Article

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Semantic, Interpretive, and Conceptual Theories of Law

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Abstract: A general jurisprudential theory explains the essential features of law. The objective of this paper is to provide a comparison of three kinds of jurisprudential theories that have dominated legal philosophy in the last seventy years. First, there are semantic theories that seek to understand the nature of law by digging out shared linguistic criteria that designate the correct use of legal terms. Second, there are interpretive theories that take the perspective of the judge in constructing the most moral interpretation the law to determine what it "really" says on a case. And third, there are conceptual theories which explicate the logical presuppositions, implications, and concepts that underlie legal phenomena and reveal more than what is made obvious by language. This paper shall also defend Legal Positivism—the view that law has social foundations—against Ronald Dworkin's objection known as the "semantic sting", which claims that positivists are unable to account for the existence of deep controversy in legal practice by virtue of allegedly treating law as a trivial linguistic enterprise. It shall argue, alternatively, that deep controversy occurs because law is an "essentially contested concept", which in turn occurs because law is a complex social institution.

Keywords: jurisprudence, semantic sting, legal positivism, ordinary language philosophy, essentially contested concepts

INTRODUCTION

> What is law? Now I offer a different kind of answer. Law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theater of behavior. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process. We studied that attitude mainly in appellate courts, where it is dressed for inspection, but it must be pervasive in our ordinary lives if it is to serve us well even in court. It is an interpretive, self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances. The protestant character of law is confirmed, and the creative role of private decisions acknowledged, by the backward-looking judgmental nature of judicial decisions, and also by the regulative assumption that though judges must have the last word, their word is not for that reason the best word. Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have. - Ronald Dworkin, *Law's Empire*[1]

A general jurisprudential theory must satisfy two criteria: first, it must consist of propositions about the nature of law that are *necessarily* true, and second, it must be able to explain what the law is.[2] For a proposition of law to be necessarily true, it must hold in every possible setting,

[1] Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986), 413.

[2] Joseph Raz, "Can There Be A Theory Of Law?" in *Between Authority and Interpretation* (New York: Oxford University Press, 2009), 17.

jurisdiction, or time. For example, that law is a normative system is necessarily true because every law establishes standards of behavior. On the other hand, the claim that law is moral is only contingently true because some laws throughout history have been patently unjust. For a general jurisprudential theory to explain what the law is, it must be capable of elucidating its essential features. For instance, it must be able to distinguish law from non-law, explain what makes law binding, account for the central functions of law, clarify how legal systems are structured, or describe what laws from different jurisdictions have in common.

The first objective of this article is to compare three kinds of jurisprudential theories known as semantic, interpretive, and conceptual theories of law. The second, made possible by the first, is to defend Legal Positivism—the view that law ultimately has social foundations[3]—against the semantic sting, an objection raised by Ronald Dworkin which claims that positivists are unable to account for the existence of deep legal controversy by virtue of allegedly treating jurisprudence as a linguistic enterprise. This article shall be divided into three parts. Part I shall consist of a summary of Dworkin's depiction of positivism as a semantic theory and the interpretive theory he developed to rival it. Part II shall be concerned with showing that Dworkin's criticism rested on a fundamental misconception that confused positivism for a semantic theory when it is, in fact, a conceptual one. It will also explain why Dworkin's interpretive method is generally unsuitable for constructing a general jurisprudential theory. Part III shall be devoted towards arguing that law is an "essentially contested concept", which, it shall be shown, provides a plausible answer to Dworkin's challenge: how can a positivist account for the existence of deep controversy in legal practice?

[3] Leslie Green, "Positivism and Conventionalism," *Canadian Journal of Law and Jurisprudence,* 12 (1999), 35.

I. THE SEMANTIC STING

The most dominant theory of law in the twentieth century was undoubtedly H.L.A. Hart's Theory of Law as the Union of Primary and Secondary Rules, which Dworkin took to be paradigmatic of Legal Positivism. For Hart, law is a system of "rules within rules"[4] in the sense that a legal system consists of two kinds of rules. The first are primary rules that directly guide the behavior of ordinary citizens such as the law against murder, the law on inheritance, or the law conferring powers on guardians. There are also secondary rules that are addressed to officials of the legal system to guide them on the administration of the primary rules themselves. These include "rules of change" that stipulate how laws are to be amended, or "rules of adjudication" that instruct judges on how to decide whether a law has been broken. The ultimate rule of any legal system, however, is a secondary rule known as the "rule of recognition", which is a customary rule by which judges determine whether something is legally binding.[5] The rule of recognition incorporates several criteria of legal validity, such as the enactment of a law in a constitutional provision, its promulgation as a legislative statute, or its enshrinement in judicial precedent. Like other positivist tests, it treats law as a defined system of norms wherein membership is determined "mechanically" in terms of social facts.[6]

Dworkin classified Legal Positivism as a semantic theory that probes into the nature of law by examining the nature of language. There are three reasons why this method of inquiry is plausible.[7] The first is that law is created by means of linguistic expressions. Statutes need to be

[4] H.L.A. Hart, "Introduction," *in The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* by John Austin (Indianapolis: Hackett Publishing Company, 1998), xii.

[5] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 77-96.

[6] Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1970), 1.

