THE BOUNDARIES OF LAW AND THE SCOPE OF LEGAL PHILOSOPHY

INTRODUCTION

A prevalent view among legal philosophers is that an important task of jurisprudence is to provide a set of necessary and sufficient conditions for what counts as law. This view rests on an assumption that has been pithily summarized recently by Joseph Raz: "So long as we allow that it is possible for a population not to be governed by law, there must be a difference between legal standards and those which are not legal, not part of the law."[1] With this assumption in mind legal philosophers have spent considerable intellectual energy on trying to articulate as accurately as possible what it is that distinguishes legal standards ("laws") from non legal standards ("non laws").

In this Essay I wish to challenge this approach. My argument will develop in two interrelated stages. After describing in greater detail in Part I the view I set myself against, I will first argue in Parts II and III that the fact that legal philosophy aims to explain a practice sets limits on the scope of what it can explain; more specifically, I will argue that on certain questions the practice may simply be indeterminate, and that many questions about the boundaries of law probably belong to this group. The second argument, developed in Part IV, shows that even if the practice is not indeterminate on some questions, it does not follow that finding an articulate answer to those questions is important for understanding the practice. Part IV also offers some directions towards what I believe are more important issues for jurisprudence to tackle.

I. DESCRIPTIVE JURISPRUDENCE

It is useful to begin by drawing the familiar distinction between descriptive and normative jurisprudence.[2] A rough and ready definition of the former is that it is concerned with giving us an account what law is, or as it is sometimes put, that it is concerned with law's "nature" or "essence." In giving such an account the theorist refrains from making judgments about the practice or suggesting any changes to it. He or she only aims to describe what the practice, or the

---

[1] Joseph Raz, "Incorporation by Law," 10 *Legal Theory* (2004) 1, 15-16.

[2] A note on terminology: I will use the terms "jurisprudence," "analytic jurisprudence," "legal philosophy," "analytic legal philosophy" interchangeably throughout this essay.

most important features of it, happen to be.[3] Normative jurisprudence, in contrast, is concerned with explaining what makes legal practice, or particular aspects of it, justified. The difference between descriptive and normative jurisprudence is not between claims for leaving law as it is and claims suggesting changes to the law: an argument giving reasons for not changing legal practice is a normative argument. The difference is also not between arguments directed at particular legal doctrines and the law in general. True, much of what I call descriptive jurisprudence is concerned with the law in general, but some similar claims have been made about particular areas of the law.[4] And while most normative jurisprudence is concerned with particular legal doctrines, it is possible to advance normative arguments directed at law in general, such as claims explaining why having law is preferable to some kind of lawless state of nature, why a legal system where legal rules are incrementally developed by judges is superior (or inferior) to a legal system in which many of the legal rules are enacted by legislature and found in a statutory code.

The difference between descriptive and normative jurisprudence is between philosophical inquiry concerned with "what is law like?" in the case of descriptive jurisprudence, and philosophical inquiry concerned with "what should the law be?" in the case of normative jurisprudence. In this Essay I will focus only on descriptive jurisprudence, and unless I state so explicitly, whenever I talk about legal philosophers I refer to those who take their work to be descriptive.

Much of what descriptive legal philosophers are concerned with is the question of boundaries, that is, the proper way of distinguishing between those things in the world that are laws and those things in the world that perhaps bear some resemblance to law but nonetheless are not laws. Debates about the relationship between law and morality, and more recently between different kinds of legal positivism, are often just specific, albeit highly elaborate, examples of arguments trying to answer this question.[5] Legal philosophers engaged in this enterprise try to provide an account of the few essential features that something in the world has to have in order to count as an example or instantiation of law. They do so by looking at legal practice and trying

---

[3] Many of the legal philosophers I call "descriptive" argue that some evaluative considerations are required for such an inquiry, considerations that range from simplicity and comprehensiveness of the theory to evaluative assessment of the most important aspect of the practice. See, e.g., Julie Dickson, *Evaluation and Legal Theory* (2001) *passim*; Joseph Raz, "The Problem about the Nature of Law," in *Ethics in the Public Domain: Essays on the Morality of Law and Politics* (rev. ed., 1994) 195, 209 (hereinafter *Ethics*). For references to other legal philosophers expressing the same view see Danny Priel, "Trouble for Legal Positivism?", 12 *Legal Theory* (2006) 225, 225-26 n.1. However, even these theorists believe they rely on such evaluative considerations in order to describe what law is, not what it ought to be. See, e.g., Dickson, *supra*, at 135-36.

[4] See, e.g., Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (2001) 15 ("Corrective justice can provide an account of what tort law is, in a way that economic analysis fails to do.").

[5] I offer a reinterpretation of these debates, which I believe makes them more interesting in Danny Priel, [in the works].

to distinguish it from other normative practices and systems of norms (etiquette, rules of clubs, social norms, morality and so on).

Two important considerations guide proponents of this sort of project. First, the theorist is trying to discover the *necessary* features of law. According to this approach laws in different times and places have differed significantly in what they prohibited or required, in how they were phrased, in the way they were enforced and a myriad other ways. But underneath all these differences there are (or at least there may be) features that all laws have necessarily in common, the features in virtue of which they are all laws.

The second, related, element of this approach is that in trying to articulate those features that all laws necessarily have the theorist is not making up anything. Rather, she brings to the fore what is already to be found in the practice: those features that can be discerned from observing at the practice. Accurately articulating those features may not be a simple matter, but it does not aim to change the practice; rather, it tries to describe what the practice, prior to and regardless of the theorist's analysis, is. In doing this the theorist can (and should) consider the practice without morally evaluating it. This does not mean that the legal philosopher is barred from passing judgment on the practice, but it does mean that the description and evaluation of legal practice are separate activities and that the description must necessarily come first.

H.L.A. Hart's work, which has had considerable influence on the shape twentieth century legal philosophy has taken, exhibits both elements. He framed his work as an attempt to answer the question "what is law?," and as he explained a significant part of his answer to this question consisted of explaining how law (and legal obligation) are different from morality (and moral obligation).[6] Quoting philosopher J.L. Austin he explained that by looking for the boundaries of law we are looking "not merely at words ... but also at the realities we use words to talk about."[7] Later he showed his commitment to this view when, after developing his answer to this question, he summarized his view in the following way: "There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other, its rules of recognition ... must be effectively accepted."[8] And as he insisted years later, his account was intended to be general, value neutral and descriptive.[9]

---

[6] See H.L.A. Hart, *The Concept of Law* (2nd ed., 1994) 7-8.

[7] *Ibid.* at 14 (quoting J.L. Austin, "A Plea for Excuses," 57 *Proc. Aristotelian Soc.* (1956-57) 1, 8) (alteration in original).

[8] Hart, *supra* note 6, at 116.

[9] *Ibid.* at 239-40.

After Hart this view found its clearest articulation in the work of Joseph Raz. As he put it once, the difference between legal sociology and legal philosophy is that the former

> is concerned with the contingent and with the particular [whereas legal philosophy] with the necessary and the universal. Sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.[10]

This concern with law's necessary features is related in Raz's work with delineating the "limits" of the law, that is to say, with finding "a test that distinguishes what is law from what is not."[11] Raz also insisted on the second component of descriptive jurisprudence: for instance, he criticized Ronald Dworkin's work for "assum[ing] that legal philosophy creates the concept of law, whereas in fact it merely explains the concept that exists independently of it."[12]

The work of Hart and Raz had considerable impact on legal philosophy in the last fifty years, and many of today's legal philosophers have followed suit and described their work in similar terms.[13] Philosophers who departed from this approach have been challenged, and occasionally it has even questioned whether they are "proper" analytic legal philosophers.[14]

The argument I will develop in what follows is that this approach is mistaken. This claim is by no means novel. Others, writing from the perspective of normative jurisprudence have

---

[10] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979) 104-05 (hereinafter Raz, *Authority*); to the same effect Joseph Raz, "On the Nature of Law," 82 *Archiv für Rechts- und Sozialphilosophie* (1996) 1, 2 (hereinafter Raz, "Nature"); Joseph Raz, "Can There Be a Theory of Law?," in Martin P. Golding & William A. Edmundson (eds.) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 324, 328 (hereinafter Raz, "Theory of Law?"). For an earlier statement of a similar idea see H.L.A. Hart, "Introduction," in John Austin, *The Province of Jurisprudence Determined* (H.L.A. Hart ed., 1954) vii, xv ("Analytical and historical inquiries provide answers to different questions not different questions to the same questions"); *cf.* Nicola Lacey, "Analytical Jurisprudence Versus Descriptive Jurisprudence Revisited," 84 *Tex. L. Rev.* (2006) 945, 953 (arguing that "Hart was relatively impervious to historical and sociological criticism, precisely because he saw his project as philosophical" and as such as distinct from sociological inquiry).

