law and the rule of recognition.
after all, has been the most influential advocate of the use of conceptual analysis in jurisprudence. If his theory is rejected, one must wonder about whether conceptual analysis is an appropriate tool for doing legal theory. That said, the analysis presented here does not itself require the abandonment of conceptual analysis. Simply because Hart has implemented conceptual analysis in an apparently muddled and inconsistent way does not mean that all forms of conceptual analysis are discredited. The question remains whether a more consistent and reflective implementation of the methodology might be persuasive as a basis for doing legal theory.

In the remaining space, I want to take a step back and consider that fundamental question. If legal theorists were to adopt a consistent conceptual methodology, which approach – scientific, hermeneutic, or philosophical -- should they adopt as their own? Though providing a complete answer is beyond the scope of this paper, a few preliminary observations are worth making in the hope of spurring a broader discussion about the proper methodology for legal theory.

One tempting answer would be to follow the lead of cognitive scientists and to adopt the scientific analysis of concepts. As we have seen, this is a fertile approach with a coherent methodology and a clear research agenda. But ultimately, scientific analysis is not a promising method for jurisprudence.

The central problem is that the scientific method ideally relies on empirical research. That kind of research plays to the institutional strengths of cognitive scientists who, one can assume, are trained in the tools of empirical research. But legal theorists typically lack these same skills. If philosophers have any comparative advantage, it is in a form of abstract, theoretical reasoning. Legal philosophers, moreover, have a particular advantage in applying these reasoning skills to legal rulings and practices. Scientific analysis does not play to these competitive strengths. If legal theory hopes to maintain its distinctiveness as a discipline, scientific analysis is an unappealing path to take.

The second methodological approach – the hermeneutic approach – is even less promising. That method, we saw, seeks to identify criteria consciously accepted by individuals (and perhaps broadly shared). But this methodology seems particularly unambitious as a focus

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171 This doesn’t mean that a background in legal studies might not prove useful in undertaking certain kinds of scientific conceptual analyses. For example, researchers may find that individuals utilize different mental processes when utilizing abstract concepts, like Law or Justice. In that context, having a deeper understanding of the different ways “law” is used in practice might prove helpful in developing a research agenda for cognitive science. But it would seem odd to suggest that the primary focus of legal theory is to serve a support role for cognitive science.
for legal theory. Since it seeks to identify consciously accepted criteria, hermeneutic analysis ultimately tells us only what we already know.

To be sure, there may be some benefit in trying to illuminate the different ways in which a concept like law is consciously understood. Thus, greater clarity of thought may emerge from outlining the widely-accepted meaning that various individuals give to a concept. Though possibly useful, the result is uninspiring, a kind of glorified lexography. The approach, to use Stephen Perry’s phrase, “effectively abandons the philosophical ambitions of jurisprudence.”

That leaves the third method of analysis – the philosophical study of concepts. As we have discussed, this approach seeks to identify the implicit premises underlying conceptual claims. And philosophical analysis can yield interesting results. Even our brief discussion of the method highlights an important, if not fully appreciated, insight – that the normative force of the law (assuming such a force exists) must rest on moral principle. The methodology also plays to legal theorists’ institutional strengths; it draws upon the kind of abstract reasoning skills in which legal theorists (one might suppose) have particular competence. Philosophical analysis, alone, seems to provide a possible method of conceptual analysis for jurisprudence.

Of course, philosophical analysis is a general method of analysis, and it is not clear why one would want to limit it to the study of legal concepts alone. Indeed, the methodology can be fruitfully applied to important non-conceptual claims that arise in the law, such as claims about how a court “should” act in a given case, or how much punishment should be imposed, or whether an individual should resist a specific government edict. These are non-conceptual claims since they focus on decision-making in the context of specific facts and circumstances (rather than concerning concepts or categories of thought). Moreover they are normative claims, since they look at how individuals or institutions should act.

Philosophical analysis can identify the underlying premises that must be accepted if these

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172 Perry, *Interpretation and Methodology*, supra note 13, at 123. John Finnis explicitly attacks this approach, noting that “[j]urisprudence . . . aspires to be more than a conjunction of lexicography with local history.” See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 4 (1997).


174 As discussed in more detail in a separate article, philosophical analysis, or rational reconstruction, is better classified as a “normative” methodology, rather than a descriptive one. *Id.* But little turns on how we classify that method. The key point is that rational reconstruction helps address questions -- typically normative questions -- that individuals find interesting and important.
normative claims are true. Such an approach enables individuals to reflect on the underlying premises of their beliefs, and to consider whether those premises are appealing. In doing so, the methodology can help individuals make more reflective decisions about how to answer key normative questions about how individuals and institutions should act. Any methodology that helps us answer those questions – or at least helps us think more clearly about them – counts as a worthy endeavor.

These few comments suggest that legal theory would do well to reorient itself away from a strict form of conceptual analysis, towards a broader mission that involves the philosophical analysis of legal claims in general. That methodology could be used to analyze conceptual claims, but it would be even more fruitfully used to analyze normative questions about how individuals, courts, and government should act in the legal realm. The approach would help theorists explore truly interesting “should’ questions about the law, questions that lie at the center of many persistent debates in American society. In doing so, this method and approach would place legal theory on a far stronger foundation than the crumbling edifice Hart left behind.

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175 This discussion leaves out consideration of certain normative methods of conceptual analysis. These methods do not attempt to say what the concept of law “is,” but rather how the concept should be used. This is not the place to consider the viability of this alternative method of conceptual analysis. In a future paper, however, I hope to explain why normative theories of conceptual analysis are problematic, as well.