[7] *See* Timothy A. O. Endicott, "Law and Language" in *The Oxford Handbook of Jurisprudence & Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (New York: Oxford University Press, 2002), 937-938.

written in order to be promulgated, while court decisions must be delivered to become enshrined as precedents. Hence, one must understand how language works to understand the nature of law. The second is that language and law share common functions. For example, both facilitate the coordination of human behavior within society, thus the study of language reveals relevant insights into the nature of law. The third is that the legal theorist himself must use language to construct his theory. He must use terms such as 'rights' to represent abstract concepts, terms such as 'reasonable care' that are vague, or terms such as 'justice' which have conflicting legal and moral senses. It is therefore important to understand the linguistic properties of words and their relation to the ideas that are conveyed.

In Dworkin's view, the purpose of the positivist rule of recognition is not only to identify the conventions that judges hold to be legally binding, but to determine the linguistic practices that constitute those very conventions. The positivist then discovers, through the careful analysis of the linguistic practices that lawyers and judges engage in, what counts as the meaning of legal terms such as 'law', 'right', 'obligation', 'due process', or 'equality'. In learning what counts as their meaning, he also learns the criteria for their proper application. He then becomes capable of digging out the public, fixed, and settled linguistic criteria that are shared among lawyers and judges.[8] For example, it might be the case that a positivist wants to understand what 'equality' means in the legal sense. He must refer to the rule of recognition to identify the official conventions in which the term 'equal' appears to know how it is properly used. By studying the ways in which 'equal' is used in provisions, statutes, and precedents, he learns what the law means by 'equality' and the nature of equality itself.

The problem, according to Dworkin, is that a semantic theory can only account for one type of disagreement in legal practice when there are two. On one hand, there are trivial disagreements when judges are at odds

[8] Dworkin, *supra* note 1, 31-35.

over whether a proposition of law is true or false.[9] For example, two judges may disagree about whether a statute has taken effect in their jurisdiction. These disagreements can easily be resolved by checking whether a bill has officially been passed into law, assuming that they agree on the meaning of the words written in official documents pertaining to the procedure of ratification.

On the other hand, there are deeper theoretical controversies about the very grounds of law themselves, which are the facts by virtue of which legal propositions are rendered true or false in the first place.[10] When these disagreements occur, judges cannot settle their quarrels by merely referring to shared linguistic criteria because they are engaged in meta-level quarrels over the validity of the criteria themselves. They might be disagreeing, for instance, whether the fact that Congress promulgated a particular statute is a sufficient reason for legal propositions that are covered by them to be true. Someone might counter that something other than human acts of lawmaking needs to be satisfied to determine the truth of a proposition.

Dworkin gave the example of a probate suit known as *Riggs v. Palmer*.[11][12] Elmer Palmer was a teenager from New York whose wealthy grandfather wrote a will that would bequeath him the bulk of his estate when he came of legal age. The will also left small legacies for his two daughters, Mrs. Riggs and Mrs. Preston. Palmer, however, poisoned his grandfather shortly after he remarried, out of fear that he would revise his will and leave him with virtually nothing. Palmer was convicted for murder. After serving time, he insisted upon receiving his full inheritance as stipulated in the will. Riggs and Preston sued the administrator of the will. The case eventually reached the New York Court of Appeals, where Palmer reasoned that no law invalidated his claim as a named beneficiary to profit

[9] *Ibid.*, 4-5.
[10] *Ibid.*, 6.
[11] *Riggs v. Palmer*, 115 NY 506 (1889). Hereinafter referred to as '*Riggs*'.
[12] Dworkin, *supra* note 1, 15-20.

according to its terms even if he had murdered the testator. The dissenting judges favored the literal reading of the law because they believed that it was not the business of the court to decide the case as a "matter of conscience".[13] The majority, however, reasoned that although Palmer correctly pointed out that no explicitly written provision in the New York Statute of Wills prevented him from receiving his inheritance, there was an unwritten moral principle in the law that did, one which says that no man should profit from his own wrongdoing. In their view, it was this moral principle, not only the plain text, which constituted the grounds of that law. Palmer was denied his inheritance.

Dworkin thought that if law were indeed a semantic enterprise, then the court could have easily decided *Riggs* by agreeing on the meaning of the text in the New York Statute of Wills. But clearly, they were not engaged in a trivial linguistic misunderstanding so much as they were contesting a deeper substantive issue. In his view, this could only mean that legal controversies are not always linguistic in character, which in turn means that a general theory must explain law as more than just a collaborative effort between judges to dig out settled linguistic criteria. Otherwise, they could only have small misunderstandings and never really disagree about anything. However, judges obviously do have deep theoretical disagreements, so in this sense, the positivist falls prey to the "semantic sting" because his theory is incapable of explaining why substantive controversy occurs.[14] How can such disagreements occur if there really are shared linguistic criteria that are supposed to eliminate the possibility of theoretical controversy to begin with? The only way to explain how these occur must be to abandon semantic theories altogether because law must be more than a linguistic enterprise.

[13] Court of Appeals of New York, "*Riggs v. Palmer* (1889)" in *Philosophy Of Law*, ed. Joel Feinberg and Jules Coleman (Belmont: Wadsworth, 2004), 101.

[14] Dworkin, *supra* note 7, 45-46.