[11] Joseph Raz, "Legal Principles and the Limits of Law," 81 *Yale L.J.* (1972) 823, 842.

[12] Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison," in Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to* The Concept of Law (2001) 1, 35 (hereinafter *Hart's Postscript*); Joseph Raz, "Authority, Law, and Morality," in *Ethics*, *supra* note 3, at 210, 237 (hereinafter Raz, "Authority"); see also Dickson, *supra* note 3, at 135-36.

[13] See, e.g., Dickson, *supra* note 3, at 17 (limits legal philosophy to those features of law that are both "necessarily true" and "adequately explain" its nature); Andrei Marmor, *Interpretation and Legal Theory* (2nd ed., 2005) 27, 43; R.H.S. Tur, "What is Jurisprudence?," 28 *Phil. Q.* (1978) 149, 152, 155; see also Ruth Gavison, "Comment," in Ruth Gavison (ed.), *Issues in Contemporary Legal Philosphy: The Influence of H.L.A. Hart* (1987) 21, 25 ("Usually, when people think of a theory of law, they think of an attempt to identify the features which are unique to law and distinguish it from other social phenomena."). For a recent article-length defense of this approach see Andrei Marmor, "Legal Positivism: Still Descriptive and Morally Neutral," 26 *Oxford J. Legal Stud.* (2006) 683 (hereinafter Marmor, "Legal Positivism"). (I criticize Marmor's essay on other grounds than the ones discussed here in Danny Priel, "Evaluating Descriptve Jurisprudnece," 52 *Am. J. Juris.* (2007) 139.) I think this view is also implicit in John Gardner's claim that legal positivism is "normatively inert." John Gardner, "Legal Positivism: 5½ Myths," 46 *Am. J. Juris.* (2001) 199, 202, 213.

[14] See, e.g., Dickson, *supra* note 3, at 22-23 & n.31 (questioning whether Dworkin is an analytic legal philosopher); Marmor, *supra* note 13, at 27 (same).

challenged this approach, arguing that any such description of what law is can only be made against a background of an evaluative judgment as to the point or purpose of having law and the goods that having law can secure.[15] However, the argument I will develop in the Parts II and III is different. I will argue that legal philosophers' engagement in such questions is misguided, because many of the questions to which they seek answers have no determinate answer.

II. THE LIMITS OF JURISPRUDENTIAL INQUIRY

A. *Why Jurisprudence is not Like Mathematics?*

In the course of a recent discussion of "conceptual jurisprudence," essentially what I called descriptive jurisprudence, Kenneth Himma defended it by drawing an analogy between this kind of descriptive inquiry and pure mathematics. Using as his example the recent proof of what has come to be known as the "last theorem of Fermat," Himma argued that jurisprudence could be justified as the pursuit of knowledge for its own sake, which has intrinsic value.[16]

Himma's argument rests on two premises: the first is that analytic legal philosophy discovers certain truths about law, and the second is that discovering those truths about law is sufficient justification for engaging in legal philosophy. I believe both premises are problematic and need qualification. The second premise will be questioned in Part IV; here I will argue against the first premise, namely that descriptive jurisprudence as currently practiced tells us truths about law. To see why we have to understand better what it is that legal philosophers do.

A theory that tries to explain the nature of law is one that adequately explains certain social phenomena that exist in our world and that people refer to using the English word "law" or its translations to other languages. (I disregard the use of the word in the sense of law of nature.) If this demand is not met, then we can no longer say that the theory is *about* an existing practice or that it describes what it is. In this respect there is no difference between the legal philosopher the sociologist of law. Indeed, if it were otherwise there would have been nothing we could tell the "legal philosopher" whose theory of law was that law has to do with green jumping objects. He

---

[15] See, e.g., Ronald Dworkin, *Justice in Robes* (2006) 32-34; John Finnis, "On the Incoherence of Legal Positivism," 75 *Notre Dame L. Rev.* (2000) 1597, 1604 ("*general* descriptions of law will be fruitful only if their basic conceptual structure is ... derived from the understanding of *good reasons*").

[16] See Kenneth Einar Himma, "Substance and Method in Conceptual Jurisprudence and Legal Theory," 88 *Va. L. Rev.* (2002) 1119, 1219-21 (reviewing Coleman, *supra* note 4). To the same effect see Brian Bix, "Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate," 12 *Can. J.L. & Juris.* (1999) 17, 24, who argues that "there is (or, at least, there need be) no point to [analytical jurisprudence] other than knowledge." Soon afterwards he adds that there may be "pleasure from knowledge, from uncovering certain kinds of insights about a social practice that may not have been clear to us, though that practice has been in front of us all of our lives." *Ibid.* at 25. See also Marmor, "Legal Positivism," *supra* note 12, at 692 ("Philosophy should be interested in truth").

could have said that after thinking hard on the "nature" of law he has come to the conclusion that this is what law's nature is. But the simple reason why this person is mistaken is that whatever it is he was describing, he was not explaining that social practice that we have been talking about, namely the one called "law."

All this sounds trivial. What implications does it have for the legal philosopher? Most members of a society are not legal theorists in the sense that they do not have an articulate theory of what counts as law, let alone an explanation *why* something counts as law. However, they habitually make "legal judgments" about certain events that happen in the world: they consider actions (e.g., intentionally killing others) "illegal" or forbidden by law; other actions (e.g., paying taxes) they consider as required by law; still others (e.g., going shopping) as permitted by law. In addition, they have certain, often rather vague, attitudes about certain legal officials, judges, lawyers, police officers, as somehow related the machinery of law.

But one can have knowledge of all this without knowing what makes it the case that all this is true. It is important to see that the legal attitudes are *not* the same as what makes it the case that something is law: the former are of the form "intentional killing is illegal in this country," the latter are of the form "the reason why intentional killing is illegal in this country is ...." The descriptive philosopher is after filling the ellipsis in the latter sentence.

At this point we need to clarify the relationship between three different things we might be talking about: a phenomenon or a set of phenomena that (could) exist in the world (e.g., law), concepts (e.g., LAW), and words that people use to refer to things (e.g., "law" in English).[17] The object law and the word "law" are relatively easy to understand. The former consists of attitudes and actions of numerous individuals, a set of events that count as legal events. This is the "thing" we are trying to explain. Because law consists of social phenomena which are understood by members of a particular society to belong to it, the theorist has to follow participants' attitudes as to what counts as the object of inquiry to be explained. The theorist does that not because they have special knowledge on the question, but because their attitudes constitute the object of her inquiry. The second element, the word "law," is simply what we use with our language to refer to that object of inquiry, or to instantiations of it.

Contrary to the relative ease of understanding what law and "law" are, it is more difficult to understand what the concept LAW is. One reason for the difficulty is that the word "concept" is ambiguous. In one sense we use this word to refer to the most basic constituent of thought in a

[17] I follow common philosophical usage by using normal text to refer to things, small capitals to refer to concepts, and the word in quotes to refer to the word that refers to the object within language. Thus, there are dogs in the world, which humans talk about by using the word "dog"; and when doing talking about dogs people employ the concept DOG.

thinker's mind; and it denotes the mental content a thinker has with regard to certain things in the world. But alongside this sense, the word "concept" is also used in expressions like "*the* concept of a person," "*the* concept of responsibility," or "*the* concept of law," and here it does not refer to a particular thinker's mental content, but to a description of a set of features that something has to have in order to count as an instantiation of that concept (or more precisely, as an instantiation of the object which the concept denotes). Thus, if for example Hart's account of a legal system as the "union of primary and secondary rules" is correct, then the concept LEGAL SYSTEM in this sense provides us with a method for identifying those things in the world that are laws: we will identify something as legal system if it is a set of rules with identifiable primary and secondary rules. We can call concepts in the first sense I-concepts, and in the second sense E-concepts.[18] Legal philosophers' efforts at explaining law are attempts to articulate an account of the E-concept LAW. This distinction helps us see the unique role legal philosophers are supposed to play in explaining law: by articulating the concept LAW the legal philosopher goes beyond merely collecting data as to the judgments people make; the legal philosopher seeks to use those judgments to offer an account of how to identify other, real or hypothetical, instantiations of law, and to explain what makes them instantiations of law.

The relationship between individual people's I-concepts and the E-concept the legal philosopher is trying to explicate is complex: the E-concept LAW is a reconstruction of the features because of which people make judgments about certain things in the world that they are legal, and it explains why they have the legal attitudes that they have. But individual people only have I-concepts, and to know that certain I-concepts are relevant for our reconstruction of the E-concept they need to be instantiations of the E-concept. But how can we know that? The answer is that we cannot, and our judgment whether to count certain persons' I-concepts as relevant for the explication of the E-concept is to some extent an evaluative question. So if we encountered someone whose judgments of what is legal showed that her I-concept LAW was something like GREEN JUMPING OBJECTS we would have to make the judgment that when this person uses the word "law" she has an I-concept that is not an instantiation of the E-concept that we are trying to reconstruct.

So we can talk about there being a single E-concept only if we observe that different language users seem to be able to converse with each other on the object whose concept we are interested in. Whether different people can be considered more authoritative on the matter, that is, whether when different people's I-concepts are inconsistent on some judgments, there is some

[18] I follow here Ray Jackendoff, "What is a Concept, That a Person May Grasp It?," in Eric Margolis & Stephen Laurence (eds.), *Concepts: Core Readings* (1999) 305, 305-06.

way of telling who is right or wrong is something that depends on the practice: with regard to some concepts there may be what Putnam called "linguistic division of labor," on others there may not be. In the latter case, it may well be the case that we will have to conclude that we cannot reconstruct a single E-concept from different people's I-concepts. Though not framed in this way, most of this is familiar even to descriptive legal philosophers, who mostly agree that determining what belongs to the concept LAW requires reliance on evaluative considerations.

We can now go back to Himma's analogy that opened this Part. The problem with it is that it overlooks a crucial difference between what analytic jurisprudents and pure mathematicians are doing, which has to do with what they are investigating. Descriptive jurisprudence is an attempt to explain the standards by which we decide what belongs to legal practice, whereas pure mathematics is better described as *part of* mathematical practice. As such pure mathematics is not an attempt to describe or explain any existing practice. Indeed, unless we are Platonists about mathematics, a view that there is little reason to believe is true (at least at the level required for solving Fermat's last theorem), mathematics does not correspond to anything in the world.[19]

This difference is important, because it sets limits to meaningful theorizing about the concept LAW, a limit that has no equivalent in the case of mathematics: in describing what LAW is, the theory must be faithful to the object it tries to explain, namely legal practice, and it cannot go beyond the object it seeks to describe (in a sense that will be clarified in a moment) if it seeks to remain descriptive. In contrast, when Andrew Wiles, the mathematician who solved Fermat's last theorem, was working on his proof he was not interested one bit in popular attitudes or opinions about this problem (attitudes or opinions that for the overwhelming majority of people are non-existent), nor was he even interested in Fermat's own supposed solution to the problem (a proof that, given what we now know about the actual proof, was almost certainly faulty). He was not trying to describe any existing social practice. What he did was develop and work out the implications of certain accepted axioms and theorems within the small community of pure mathematicians.

All this shows that if we want to analogize what legal philosophers do to scientific work the more appropriate analogy is not the work of mathematicians, but the research of natural scientists trying to learn the nature of a certain material, as is for instance the case with a chemist who tries to learn what water is. In both cases what the researcher aims to do is expand our understanding of something in the world without altering it. In both cases we can identify instances of the object of inquiry (and the theorist does not aim to challenge *that*), but we lack an account of the features

[19] For the problems with the view that mathematics is descriptive of something see Paul Benacerraf, "Mathematical Truth," 70 *J. Phil.* (1973) 661.

in virtue of which something belongs to our object of inquiry. In the case of natural science it is the substance under examination, in the case of social practice it is a certain practice. There is even some similarity between the way a scientific theory and the way a suggested explication of a concept are tested. The most common method by which philosophers test a suggested explication of a concept is by trying to refute it against agreed-upon instantiations of the concept: if we all agree that a certain thing in the world is an instantiation of law, but a suggested explication of the concept LAW suggests that this is not law, we have thereby shown that the suggested explication is mistaken.

Despite this similarity, there are several notable differences between what the natural scientist and the descriptive legal philosophers do. The most obvious one is that natural scientists investigate physical substances, whereas the legal philosopher examines a social practice. For our purposes the most important implication of this difference is that what water is (as opposed to the concept we use to refer to water) is fully determined regardless of human attitudes on the matter. Humans, even those considered experts, might be thoroughly mistaken about the deep structure of water and that would not change what water is. In fact, for most of human history humans have been mistaken (or at least ignorant) of water's nature, and for all we know, it may turn out that we are mistaken about it as well.[20]

This is not how things are in the case of law. The important difference for our purposes is that the natural scientist trying to discover the nature of water needs to care for human attitudes only for identifying an object investigated with a certain lay term used (e.g., a scientist will have to have an agreed sample of water in order to tell lay people what its nature is), whereas as we have seen what I called legal attitudes *constitute* what the object she investigates is, and thus they are the "specimens" she works on trying to learn from them the concept LAW.

To summarize this point: explication of a concept must be grounded in attitudes that are part of the practice, cannot contradict the attitudes that constitute the practice, and cannot go beyond those attitudes or what is implicit in them. If she does, the result will no longer be a description of the *object* the philosopher was trying to explain in the first place. How does this affect legal philosophy?

---

[20] Of course it is a contingent fact that when referring to water people use a concept that is answerable to changes as a result of scientific discovery. They could have used a different one. This is *not* in conflict with externalism about meaning. What philosophers Hilary Putnam and Saul Kripke (among others) have argued, see e.g., Saul A. Kripke, *Naming and Necessity* (1980); Hilary Putnam, "The Meaning of 'Meaning'," in 2 Hilary Putnam, *Mind, Language, and Reality: Philosophical Papers* (1975) 215, is that the concepts we *actually* use to refer to natural kinds are those whose meaning (content, intension) is fixed by their extension. But we might have used different concepts to refer to natural kinds. For instance when uttering the word "water" we could have denoted by the word the concept WATERY STUFF, i.e., the stuff that has all the superficial features of water and that on Earth happens to be water (H_2O), but on Twin Earth would have referred to XYZ. That we use the concept WATER to refer to water is a contingent fact.

B. *The Scope of Descriptive Jurisprudence*

Law deals with practical matters. I mean this term both in the philosophical sense, in that it purports to give reasons for action, but also in the everyday sense of the term: despite some impressions to the contrary provided by a handful of cases, much of the law is concerned with finding solutions to real-life conflicts, and oftentimes the purpose of having law is to accomplish this without delving too deeply into theoretical questions. This suggests that most of people's attitudes about law will be on matters that have some practical implications; on the other hand, on questions that have no practical implications, there might not be any attitudes, and consequently, the concept LAW will be indeterminate about them. If this is true, it will not do to say that jurisprudence can be justified by the pursuit of pure knowledge, because the problem with certain jurisprudential claims is not that they provide knowledge of little practical importance, but that they are not knowledge at all.