What is it about law that prevents it from being exhausted by semantic explanations? The mistake, Dworkin explained in a later work,[15] is in the assumption that law is a criterially-explainable concept to begin with. There are, in fact, no such fixed criteria shared by lawyers and judges. That is to say, law is not the kind of concept that is elucidated through purely descriptive methods and fixed criteria. On the contrary, lawyers and judges deploy substantive arguments as well. In court, they do not only explain *what the law is*, but they argue *what it ought to be* and try to make the most sense out of it. They seek the interpretation that fleshes out its purpose, point, or justification. Obviously, evaluative reasoning of this sort entails making controversial moral and political claims to support an interpretation, for an interpretation cannot be said to be the "best" unless it is also the most fair, equitable, or compassionate rendering of the law. But this, Dworkin explained, is precisely why deep legal controversy exists. Law is not a semantic enterprise; it is an interpretive one.

Dworkin thus set up an interpretive theory to rival positivism's allegedly semantic approach. Interpretive theories do not separate jurisprudence from adjudication. They characterize judges as being concerned with explicating the sense of legal propositions and claim that if this problem is solved, then the nature of law is thereby understood. Moreover, interpretive theories liken law to literature; its "essence" can only be grasped if the interpreter goes beyond the plain text and constructs its greater purpose, point, or value. But for Dworkin, the "true" interpretation is that which makes the most *moral* sense of the law. Without it, the law would only be an unjustified exercise of state coercion that infringes on individual liberties.[16] In other words, the law is whatever its morally best version is.

[15] Ronald Dworkin, "Hart's Postscript and the Point of Political Philosophy" in *Justice In Robes* (Cambridge: The Belknap Press of Harvard University Press, 2006), 165-166.

[16] Dworkin, *supra* note 1, 95.

Dworkin introduced a method known as constructive interpretation.[17] The method is divided into three stages and makes use of Rawls' concept-conception distinction.[18] Let it be assumed that a judge is presiding over a workplace discrimination lawsuit which turns on an argument about equal opportunity. He must construct an interpretation of the concept of equal opportunity to arrive at a decision. At the pre-interpretive stage, the judge gathers legal materials related to equal opportunity and treats them as the raw data of the concept. He may look for relevant statutes or past decisions that revolve around issues of equal opportunity in the workplace. At the interpretive stage, he begins to construct his interpretation of equal opportunity. He develops some highly abstract interpretation that elucidates what it "really" means. This is the concept. At the post-interpretive stage, the judge adjusts his interpretation of the concept so as to discover what it "really" requires. He allows competing conceptions to do battle until the "best" one emerges. Then he will know what the law "really" says on the matter and therein lies the one right answer, and hence, decision to the case.

II. CONCEPTUAL AND INTERPRETIVE THEORIES COMPARED

What reason could Dworkin have had to depict Legal Positivism as a semantic theory of law? Hart belonged to a generation of philosophers from the University of Oxford who rose to prominence in the 1940s and 1950s and came to be known as ordinary language philosophers.[19] These philosophers were concerned with the study of language of everyday conversations. They examined how people use words, what they mean, what they try to say, or what they are doing in saying something. They did not presume that ordinary language is neat and perfect. On the contrary,

[17] *Ibid.*, 64-65.

[18] John Rawls, *A Theory Of Justice* (Cambridge: The Belknap Press of Harvard University Press, 1971), 5.

[19] Nicola Lacey, *A Life Of H.L.A. Hart* (Oxford: Oxford University Press, 2004), 142-145.

they acknowledged that ordinary language is sloppy, informal, unstructured, and was thus the source of philosophical confusion. They brought rigor, precision, and clarity to ordinary language to dissolve what appeared to be perplexing philosophical problems, a task which Wittgenstein described as the "therapeutic" purpose of philosophy.[20]

J.L. Austin was the foremost proponent of Ordinary Language Philosophy. He developed a three-stage method of analysis that involved the study of words but was not a semantic method *per se*.[21] In the first stage, the philosopher chooses some general area of investigation and identifies common words. He might, for example, choose to philosophize about responsibility and come up with 'plea', 'excuse', 'defense', 'knowingly', 'negligently', and 'mistakenly'. In the second stage, he lists down various contexts in which they are used and identifies the conditions under which one is more appropriate than another. He might say that a defendant in court is expected to shore up a *defense* rather than an *excuse*. Or he might explain that a child can be *irresponsible*, but not *negligent*. Or he might point out that a person can *intentionally* hurt a dog but that the dog cannot *deliberately* bite the person back. In the final stage, he gives an account of these expressions to clarify what people say or do not say in speaking them. For example, he might explain that someone gives a *defense* when he justifies why he knowingly and willingly committed an action, while an *excuse* is given when an unforeseeable circumstance prevented someone from fulfilling his duty. Or he might explain that intentional action presupposes some kind of pre-meditation occurred, which, in turn, requires a degree of rationality that only humans possess. In short, the third stage involves learning about the *concepts* underlying the uses of words, not just their *meanings*:

[20] Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe, P.M.S. Hacker, and Joachim Schulte, 4th ed. (London: Blackwell Publishing Ltd., 2009), 57e.

[21] J.O. Urmson, "J.L. Austin," in *The Linguistic Turn*, ed. Richard M. Rorty (Chicago: The University of Chicago Press, 1992), 232-235.