Let me illustrate this point with three examples relating to the questions of boundary between law and other practices. Suppose, first, that within one legal system a certain legal norm unquestionably exists. Later, a new case requires an application of that legal norm. Would we say that there was law on this question prior to the decision? In a sense this is a very simple question: if law is understood as some standard of conduct knowable in advance and to which people are required to adhere, then it seems reasonable to say that there was law on this question. But Hans Kelsen in his later writings suggested that until the actual decision is laid down there is no law on the question but only a "hypothetical legal norm", because there are only specific and individual norms that can be observed "immediately."[21]

The second example comes from the debate between legal positivists and Dworkin about the place of morality in law. In its more recent rounds it turns out that the agreement among the disputants is quite extensive: there is general agreement that judges often rely on moral reasons, and there is also agreement that judges *should* rely on moral reasons when deciding cases. The question that remains disputed is whether when the judge relies on moral reasons she is within or outside the boundaries of the law, or as Raz has recently put it, the question is whether in deciding such cases the judge does so by following standards that are *part of* the law, or by following standards that one ought to follow *according to* law, even though they remain outside of it.[22]

---

[21] See Hans Kelsen, *General Theory of Norms* (Michael Hartney trans., 1991) 19-21, 46-55. I gloss over certain complications in Kelsen's view.

[22] Raz, *supra* note 1, at 10. This question is close to the exclusive-inclusive debate that will be discussed at greater length at Section III.B, *infra*.

The third is the even older question whether properly promulgated putative laws that are (grossly) unjust are laws or not. Again, there is no disagreement among disputants that sometimes immoral laws should not be obeyed. The only question under consideration touches on the proper distinction between things that are laws (albeit immoral ones) and things that are not laws.

How are we to settle these debates? Legal philosophers might offer various arguments in support of different positions, but I think that in most cases such arguments would not be merely pointless, but misguided. The reason is that if we try to go beyond the notion of guidance by law in deciding on these matters, then the object of our inquiry (law) does not have an answer to these questions, or if I may put it in terms more familiar to lawyers, there is a gap in the practice (and hence in the concept) on this matter. This gap may exist for three reasons: the first is that because the question has no effect on the working of the law, it is unlikely that non-reflective (or even reflective) participants in the practice will form any attitude on it: if legal practice is not affected by the question whether a legal norm is "hypothetical" or "real" until it is applied to a particular case, then there may not be anything in the practice to answer the question one way or another. A second possibility is that in such a case some participants in the practice may form one view, others another, but the theorist, at least so long as she keeps to her descriptive guise, will have no way of deciding among them. Legal philosophers themselves are members of legal practice: like others they make judgments about what things are laws and what things are not laws. Therefore they may both express attitudes regarding the boundaries of law in their capacity as participants in legal practice, and then describe them in their capacity as legal philosophers. But so long as opposing views of different participants in the practice are consistent with the practice, there will not be any way of deciding which view explains the practice more accurately.

The third possibility is somewhat different. It may be that participants in the practice will intentionally (although perhaps not fully consciously) keep the boundaries of law vague. Keeping the boundaries of law vague may be important to participants in the practice and therefore very important for our understanding of the practice. The most ancient of legal boundary questions, that of the boundary between law and morality provides an example: leaving aside the possibility that the boundaries between the two have shifted between different times and places, attempts to give a crisp distinction between law and morality or to say where law ends and morality begins, may flout legal practitioners' desires to keep those boundaries vague so as to allow for the influence of one on the other. If that is the case, then a theorist whose account makes the distinction appear sharper than it is, will give an inaccurate description of the practice, not a more precise one.

Whichever is the case the result is the same: the object (law) does not have "in it" an answer to such questions, and therefore the theorist has no basis on which to give a determinate answer to the question. In one sense one may say that in this situation "there was a legal norm prior to the decision" on the new question, on the other that "there was no norm, only a hypothetical norm," or that in some sense a grossly unjust laws are not laws, and in another they are.[23] But I believe it is more accurate to admit that the practice is simply silent on the question. In that case, the descriptive legal philosopher should be silent on it as well.

Three clarifications are due here: first, I have little doubt that the attitudes of participants in the practice provide an answer to some boundary questions. Consider the "legal system" that contains the following single primary norm: "a person who does not behave morally will be punished appropriately." I believe existing attitudes about law would militate against calling this an example of a legal system. But I do not think this is the case with regard to questions of boundary in less extreme cases. And while it is perhaps true that "[s]o long as we allow that it is possible for a population not to be governed by law, there must be a difference between legal standards and those which are not legal,"[24] it does not follow that there won't be many questions about the boundary between law and non-law on which the practice simply will have no answer, because those who engage in the practice were never required to consider them. Similarly, most people have some distinction between law and politics, between the kind of arguments that a politician (or even a political theorist) may make and an argument that a lawyer or a judge may make. But this distinction is vague and shifting: what once might have been considered a political argument which may be good for the legislator may now be an acceptable argument before court; what might be considered a respectable legal argument in one country, could be alien to the practice in another. A theorist who aims to give a faithful account of the practice must acknowledge all this in her account.

Second, I cannot *prove* by logical deduction that the practice of law is indeterminate about any claim about the boundaries of law. But there are several reasons for thinking that this is often the case. These reasons will be spelled out in greater detail in the following Parts, but they can be stated briefly here. They include the fact already mentioned that people will probably have attitudes about the practice of law primarily on issues that are practically relevant for them, and given the irrelevance of the question to the practice it is not likely that such attitudes exist, or that they will be in any way uniform. We can gain some support for this conclusion from the fact that

---

[23] Indeed this is very close to Dworkin's final say on whether regimes with immoral laws can be said to have a legal system or not. See Ronald Dworkin, *Law's Empire* (1986) 103-04.

[24] Raz, *supra* note 1, at 15-16.

in any of those debates about the boundaries of law it is rare to find references to participants' attitudes on this question. From the other direction, if the debate had some important implications for the practice of law, it would be reasonable to expect that lawyers would have picked up on the debate and have used the insight provided by the philosophers. But there is virtually no evidence of awareness of the debate among practitioners, or any evidence that they (or even other academic lawyers) consider it important or relevant for understanding the questions that interest them.

The final clarification is that the argument does not rule out the possibility that the practice of law will change in such a way that a certain boundary question that is now indeterminate about it will become determinate by changes in the practice in the future. But this will not prove my current argument is false, only that the current practice of law changed.

III. SOME POTENTIAL OBJECTIONS

The previous Part sought to show that the fact that legal philosophy aims to find the features of an existing practice limits the scope of philosophical inquiry about law to what can be "extracted" from the attitudes of participants in the practice. This may seem obvious, but I suspect it militates against some of the recent debates among legal philosophers about the boundaries of law, so in this Part I hope to further refine my position. In the first Section I will consider five possible objections to my claim, but the discussion there will still remain relatively abstract. I will bring it closer to the ground in the second Section by examining my arguments against the debate about the boundaries of law among two versions of legal positivism.

A. *Five Questions*

1. If the argument in the previous Part is correct, then not just jurisprudence, but also much of contemporary philosophy should be abandoned. It does not make sense to suggest that philosophers of mind or metaphysicians are explicating the implicit attitudes of anyone (except, perhaps, their own). Why place the constraint only of philosophy of law? This is not the place to argue in favor or against current philosophical practices in general or on the nature of philosophical knowledge (if there is any such thing), because we can easily answer this challenge without having to get into such issues.[25] I have

[25] It is, however, worth noting that contemporary philosophy has come under attack both by philosophers and outsiders for employing a mistaken methodology that cannot yield knowledge. For such criticisms see, for example, Steven Weinberg, *Dreams of a Final Theory* (1992) 166 (chapter entitled "Against Philosophy"); Jakko Hintikka, "The Empreror's New Intuitions," *96 J. Phil.* (1999) 127 (criticizing philosophers for relying on intuitions). Best known, perhaps, is physicist Richard Feynmann's quip that scientists need for philosophy of science as much as birds need ornithology.

not argued that there is no point to all jurisprudential inquiry. In fact, I will outline below some questions that legal philosophers will do better to explore than boundary questions. So plainly it would be odd to conclude from my arguments, which even if successful are good only against a certain kind of jurisprudential question, that they undermine all philosophical inquiry. But even had I argued that all jurisprudence has no value, this would not necessarily have any more general implications on philosophical inquiry, because of the difference between the aims of legal philosophers concerned with boundary questions and those of other philosophers: philosophers of law aim to explain a certain *practice*. For my criticism of legal philosophy to be successful all I need to show is that some of the questions that if that is our aim, legal philosophers are currently writing about should be abandoned. In this respect the philosophy of law is very different from other "philosophies of." Philosophers of physics or philosophers of mathematics are not interested in *the practice* of physicists or practice of mathematicians. They are interested in the metaphysics of physical and mathematical entities. The same is true for most of what goes under the name of meta-ethics with regard to ethical properties. So such inquiries are not (directly) intended to explain the boundaries of a practice. Other philosophical questions are similar to the question of normativity discussed above: consciousness, for instance, is something that (arguably) exists and all persons can have a sense of without understanding how it comes about. Here, as in the question of normativity, we only need to show that our explanation best fits the phenomenon in the world we are trying to explain; we need not assume that attitudes about the object of our inquiry, even if they exist, are correct.