> When we examine what we should say when, what words we should use in what situations, we are looking not merely at words (or 'meanings', whatever they may be) but also at the realities we use the words to talk about: we are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena.[22]

Austin's influence on Hart was obvious in the latter's example of how 'being obliged' differs from 'having an obligation'. In the *Concept of Law*, Hart criticized John Austin's[23] Command Theory that laws are essentially general commands issued by a sovereign body to the members of a political society who habitually obey it and are backed up by credible sanctions in the event of non-compliance.[24] Hart objected that it misrepresented the normativity of law by likening law to a gunman who coerces his victims into surrendering their money. *Being obliged*, they have no choice but to comply with his orders. But once the gunman escapes, the threat of harm vanishes and they are no longer *obliged* to obey him. Surely, Hart reasoned, law is not normative in this sense. Even when there are no policemen who are physically present to enforce the law, citizens still *have an obligation* to comply with it. The law's normativity cannot possibly be derived from the threat of punishment, for it is binding even in the absence of immanent sanctions. Law does not *oblige* people to comply with it so much as it *gives them obligations*, a phrase that captures the duty to conform to standards of behavior regardless of the probability that citizens actually will.

[22] J.L. Austin, "A Plea For Excuses," in *Philosophical Papers*, ed. J.O. Urmson and G.J. Warnock , 2nd ed. (Oxford: Oxford University Press, 1979), 182.

[23] John Austin, the nineteenth-century philosopher of law, has no relation to J.L. Austin, the twentieth-century ordinary language philosopher.

[24] The Command Theory of Law is most frequently associated with John Austin, who is not the same person as J.L. Austin. See John Austin, *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence* (Indianapolis: Hackett Publishing Company, 1998).

As this example illustrates, Dworkin overestimated the degree to which Hart was preoccupied with language because undertaking a semantic analysis of law was never the primary objective of Hart's study. And even if the semantic sting were valid against semantic theories, not all jurisprudential ones are quite so crude. The semantic sting was premised on the false dichotomy that if semantic theories are not viable, then only interpretive theories remain. There is a third kind known as conceptual theories that positivists openly espoused, made evident by how Hart entitled his work *The Concept of Law*, not *The Meaning of 'Law'*. As their name suggests, conceptual theories deploy the method of conceptual analysis.

Conceptual analysis is defined as the logical clarification of concepts.[25] It seeks what is presupposed by, what follows from, or what is implied by the use of a concept. It is not words, meaning, or even language *per se* that they are interested in, but in concepts, and in what goes on in the non-linguistic world. In particular, they inquire into how concepts facilitate one's understanding of this world and devise better ways of representing it.[26] They do not rely on the meaning of words as the be-all and end-all of matters, for ordinary language can be vague, ambiguous, and inconsistent.

The grammatical surface of language often conceals its deeper logical properties.[27] For example, even if 'Law is just' shares the same syntactical structure as 'John is tall', they do not express analogous propositions, e.g., the property of being just cannot be predicated of an abstract universal such as 'law' in the same way that 'tall' can be predicated of a person like John. 'Law is just' implies that law is innately just, which is not necessarily true because unjust laws have been promulgated in the past.

[25] Antony Flew, *Philosophy: An Introduction* (New York: Prometheus Books, 1979), 7.

[26] Robert S. Summers, "The New Analytical Jurists," in *New York Law Review* 41 (1966), 871.

[27] For various examples, see Gilbert Ryle, "Systematically Misleading Expressions," in *Contemporary Analytic and Linguistic Philosophies*, ed. E.D. Klemke (New York: Prometheus Books, 2000), 233-252.

It is more accurate to say that law is applied *justly* by humans, that law is presumed to be just, or that law is formulated by legislators who intend it to be just. But the fact that people understand what is meant when someone says that 'Law is just' suggests that there exists a shared concept that is free of logical impurities.

That language can be vague, ambiguous, and misleading holds especially true for law-related language. Unlike 'dog' or 'chair', words such as 'law', 'responsibility', and 'duty' do not have any straightforward counterparts in reality.[28] There is bound to be controversy on their correct uses, so a semantic theorist would be hard-pressed to dig out shared linguistic criteria governing their use. Even ordinary words may have borderline cases of application. Hart gave an example of a judge who must decide whether a rule prohibiting the entry of vehicles into a park has been broken.[29] The paradigm case of the word 'vehicle' is an automobile. It might be the case, however, that someone brings roller skates, a bicycle, or a skateboard into the park and is accused of violating the rule. The judge realizes that these are "cases of the penumbra"—borderline cases that fall outside of the "standard instance" of the rule and may or may not be extensions of 'vehicle'. He cannot rely on language as the final arbiter of truth. He must engage in conceptual analysis and probe into the *concept* of a vehicle to determine whether the rule has been broken. To decide the case, he must determine what non-linguistic property of vehicles is so undesirable that they ought to be forbidden from the park.

Even if there were shared criteria governing the correct use of words, it does not follow that disputes would no longer exist.[30] As Jules

[28] H.L.A. Hart, "Definition and Theory in Jurisprudence," in *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), 21-25.

[29] H.L.A. Hart, "Positivism and the Separation of Law and Morals," in *Harvard Law Review* 71:4 (1958), 662-663.

[30] As pointed out in Joseph Raz, "Two Views of the Nature of a Theory of Law," in *Between Authority and Interpretation* (New York: Oxford University Press, 2009), 69.

Coleman pointed out,[31] there is a difference between the identification of criteria laid out by a rule from their application. For instance, it is possible for two judges to agree on the correct use of 'murder', i.e., the willful termination of human life, but also disagree about whether abortion constitutes an act of murder. To settle their dispute, it would be insufficient for them to exhaust all of the possible meanings of 'murder'. Rather, they might have to discuss and list down different examples to clarify the *concept* of murder. They might ask whether euthanizing a terminally-ill patient, killing in self-defense, or removing a premature fetus to save a pregnant mother's life constitute acts of murder. Only then might they be able to discover what is common to these cases and learn how to tell whether abortion counts as murder. In this sense, conceptual analysis is concerned with identifying the necessary and sufficient conditions for sentences to be true.

What more of terms such as 'law', 'right', or 'justice' that have even more controversial borderline cases? While law-related language is worthy of study, it cannot fully explain what law is. This is why Hart theorized at the level of concepts not only to clarify the meaning of words, but to study patterns of their use.[32] Although words are tools for communicating about the world, they must be cleaned, sharpened, and refined so as to serve their logical purpose. Their divergent applications must be studied until the general principle that underlies them emerges, one which illuminates an aspect of law that was not previously obvious.

To this end, a conceptual theory engages in a family of activities such as differentiating related concepts, tracing connections between them, classifying them from various viewpoints, analyzing their parts, identifying

[31] Jules Coleman, "Negative and Positive Positivism," in *Journal of Legal Studies,* 11 (1982), 152.

[32] Nikos Stavropoulos, "Hart's Semantics," in *Hart's Postscript: Essays on the Postscript to the Concept of Law,* ed. Jules Coleman (New York: Oxford University Press, 2001), 78.

patterns, and reconciling inconsistencies.[33] Hart's theory was no different. He distinguished 'being obliged' from 'being under an obligation', explained what it means for members of a community to "habitually do certain things" as opposed for them to "observe a rule", introduced the "internal point of view" and contrasted it against the "external point of view", distinguished between primary and secondary rules, analyzed how laws are united under the rule of recognition, and whether "international law" is or is not law. These have been described to be *about* words, but they are not *simply* about the meaning of words.[34]

How, then, does a conceptual theory compare with an interpretive one? While the conceptual theorist assumes that the study of law has a distinct subject matter, the interpretivist does not separate jurisprudence from adjudication. He takes the point-of-view of the judge, whose work has been contrasted against that of the conceptual theorist in three respects.[35] First, whereas the source of a judge's problem may be the ambiguity of a phrase in a specific statute, that of the conceptual theorist may arise from philosophical puzzlement. Second, whereas the judge may base his interpretation of a statute upon the arguments presented by opposing counsels, the conceptual theorist seeks to understand its broader history of invocation, social context, and underlying rationale. Third, the judge may use techniques of interpretation that are inappropriate for conceptual analysis, like treating some moral principles as part of the law because they figure into its justification. The problem, however, is that some of these techniques allow them to base their interpretation on only select pieces of legal material, depending on what fits with his interpretation of a concept. This is aggravated by the fact that Dworkin's method allows judges to

[33] Robert S. Summers, "Legal Philosophy Today—An Introduction," in *Essays in Legal Philosophy*, ed. Robert S. Summers (Oxford: Basil Blackwell, 1970), 2.

[34] Thomas Adams, "Practice and Theory in The Concept of Law," *in Oxford Studies in Philosophy of Law, Volume 4,* ed. Leslie Green and Brian Leiter (Oxford: Oxford University Press, Forthcoming 2021), <https://ssrn.com/abstract=3684512>, 26.

[35] Summers, *supra* note 31, 3.

ignore precedents that do not fit their interpretation,[36] essentially treating them as mistakes to be forgotten. Not only is this incompatible with the purpose of a *general* account of law, but it is also inconsistent with law's claim to authority.[37]

Although the conceptual theorist is often a lawyer by profession, he must not arbitrarily take the lawyer's perspective in developing a general theory of law. The law is of interest to everyone because we hope to understand ourselves by understanding our social norms and institutions. He must assume a wider perspective of the interaction between law and society knowing that the nature of law can only be understood if it also takes the views of its subjects into account, [38] not just those of deputies of the court who only step in when conflicts arise. He treats ordinary people's conceptualizations of their practices as vital ingredients of a shared framework, however imperfect, inconsistent, or ambiguous they may be.