The area of philosophy which bears closest similarity to legal philosophy in the sense of trying to explain a practice is philosophy of science, significant parts of which aims to understand scientific method. But even here it is more accurate, I think, to describe those inquiries as instrumental to finding the answer to the learning the truth about what the world is like the world, and philosophers examine scientific method as a means for attaining that. As such, the practice of science answers to a standard of success that is missing from the practice of law.

All these differences show that even had my arguments been directed at all of jurisprudence, it would have been a mistake to conclude from them that they undermine the rest of philosophy.

2. But does this account leave place for philosophical inquiry about law*?* It may be objected that if my argument is correct, then all the theorist can do is report social attitudes. So even if my

---

Within jurisprudential circles Brian Leiter has expressed views similar to Hintikka's and expressed Quinean-inspired claims about the possibility of making any conceptual claims. Thus, though he defends "descriptive jurisprudence," his brand is quite different from the one I criticize here, and so exempt from it. For Leiter's views on this matter, which I cannot examine here, see generally Brian Leiter, "Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence," 48 *Am. J. Juris.* (2003) 17.

arguments do not undermine all philosophy, they undermine all of *legal* philosophy. Instead of the philosopher, we should look for a pollster who will collect the prevalent attitudes people have about law.

I believe this charge is not warranted, but it is worth reminding that philosophers are not inductees to some special lore or to a unique way of attaining knowledge, so we shouldn't be surprised if there will be interaction between philosophical inquiry and other kinds of research. This seems to be especially true in areas of philosophy that are concerned with social practices or physical phenomena (e.g., philosophy of mind and cognitive science; or jurisprudence and sociology of law). It would be strange (to say the least) if a philosopher came up with an account of law's "nature" that was at odds with everyone else's understanding of what law is. So if my argument is correct and it entails that there are no interesting philosophical questions about law, so much the worse for legal philosophy.

If that were to happen, this would by no means be a historical precedent. Until the late nineteenth century psychology was considered part of philosophy, and much of what was considered philosophy barely a century ago, now firmly belongs to psychology. Even with regard to the questions that are still within the purview of philosophy of mind many believe (including some philosophers) that they are still there only because our scientific knowledge about the brain is still meager, and that with the growth of knowledge, many of those issues will cease to be "philosophical" questions and will be answered, one way or the other, by empirical science.[26]

So there is nothing illogical or even historically unusual about the claim that a certain branch of philosophy would be superseded by science. In the context of law this move towards science, that is, towards more empirically-grounded work, may reject the search for the boundaries of law in general in favor of more robust conclusions about the boundaries of law in particular legal systems (in a particular time). But there is no inherent problem with that. We should not assume that the boundaries of law and other practices have been constant throughout history and across geographical boundaries.[27]

Even when engaged in this kind of inquiry, the theorist must be careful not to mix her explication of the boundaries of the practice with normative argument for changing the practice. Suppose the theorist says she can identify clear boundaries between law and morality in a particular legal system, and it is fairly easy to explain what belongs in the practice, except for some recalcitrant examples that do not fit the account. What follows from such claims? Does it follow

---

[26] See, e.g., Paul M. Churchland, *Matter and Consciousness* (rev. ed., 1988) 5, 61; V.S. Ramachandran & Sandra Blakeslee, *Phantoms in the Brain: Human Nature and the Architecture of Mind* (1998) 229.

[27] For more on this see Danny Priel, "Jurisprudence and Necessity", 20 *Can. J. L. & Juris.* (2007) 173, 196-97.

that people are mistaken in their judgments as to what counts as law? I don't think so. People will carve their practice in a manner they find convenient, and if that practice cannot be accommodate within a neat and tidy account, why should a descriptive theorist grumble? Even if people's treatment of the boundary question is sometimes contradictory, this is something that will have to make it into the theorist's account, not something about which the theorist can chastise the practitioners for getting the concept wrong. Of course, the theorist may argue that there are reasons (e.g., preventing injustice, reducing inefficiencies) for altering the practice to make it "tidier" or less contradictory. But this is no longer a description of the practice. And when urging such a change, it must be stressed, the philosopher is not trying to persuade people to make their practice conform better with the concept LAW, for the E-concept follows the practice, but rather she argues for a change in their practice.[28]

Furthermore, there may be other possible areas of inquiry for legal philosophers that are not about the boundaries of law. I want to give an example of one such issue. Law is a normative practice, by which I mean that it gives (or purports to give) reasons according to which one ought to behave. And yet law's normativity may seem puzzling, for law is a human creation, and thus belonging to the world of fact, the realm of "is." If we take seriously the claim that we cannot derive an "ought" statement from an "is" statement we seem to have puzzle about law.

The difference between questions of boundary and the question of normativity is that unlike the question of boundary that touched on the attitudes of participants with regard to what the practice is, and on which I suggested participants may have no attitudes at all, the question of law's normativity is not a question on where law begins or ends, something on which people may not have any attitudes, but rather a question on how to explain what seems an indisputable feature of law and one that is familiar to all those who engage in legal practice. The important point, one we have already seen before, is that while the descriptive philosopher cannot dispute the existence of

---

[28] This, I believe, is the best explanation of certain normative theories that try to explicate the concept LAW. Such arguments have been criticized as some kind of wishful thinking, as mistaking the philosopher's job of describing what law is with aspirations as to what law should be. See, e.g., Philip Soper, "Choosing a Legal Theory on Moral Grounds," 4 *Soc. Phil. & Pol'y* (1986) 31, and Dickson, *supra* note 12, at 83-92. But the explanation in the text shows why these arguments are mistaken. What such theorists should be understood to be doing is not a change in the *concept* LAW but rather a change in the *practice* law, a change that if it were to occur would lead to a change in the concept LAW. There is nothing logically mistaken about such an argument. Elsewhere I offered a different explanation than the one offered here for such normative arguments: I argued that it may be that the concept LAW is partly indeterminate, and that there might be a place for arguing as to what the law should be within the range of indeterminacy as to what the law is. See Danny Priel, "Alexy on the Connection between Law and Morality", 29 *Austl. J. Legal Phil.* (2005) 140, 146. Of these two explanations Liam Murphy seems closer to the latter, whereas Frederick Schuaer seems closer to the former, although he has not made the two-step argument I make in the text, and which I think would make his position stronger. See Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," 25 *Oxford J. Legal Stud.* (2005) 493; Liam Murphy, "The Political Question of the Concept of Law," in *Hart's Postscript*, *supra* note 12, at 371, 381-84.

the phenomenon to be explained, she can offer an explanation that goes beyond participants' attitudes of what makes it the case that this phenomenon exists. (This point is also dealt with in answer to the next question.)

3. But why assume the philosopher is confined to attitudes about the subject of her inquiry? Couldn't practitioners be wrong about what they are doing?[29] People are often mistaken about what they are doing. A person may think he is walking towards a certain place when in fact he is going in the opposite direction; a parent may genuinely think that by talking to her daughter she is helping her and that her efforts are appreciated, when the daughter in fact would prefer to be left alone. Perhaps somewhat closer to our discussion, people's beliefs about what fire is have proven utterly wrong, but this has not prevented them from putting fire to myriad uses. Why can't we similarly allow for the possibility that the attitudes of people who may have never considered the question of law's nature will be immune from error on what law is? And even if we are convinced that the concept LAW cannot contradict practitioners' legal attitudes, why should we think that practitioners' attitudes exhaust what their practice is?

The answer, again, calls for the distinction between the attitudes within legal practice and that *constitute* what law is, and attitudes *about* the concept LAW. Many people do not have many clear attitudes as to what LAW is, but they have what I called legal attitudes. These are the attitudes from which the philosopher has to reconstruct an account of the boundaries of law, and so these attitudes cannot be mistaken.

But matters are not so simple: I do not want to be thought to deny the possibility or importance of going beyond people's attitudes in explaining and describing social phenomena; nor do I want to deny that with regard to certain social phenomena people may have erroneous attitudes. But it is important to see the difference between trying to explicate the important features *of* legal practice (essentially, what most analytic philosophers are trying to do when engaged in questions of boundary), and the attempt to articulate true yet unrecognized facts *about* legal practice. Take for example the "Marxist" claim that law has always been a mechanism used by the ruling elites to oppress the proletariat. (For our purposes, it is irrelevant whether Marx or any Marxist legal theorist had made this claim, or whether this claim is true.) Even if this claim is true, it does not purport to explain what law is in the same way that analytic philosophers try to do. True, both kinds of claim can be expressed in the form "law is *X*," but the appearance of

---

[29] Here I answer a view found in Coleman, *supra* note 4, at 24, 188-90, 200.

similarity here is misleading. The difference between a conceptual explication and the "Marxist" claim stems from an ambiguity in the word "is."[30] Compare the following:

(1) Cicero is Tully.

(2) Cicero is human.

In the first case "is" serves to show identity (the word "Cicero" and the word "Tully" are synonyms, they are two symbols that refer to the same object), in the second the "is" is used for predicating the subject (Cicero). And this is very close to the difference between what analytic philosophers are trying to do and the "Marxist" claim:

(3) LAW is SYSTEM OF PRIMARY AND SECONDARY RULES ETC.

(4) Law is a tool of the ruling elites for oppressing the proletariat.

(3) is a statement of identity (or at least close similarity) between the concept LAW and the concept SYSTEM OF PRIMARY AND SECONDARY RULES or whichever complete account of the E-concept LAW turns out to be. Note therefore that the claim of identity is not between the object (law) and the explanation, but rather between concepts. It is highly likely that most people do not have (3) in articulate form on their mind whenever they make a judgment about certain things in the world whether they are legal or not, or whether they are part of a legal system or not. But if our account of LAW is correct, then (3) is an explicit articulation of the considerations that people rely on in making such judgments. In this sense, therefore people cannot be mistaken about (3). Moreover, if (3) were explained to them, and if (3) is true, it is something that people *who only have attitudes with regards to laws* would not be able to rationally deny.

In contrast, (4) makes a claim that is not part of the concept LAW, but rather the result of a posteriori discovery about what happens to be true (empirically) about legal practice. So (4) may turn out to be true even if most people genuinely believe that law (or their law) works to reduce social inequalities.

It is important to see that what distinguishes (3) from (4) is not something that relates to their different content. Indeed, a proposition very much like (4) could be a priori:

(4′) LAW is TOOL OF THE RULING ELITES FOR OPPRESSING THE PROLETARIAT.

The difference, however, between (4) and (4′) is that (4) is a discovery made after inspecting at the workings of the law (in some countries, in all countries, at some time, at all times). Such claims may or may not be known to most people who possess the concept LAW, and can be refuted (or at least weakened) by providing examples of law about which (4) does not obtain. (4′),

---

[30] This point comes from Bertrand Russell, *Introduction to Mathematical Philosophy* (1919) 172.

on the other hand, cannot be true unless it is not something that forms part of the attitudes that participants in the practice of law have about what *counts* as law.[31]

So (4′) is not a challenge to my account. (4) may seem to pose a different challenge, because it is ambiguous, and can be interpreted in two ways:

(4a) It so happens that law as it is practiced is a tool for oppressing the proletariat.

(4b) Law is necessarily a tool for the ruling elites to oppress the proletariat.

(4a) is an empirical claim about the law in a particular legal system. As such it has nothing to do with the kind of claims legal philosophers are trying to make. Even if it something that turns out to be true about the law in the whole world it is still an empirical finding that *happens* to be true in the whole world, and could have been wrong if some other conditions obtained. As such it can be reached only by a posteriori examination of the way law actually operates. In contrast, (3) is a priori. By saying that (3) is derived a priori all I mean to say it that it is derived by a process the like of which could generate the same knowledge in any person who knows what law is.[32] Something like this could not, of course, be said about (4a): this is a surprising, empirical, finding about law; not something one could discover merely by thinking about law.

(4b) is different. The claim here is that because of what law is, regardless of what people's implicit or explicit attitudes about law (or what it is) are. It is simply something that the practice necessarily "exhibits," and it is so bound with what law is, that it would cease to be law if it had not exhibited this feature.[33] Thus, to say about water that it is necessarily H_2O is an a posteriori

---

[31] Couldn't philosophers' work be recast as

(3′) Law is a system of primary and secondary rules etc.

that is, an a posteriori empirical finding made be legal philosophers? Some philosophers, including some legal philosophers, have indeed argued that legal philosophy should be understood as a scientific-like a posteriori inquiry. See, e.g., Brian Leiter, "Naturalism and Naturalized Jurisprudence," in Brian Bix (ed.), *Analyzing Law: New Essays in Legal Theory* (1998) 79, 93-94. We need not examine them here, because, on no plausible reading of the theories the philosophers I criticize here advance or can be understood as a posteriori or empirical arguments.

Alternatively, couldn't legal philosophers argue that something like (4) could be discovered by a priori philosophical reflection? There are some philosophers who argue that we can discover some true, non-tautological facts by a priori reflection. See, e.g., Laurence BonJour, *In Defense of Pure Reason: A Rationalist Account of A Priori Justification* (1998) *passim*. But even BonJour talks there about the truth of statements of the kind "nothing can be red and green all over at the same time" or "there are no round squares," see *ibid.* at 100-04. Leaving aside whether BonJour's claims are correct, I do not see how we could discover (4) by reflection alone. True, with the aid of some assumptions one can explain how (4) will always turn out true, but without empirical testing this is simply a hypothesis, which could only be validated by empirical examination. See more on this in the text below.

[32] I should stress that by saying that (3) is a priori I need not be committed to any strange metaphysics, unusual faculties, or the rejection of naturalism. My account follows (though simplifies) the naturalistic account of a priori knowledge in Philip Kitcher, "A Priori Knowledge," 89 *Phil. Rev.* (1980) 3; and compare with Daniel C. Dennett, *Darwin's Dangerous Idea: Evolution and the Meaning of Life* (1995) 48-49 & n.6, who correctly points out that Darwin's theory of natural selection is a priori. And Dennett is as naturalist as they get.

[33] This is the approach to jurisprudence espoused by in Michael S. Moore, "Law as a Functional Kind," in *Educating Oneself in Public: Critical Essays in Jurisprudence* (2000) 294, 310. He believes philosophers are (or should be) trying to explain what law is (as opposed to what LAW is). The problem with his approach is not, strictly speaking, that law is not a natural kind. The problem is that in order to make such a determination he must have an agreed-upon

discovery of science, but it is also a necessary feature of water: anything that is not H_2O, in virtue of this fact alone, is not water. Such an argument cannot succeed in the case of law, because there is no pre-theoretical agreed upon set of things that are laws. Therefore, it would be impossible to show (without question begging) that supposed counterexamples are not law.

4. One can accept the previous argument and admit that the practice is indeterminate on some boundary questions, but then argue that we could offer an argument showing that our concept would be better aligned with those matters on which legal practice is *determinate if we answer boundary questions one way or the other*. This move, suggested at one point by Jules Coleman,[34] is possible. However, this means abandoning the attempt to describe the practice and its boundaries, and to attempt offering a normative argument on matters about which *ex hypothesi* there is no descriptive answer. Many legal philosophers, including Coleman, have indeed argued that all theorizing presupposes theory construction norms such as simplicity, comprehensiveness, clarity, consilience etc.[35] But this suggestion goes beyond these considerations for evaluating the *theory*; Coleman's interpretivism relates to our *object of inquiry*, namely law.