Herein lies the main objection to Dworkin's interpretive method: the interpretivist, in taking the perspective of the judge in search of the "best" law, assumes a perspective that is too presumptuous, involved, and burdened with moral presuppositions that strip him of the objectivity that is required of a jurisprudential theory. By dismissing the tools of conceptual analysis as too detached and neutral, he loses valuable resources that are necessary to achieve a deeper understanding of legal phenomena. The objection is therefore not that Dworkin was unable to arrive at the correct concept of law. Rather, it is that his whole enterprise of looking for a "best law"—in the sense of a shared and uncontroversial rendering of law's fundamental character—was misguided in the first place. It is one thing to claim, as the conceptual theorist does, that there are widely accepted paradigms and "best possible interpretations" of the law. On this view, the contests are on the level of which interpretation provides the most accurate

[36] Grant Lamond, "Legal Reasoning for Hedgehogs," in *Ratio Juris,* 30:4 (2017), 509.
[37] Thomas Adams, "Law's Umpire," in *Jurisprudence,* 8:3 (2017), 623.
[38] Joseph Raz, "The Problem About the Nature of Law," in *Ethics in the Public Domain* (New York: Oxford University Press, 1994), 203.

account of law, but that is a long way off from asking which interpretation makes the "best law". The conceptual features of law are neither so neat nor homogeneous that every theorist arrives at identical conclusions about it. Borderline cases must be explained and inconsistencies reconciled without assuming that every legal concept has an essence. If the concept of law is nothing but raw data force-fit under some ideal conception of law, then there is no quarrel with Dworkin. But that is not a concept; it is nothing more than an amalgamation of phenomena.

Dworkin thereby violated two methodological constraints known as "pluralism" and "coherence".[39] He violated the pluralism constraint by disproportionately focusing on only one aspect of law—its substantive merit—to the neglect of others, such as its functions, institutions, or authority. Meanwhile, he violated the coherence constraint by equating the law with an arbitrary blend of desiderata when a jurisprudential theory must be able to explain divergent phenomena without pretending that they are more similar than they actually are. It might be asked, conversely, how a conceptual theorist satisfies both criteria. Is it not necessary to engage in some level of evaluative theorizing to be able to pick out which features of law are truly essential? The answer is that his evaluative methods are substantially different from those of the interpretivist. Those of the interpretivist may be described as "directly" evaluative; he identifies the legal propositions about justice, equality, fairness, etc. that represent the morally best version of law and refers to them as his general theory. On the other hand, those of the conceptual theorist are only "indirectly" evaluative; he does not engage in first-order judgments about which legal propositions make the "best law", but in second-order judgments about which features of law are essential. He is concerned with meta-level issues such as explaining what it means for law to have a nature, how questions have changed over time, or how insights into its nature enhance our self-

[39] John Tasioulas, "The Rule of Law," in *The Cambridge Companion to the Philosophy of Law*, ed. John Tasioulas (Cambridge: Cambridge University Press, 2020), 119.

understanding.[40] He only engages in first-order normative issues once he has settled the second-order conceptual issues, such as whether law can be evaluated against moral criteria, or to what extent law is separate normative system from morality. Thus, unlike the interpretivist, he does not identify features as essential because they depict law in a morally sounder light. Rather, he chooses them because they present it in a truer light, one which makes better sense of law regardless of its moral quality.

III. LAW AS AN ESSENTIALLY CONTESTED CONCEPT

This section shall answer two lingering questions raised earlier: the first is, 'If the nature of law can be elucidated through conceptual analysis, then what kind of concept is law?', while the second is Dworkin's challenge, 'Why do deep controversies occur in legal practice?' The answer to the first will supply that of the second: that law is an *essentially contested concept*.

What is an essentially contested concept? W.B. Gallie pointed out that there is a special kind of concept that creates genuine disputes that cannot be decided with finality but are nevertheless sustained by logical arguments. He referred to these as "essentially contested concepts".[41] The phrase 'essentially contested' is not simply an intensifier; rather, it speaks to the location of the disagreement. Essentially contested concepts do not only generate disagreements at borderline cases, but at their core. The essence of the concept itself is contested—not because it is ambiguous and people do not agree on the linguistic criteria for its correct use—but because the concept is so internally complex that it can be given conflicting but equally legitimate interpretations by different people. The concepts of art, democracy, justice, and equality are essentially contested in this sense. People debate about whether an object qualifies as a work of art, what

[40] Julie Dickson, "Why General Jurisprudence is Interesting," in *Critica,* 49:147 (2017), 28-29.

[41] W.B. Gallie, "Essentially Contested Concepts," in *Proceedings of the Aristotelean Society,* 56 (1956), 169.

makes a country a true democracy, whether justice has truly been served in court, or whether genuine equality has been attained in a society.

Is law also an essentially contested concept? Gallie laid out seven criteria that must be satisfied in order for a concept to be classified under this category: (A) it must signify some valued achievement; (B) the achievement must be of an internally complex character; (C) an explanation of its value must reference the respective contributions of its various features, though there may be disagreement about the weight of each feature relative to the whole; (D) the achievement is of a kind that may be modified in light of changing circumstances; (E) each party recognizes that its use of the concept is contested by others; (F) the concept is derived from an exemplar whose authority as such is acknowledged by the disputants; and (G) sustained disagreement over the concept enables the achievement to be developed in optimum fashion.[42] It shall now be argued that the concept of law satisfies each of these criteria.

(A) Law signifies some kind of valued achievement

Lon Fuller described law as a human achievement that represents the highest ideals of our collective "striving".[43] It is not a static artifact that happens to be "just there". The legal order itself is something that is worked for, protected, and improved, otherwise, it cannot fulfill its higher purpose of fostering cooperation in society. On this view, law is a matter of degree; it is appraised against evaluative criteria that determine how faithful law is to its own ideals. For example, law may be just or unjust, equitable or discriminatory, fair or unfair. But precisely because these evaluative criteria revolve around essentially contested concepts themselves, then the concept of law is essentially contested itself.

[42] *Ibid*., 171-172, 180.