There are two ways of interpreting Coleman's interpretivism in this context. One possibility is that competing arguments on the boundaries of law are different interpretations each purporting to show, for example, that their interpretation makes law more just. Even leaving aside the difficulty of ascertaining the standard by which law should be assessed, this suggestion is fraught with difficulties for the descriptive theorist who aims to give an account of law as an existing legal practice, because it may be that law should be practiced quite differently from the way it is in order to optimally achieve law's goals. Relatedly, such an argument would be a *practical* argument, one that would call for practitioners to change their attitudes as to what should belong to legal practice and in this way affect legal practice itself. This is exactly what descriptive legal philosophy aims *not* to be.

---

sample that can be "baptized" as law, and whose features we could then find by a posteriori inquiry (which presumably will not be made by philosophers, but that is another matter). But in the case of law there is no such agreed-upon sample that can be baptized in this way (as there is in the case of natural kinds). As a result Moore has to resort to an argument about the necessary function of law. He claims that this is an a posteriori discovery of the sort we are familiar with from natural kinds, *see id.* at 235-36, but his arguments don't take into account the fact that unlike in the case of natural kinds there is no prior agreement that what counts as law should be identified by certain necessary features (whether functional or not).

I think Brian Leiter would also like to model legal philosophy after (4a) kind of inquiry. See Brian Leiter, "Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis," in *Hart's Postscript*, *supra* note 12, at 355, 366-70. Yet some of what he says suggests he is closer to (4b). See Leiter, *supra* note 25, at 48-49.

[34] See Coleman, *supra* note 4, at 109-11. He explicitly says that that his argument for inclusive positivism is interpretive. See *ibid.* at 109.

[35] See, e.g., *ibid.* at 177-78. For references to other many other legal philosophers expressing such a view see note 3, *supra*.

The alternative interpretation is that this approach aims to take legal practice as it is and still aims to show how one interpretation puts existing practice in better light. Leaving aside the question of assessing what would count as a better interpretation we still face the possibility that on many questions of boundary there won't be any interpretation that puts the practice in better light. If the practice is indeterminate on the matter because participants in the practice do not have attitudes on some aspect of it, it is not at all clear that on any interpretive question there would be a determinate answer that would put the practice in better light.

Consider the question whether Macbeth had black or brown hair. The relevant materials for answering this question do not answer this question, so as far as description goes, this question is indeterminate. But I do not see how recasting this question as "interpretive," as one that aims to put Macbeth (or *Macbeth*) in better light, makes it any more determinate. At least as far as I can see many boundary questions about law (and in particular the one that interested Coleman, namely the one that is at stake between inclusive and exclusive positivists) cannot be helped by this suggestion as well, because law will not be put in better light whether we answer interpret it one way or the other. (The specific question of the exclusive-inclusive debate is discussed further in the next Section.)

5. The distinction between questions about what counts as the practice and those that are about the practice would suggest that one cannot answer questions of the second kind before having an answer to questions of the first kind. Are we not, say, required to know what law is, before trying to give an account of law's normativity? There is no doubt some truth to this challenge, but not as much as may at first seem. It is true that without knowing anything about law one would not be able to answer any question about it. But it is not true that one must be able to articulate with absolute precision the boundaries of law before being able to give an account of law's normativity. Even more importantly, if legal practice is indeterminate on certain questions of the first kind, then (as I already said) this is a feature of the object the theorist is trying to explain, and this fact may even figure out in our answer to questions of the second kind. If, for instance, it is a fact about law that its boundaries with morality are blurry, this may something that is relevant for our account of law's normativity. Even if we recognize the possibility of immoral laws or of moral requirements not protected by law, it may be that the boundaries between law and morality are vague exactly in order to create the sense by which law (an "is") can create "oughts."

B. *The Exclusive-Inclusive Debate Revisited*

The argument so far has been fairly abstract. I will try to illustrate it now by looking more closely at the debate between "exclusive" legal positivists and "inclusive" legal positivists. This

debate, which originated some twenty five years ago, has generated vast literature since its inception. It has received particular attention in the last decade or so, and has been described recently as "the most important on-going debate in recent analytical jurisprudence."[36] I hope that examining it more closely will both clarify my abstract arguments and will show how they play out in a concrete context.

The origin of the exclusive-inclusive debate was the need to explain the prevalence of moral language in the law. The immediate impetus for the debate was provided by Dworkin's anti-positivist arguments that sought to show that earlier positivist explanations of this phenomenon are unsatisfactory.

Perhaps because of their focus on questions of the boundaries of law, or with the closely-related question of the "validity" of legal norms, legal positivists interpreted Dworkin's challenge as concerned with the question of setting the right boundary between law and non-law.[37] Understanding the challenge in this way, they split into two groups and offered two answers: some, later known as "inclusive" or "soft" positivists, have argued that there is no conflict between the prevalence of morality in the law and legal positivism, because as legal positivists they need only deny that such facts are true of all possible legal systems. In other words, they need to show one *possible* (even if not actual) legal system in which no such connection exists to prove the truth of legal positivism. This is perfectly consistent, they contended, with reality on Earth in which most, perhaps even all, legal systems incorporate some moral norms into the law. In contrast, other legal philosophers, known as "exclusive" or "hard" positivists, have argued that whenever law makes use of expressions like "good faith" or "equal protection of the laws," it directs us outside the law's boundaries. To summarize somewhat crudely the difference between the two positions, while inclusive positivists argue that moral language "incorporates" morality into the law, exclusive positivists believe that it "directs" us outside of the law.[38]

---

[36] Leiter, *supra* note 25, at 27. For references to some of the voluminous literature on this topic see Danny Priel, "Farewell to the Exclusive-Inclusive Debate", 25 *Oxford J. Legal Stud.* (2005) 675, 676 n.2. For an explanation of what this debate is about see *ibid.* at 677-80, and text accompanying notes 37-38 *infra*.

[37] This interpretation is evident even from the title to one of the best known responses to Dworkin's early challenges to positivism, namely Raz, "Legal Principles and the Limits of Law," *supra* note 11. A similar reading (or perhaps, misreading) of Dworkin's challenges can still be found in recent writings: "[The] objectivity issue has been called back to the attention of legal positivists in the context of the inclusive/exclusive positivism debate thanks to Dworkin. Dworkin's framing his question in terms of validity – 'can this moral principle be considered legally valid?' – however, allowed the debate to be focused upon the problem of the boundaries of law...." Sylvie Delacroix, *Legal Norms and Normativity: An Essay in Genealogy* (2006) 204; see also Marmor, "Legal Positivism," *supra* note 6, at 704 ("the debate between legal positivism and its opponents is mainly about the conditions of legal validity....").

[38] For arguments supporting inclusive positivism see, for example, Matthew H. Kramer, *Where Law and Morality Meet* (2004) 17-140; Coleman, *supra* note 4, at 74-148. For defenses of exclusive positivism see Raz, "Authority," *supra* note 12; Scott J. Shapiro, "On Hart's Way Out," in *Hart's Postscript*, *supra* note 12, at 149.

It is important to stress that the debate is not on how judges should decide cases. This point is accepted on both sides. See Kramer, *supra*, at 38 (theorists on both camps agree "that judges within some legal systems invoke moral

It is worth noting briefly that Dworkin's challenge was not at all about validity or the boundaries of law, but rather on the question how the prevalence of morality in the law affects the *content* of law (that is to say how law's relationship with morality affects what law requires us to do or refrain from doing) and its *normativity* (that is, the fact that law creates, or purports to create, obligations).[39] As a result both the exclusive and inclusive responses completely missed their intended target. But that matters little for the exclusive-inclusive debate, because by now the debate has gotten life of its own, and its origin has been forgotten.

If considered as a debate about the boundaries of law, my arguments developed above apply to it. More specifically, my claim is that *if* no-one within the practice of law has ever contemplated anything like the question whether exclusive or inclusive legal positivism is correct, or *if* it does not correspond to any attitude lawyers have about law, then the question which version of positivism is correct is indeterminate. If this is the case, then both inclusive and exclusive positivism are false, because they provide an inaccurate account of the practice they seek to describe.

As I see it, there are five possible responses open to a philosopher wishing to vindicate the importance of this debate (even if not any particular view in it): (a) the debate does correspond to existing attitudes about law; (b) the debate is entailed by implicit attitudes about law; (c) the exclusive-inclusive debate is best understood as an interpretive, normative, debate about what would present legal practice in better light; (d) the debate has an ethical edge, and proponents of the different views should be understood (or their arguments reconstructed) as advocating a particular view for its ethical value; or (e) the debate touches on matters on which people have no attitudes, but nonetheless there may be a determinate answer to it.