[43] Lon L. Fuller, "Positivism and Fidelity to Law," in *Harvard Law Review* 71:4 (1958), 646.

(B) Law has an internally complex character

The concept of law is internally complex. It contains many rich presuppositions about its features, functions, history, and institutions. There is no single basis upon which it can be appraised, thus, naturally, people disagree about its essential features. Even if they agreed that one feature was more central than any other, there would still be deep controversy about its content. For example, there is no universally accepted theory about the primary function of law. Some argue that its primary function is to guide human conduct,[44] others assert that it is to maintain public order,[45] others that it is to solve co-ordination problems.[46] Although each group deploys logical arguments to support their conclusions, they are unlikely to reach a consensus. Sometimes, disagreement comes down to a matter of preference, attitudes, or beliefs—all of which can be rationally defended. The participants eventually realize that it is impossible to find an ultimate standard for deciding whose interpretation is really "correct".

(C) There is disagreement over the relative importance of law's various features

One implication of law having an internally complex character is that its various features are ascribed different sets of relative weights. In the same way that two art connoisseurs may disagree how important the color, texture, or spacing of a painting is to its overall artistic value, philosophers disagree about how much weight should be attributed to the various features of law. Some philosophers place overriding importance on just one characteristic. For example, St. Augustine placed greater significance on

[44] Lon L. Fuller, *The Morality of Law*, Revised Ed (New Haven: Yale University Press, 1969), 74.

[45] Matthew Kramer, *In Defense of Legal Positivism* (New York: Oxford University Press, 1999), 204.

[46] John Finnis, *Natural Law and Natural Rights* (New York: Oxford University Press, 1980), 232.

the moral merit of law above all else, stating that an unjust law is no law at all.[47] Raz, on the other hand, argues that law must be studied as a social institution which is underlined by three basic elements: its efficacy, its institutional character, and its sources.[48] It is impossible to determine whether any philosopher's ascription of relative weights is "correct", because a case can be made for many combinations.

(D) Law has an "open" character

At any stage in history, no one can predict what new developments may come to be regarded as essential to the concept of law. The way law is conceived partially depends on the historical events, the social context, or the political milieu that shape the philosopher's perspectives. During medieval times, the dominance of the Roman Catholic Church influenced philosophers such as St. Thomas Aquinas, who claimed that human law was necessarily derived from the Natural Law of God.[49] Thomas Hobbes, who lived through the English Civil War, believed that man's "state of nature" is a state of war. He consequently idealized law as a set of commands issued by an unlimited sovereign known as the Leviathan that set constraints on humans to preserve them against their destructive instincts.[50]

[47] St. Augustine, *On The Free Choice of the Will*, trans. Thomas Williams (Indianapolis: Hackett Publishing Company, 1998), 8.

[48] Joseph Raz, "Legal Positivism and the Sources of Law," in *The Authority of Law* (Oxford: Clarendon Press, 1978), 42.

[49] St. Thomas Aquinas, "Question 91, Articles 1-3," in *Summa Theologica*, ed. The Priests of the English Dominican Province (Maryland: Christian Classics, 1981), 1332-1335.

[50] Thomas Hobbes, *Leviathan* (New York: Dover Publications Inc., 2018), 95-96.

(E) Each party recognizes the fact that its use of the concept of law is contested by others

It might be objected that there is no such thing as an "essentially contested concept", and that what we think is deep controversy occurs only because different parties are defending two entirely different concepts altogether. The answer to this objection is that there is usually only one concept of law that is being spoken of, which is positive or man-made law. It is just that there are different *conceptions* of the same concept.

For example, Gustav Radbruch, a natural lawyer, criticized positivists of failing Nazi Germany because "*with [their] credo 'a law is a law', [they] rendered the German legal profession defenseless against laws of arbitrary and criminal content*."[51] Although Nazi laws were *prima facie* valid, judges should have invalidated many of them in the name of natural justice. In his view, no man of conscience could have permitted such wicked laws to take effect. Hans Kelsen, a positivist, argued that the role of the court is to distinguish between law and non-law, not between good and bad law.[52] For Kelsen, as long as the essential elements of a legal system were in place, and a law was promulgated according to the established procedures, then Nazi law was, properly speaking, law. In this exchange, it *might* appear that Radbruch and Kelsen were talking about two different concepts, but they were really speaking of the same set of Nazi laws and the same concept of law. They only had different conceptions which needed to be defended from their critics.

[51] Gustav Radbruch, "Statutory Lawlessness and Supra-statutory Law" in *Oxford Journal of Legal Studies* 26:1 (2006), trans. Bonnie Litschewski Paulson and Stanley L. Paulson, 6.

[52] Hans Kelsen, "Law, State, and Justice in the Pure Theory of Law," in *What is Justice?* (Berkeley: University of California Press, 1971), 295.

(F) The concept of law is derived from an exemplar whose authority is acknowledged

The different uses of the concept of law claim the authority of a longstanding tradition of recognizing what counts as law. For example, while the proposition that 'One ought not lie' makes a normative claim, nobody will agree that it is a law unless something to that effect is enacted by the proper law-creating institutions. In common practice, it is easy for someone to distinguish between law and non-law or to study law in its "proper" sense.

(G) The concept of law has been continuously refined as a result of competition

It has been said that competition between various traditions has led to a sense that somewhere in the midst of all this debate is a valuable ideal that all legal systems should aspire to,[53] which, in turn, has led to tremendous advances in jurisprudence. Dworkin's insistence on the prevalence of moral principles in legal practice compelled a new generation of positivists to improve Hart's theory so they could account for the moral elements of law as well.[54] Jeremy Bentham, a positivist who accused natural lawyers of peddling rhetorical "nonsense upon stilts",[55] was partly responsible for the movement away from theories that posited the existence of abstract metaphysical entities such as natural rights. When the Natural Law tradition did return to prominence, it was through the works of philosophers like John Finnis who insisted that the "natural" aspect of their

[53] Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" in *Law and Philosophy*, 21:2 (2002), 150.

[54] See W.J. Waluchow, *Inclusive Legal Positivism* (New York: Oxford University Press, 1994).

[55] Jeremy Bentham, "Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution By Jeremy Bentham" in *The Works of Jeremy Bentham Vol. 2* ed. John Bowring (Edinburgh: William Tate, 1843), 502.

tradition was a reference to the intrinsic goods of human nature that law upholds,[56] not the existence of a moral natural order—a less ambitious speculation than those of his classical predecessors.

There is now a plausible reply to Dworkin's challenge from the perspective of the positivist: deep controversy occurs because the concept of law is essentially contested, which in turn occurs because law is a social institution. There are two ways of explaining this relation.

The first is that law, far from being an autonomous and self-contained system, does not arise in a vacuum. It is not merely a one-way projection of authority by the government unto civilians. Instead, it is a kind of collective endeavor, the product of a collaborative effort between officials and citizens which reflects the community's principles, goals, and values. The law contains more than what is explicitly stated. This is because judges must often appeal to background information that is derived from the norms of society to interpret statutes that are written in vague or ambiguous language.[57] In modifying the ways in which the law is interpreted, these background norms form part of the law's content. This is not to say that all background norms are part of the law, for clearly the law has limits. It does, however, mean that social norms widen its scope.

The second explanation is that judges who interpret the law are only human. Inasmuch as they are trained legal professionals, they cannot help but sometimes interpret the law in accordance with their ethnic background, political biases, religious beliefs, cultural sensitivities, social attitudes, and unique social experiences. Two judges who may have been trained in the same academic institution, have read the same law books, and are faced with the same case may arrive at different conclusions about what the law says.

Both points explain why deep controversy occurs, especially in hard cases where there is no existing statute or precedent under whose ambit the

[56] See Finnis, *supra* note 44.

[57] Joseph Raz, "Dworkin: A New Link in the Chain," in *California Law Review,* 74:3 (1986), 1105-1106.

facts of the case fall. In *Riggs*, the controversy was not so much rooted in the question of which interpretation made the New York Statute of Wills the "best law". Or at least, there is no evidence that the non-profit principle was invoked with the intention of applying the most moral version of the law. It is possible that the court thought that the principle was binding because it was embedded in past decisions,[58] which, for the positivist, is a perfectly acceptable criterion under the rule of recognition.

It is also possible that the judges disagreed about how to appraise the law, where the boundaries of law were drawn, how much weight to allocate to different considerations, how relevant past decisions were to the case, how binding the non-profit principle is, whether the law could be used to discourage future acts of murdering testators to prevent their wills from being modified, or whether the social milieu of the time called for the court to temper the law with a sense of morality. These possibilities are intrinsic to legal practice because law is an essentially contested concept. They are not necessarily specific to *Riggs*; rather, they are theoretical questions that can turn several cases into hard ones. Hence, deep controversy exists not because of the controversial, interpretive character of adjudication and legal practice, but because of the intrinsically complex character of the concept of law itself.

CONCLUSION

It will be useful to conclude with a summary of how the three jurisprudential methods that have been discussed in this paper differ from each other. First, whereas semantic theories of law *fix* their insights against shared linguistic criteria among lawyers and judges, interpretive theories *argue* towards these insights by giving legal propositions their most moral interpretations. Second, whereas semantic theories of law study the meaning of words to gain an understanding of law, conceptual theories

[58] Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), 233.

probe deeper into their underlying concepts and what they have to say about the non-linguistic world. Third, whereas interpretive theories of law take the point-of-view of the judge in search of the "best law", conceptual theories take the general point of view of society and only seek the "best interpretations" of the law.

It has been argued that the semantic sting did not sting Hart. Deep legal controversies do not exist because law is an interpretive concept that can never be studied against social fact criteria. Rather, they exist because law is an essentially contested concept; there is disagreement at its very core about its essence, scope, functions, character, limits, values, and so on even if there *were* linguistic criteria. This is not to say that there is no such thing as a legally correct answer in cases that are deeply contested. Nor does it mean that it is necessary to deploy Dworkin's method of constructive interpretation to arrive at the "true" character of law in each controversial case. As it has been argued, his solution does not eliminate deep controversy so much as it disguises it, depicting the law as more unified and coherent than it actually is, and presenting it in terms of what it ought to say instead of what it really says. There is a more challenging but ultimately better route to take, and it is through the careful, conceptual analysis of legal phenomena that begins with language but looks beyond it. And if the argument that has been presented here is correct, then Legal Positivism successfully resists Dworkin's semantic sting.

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