The first and second replies in essence say: "your arguments may be convincing in the abstract, but the exclusive-inclusive debate is unaffected by them, for the debate *is* about the correct explication of the attitudes of participants in the practice." The first reply is undermined by the fact that if we could find actual attitudes of participants in the practice on the question, then presumably those engaged in the exclusive-inclusive debate would have relied on those attitudes in their argument.[40]

---

precepts to resolve ... hard cases"); Raz, "Authority," *supra* note 12, at 233 (the debate has no "bear[ing] on what judges should do.... The issue addressed is that of the nature and limits of law").

[39] For the distinction between validity, content, and normativity see Priel, *supra* note 3, at 232-36. For an interpretation of Dworkin's work that shows that the most fundamental link between law and morality in his work touches on the question of normativity see Danny Priel, "Forty Years On" (unpublished manuscript, available at http://ssrn.com/abstract=1086386). See also Dworkin, *supra* note 15, at 238.

[40] See also the discussion accompanying notes 54-57 *infra*.

The second reply is on its face more plausible. It suggests that while participants in the practice may not be aware of the distinction as articulated in philosophical debates, legal practice is such that we can conclude that one particular view is correct. In fact, the role of the philosopher is exactly to look hard at the practice and adduce from it the "evidence" for the truth of one particular answer. This, it will be argued, is exactly what distinguishes the philosopher from the sociologist who collects the unconsidered views of laypeople.[41]

We can set aside the question whether this answer is correct in general, because in the context of the exclusive-inclusive debate this answer is unconvincing,[42] and we can learn this by looking at the kind of arguments offered in support of both views. For instance, one of Jules Coleman's arguments in support of inclusive positivism asks us to imagine a Swede who knows all the law of the United States (and thus is supposedly an authority on U.S. law) even though U.S. law does not apply to him; and Matthew Kramer distinguished between norms that are "free-floating" and those that are not arguing that the "free-floatingness" of some norms makes them "ready" for incorporation.[43] But these arguments, even if sound, are so removed from law and the attitudes of participants in the practice, that I cannot see how they can conceivably be said to be *about* the practice. Pointing out logical possibilities is not the same as explaining what the practice actually is.

The same can be said for arguments in support of exclusive positivism. Raz has argued in support of exclusive positivism that in the same way we don't think that choice of law rules that instruct judges to follow the laws of another jurisdiction incorporate the law of that jurisdiction, we should not think that statutes that require judges to rely on moral standard incorporate morality.[44] This analogy is imperfect since choice of law rules call for different sets of norms to be applied depending on the context whereas a rule demanding the judge to take "equal protection" into account demands (or so it would seem) a single norm to be followed. Yet even if the cases were more similar, the important point is that since the law is silent on the matter on both cases, there is no way of knowing whether it does not call for incorporation in one case (morality) and

---

[41] Indeed, on a few occasions one can find arguments of this kind. See Raz, *Authority*, *supra* note 10, at 48-50 (attitudes support exclusive positivism); W.J. Waluchow, *Inclusive Legal Positivism* (1994) 155-63 (attitudes support inclusive positivism). But if we believe the debate could be resolved in this why, why speculate on the matter, why not simply *ask* people what they think about the question?

[42] To be fair to the proponents of those debates, they occasionally admit that their arguments based on such considerations are not conclusive. See e.g., Raz, *supra* note 22, at 17 ("None of this *proves* that the incorporation thesis is false. But it raises serious doubts about it...."); Kramer, *supra* note 38, at 39, 43 (giving arguments for "favoring" a version of inclusive positivism, and arguing it to be "preferable" to exclusive positivism).

[43] *Ibid.* at 130, 141-42; Kramer, *supra* note 38, at 40-42. Kramer never explains why the "free-floatingness" of a norm is relevant to the question at hand. In any case, even on its merits the argument is unsuccessful. See Danny Priel, "Free-Floating from Reality" (unpublished manuscript).

[44] See Raz, *supra* note 1, at 15.

does not in another (foreign law). What reason have we to think that the law treats both cases in the same way? There are, after all, instances in which the law seems to "incorporate" prescriptions from other domains, such as when courts treat rules of ethical conduct adopted by a profession as part of the law that applies to members of the profession.

The third reply is that what proponents of the different views in the exclusive-inclusive debate disagree about is the question which view presents the concept LAW in better light. So understood this debate is not at all about legal practice, because as we have seen, there is nothing in the practice that could decide the debate one way or the other. But this answer is problematic in several respects. To begin, it does not take seriously the possibility that since the practice is indeterminate on those questions on which the debate is conducted, there will be nothing on which to decide the question which of the two possible interpretations of the concepts is superior. Furthermore, on the assumption that the debate only relates to the *concept* LAW and not the *practice* law (which it must because it does not describe the practice or aim to change it), it is not clear what it means for a concept to be presented in a better light. If such conceptual debate has no aims of improving *the rationality or coherence of the practice*, it is not clear why we should try to make our concepts more coherent or rational than needed.

The fourth response is close to the third in presenting the debate as a normative one. Unlike the third response, however, it wishes to salvage the exclusive-inclusive debate by reconstructing it not as a debate that is about the concept LAW, but as an argument in favor of changing the attitudes as to what counts as law by arguing that adopting one of the competing views is going to have morally beneficial outcomes. Thus, this is an attempt to reinterpret the exclusive-inclusive debate along the lines of the normative debate between so-called "ethical" legal positivists and some natural lawyers.[45] The idea is that by clearly separating law from morality as the exclusive positivists suggest, we are likely to inculcate in people a healthy degree of critical attitude towards the law, because they are not likely to associate what is legal with what is moral.

This argument has a clear advantage over the previous ones, because if successful it provides a straightforward justification for the exclusive-inclusive debate. Nevertheless, this argument suffers from several serious drawbacks. First, plainly, it is an empirical argument and a purely speculative one at that. In fact, the exact opposite moral argument has been made in support of blurring the line between law and morality: natural law theory, it has been said, will force people to constantly think of their laws from a moral perspective. When asked to comply with an immoral law, people would be less likely to think they are in a morally safe zone just because they

[45] See the way I explain this debate as calling for a change in the practice of law, not in the concept of LAW, in note 28, *supra*.

are following the law.[46] To know which of these two views, if any, is correct requires empirical support. Second, even if such an argument could be made with regard to the distinction between legal positivism and natural law (which is the context in which the two competing views presented here have been made), it is much more difficult to make such an argument in the context of the exclusive-inclusive debate, for it is hard to see how adopting either view is going to have any such moral effect. After all, neither view calls for any change with regard to the situations in which moral considerations are taken into account in adjudication. The difference between the views is merely concerned with the question whether those moral standards have become part of the law or not. Given that the difference between these views is not "visible," as is, say, the claim that immoral laws are deficient laws (or not laws at all), it is hard to see how adopting either view could affect people's attitudes in cases of conflict between law and morality. To be sure, what I say here is an unsubstantiated speculation which may be disproved by empirical research, but this speculation is surely no worse than one that purports to justify the exclusive-inclusive debate on such grounds.

These responses dispose, I think, of the exclusive-inclusive debate if it understood as a debate about the boundaries of law. But perhaps the debate can be salvaged as a debate about the content of legal norms or about their normativity. As a claim about the content of legal norms, the argument is that the difference between inclusive and exclusive legal positivism as a claim about what the law requires when moral words are used in the law. Though not framing it in those terms I have argued elsewhere that if understood as a debate about the content of legal norms, the debate is mistaken and should abandoned, although for different reasons from the ones made here for abandoning it as a debate about boundaries. Briefly, my argument there was that positivists should acknowledge that legal correctness is not tied to moral correctness but to *what is morally accepted at the time* a decision is made. Even if we come to the conclusion that capital punishment violates the Eighth Amendment of the United States Constitution in all times and places, then positivists should explain the sense in which a decision imposing capital punishment on someone rightly convicted of a capital crime in 1850, when it was believed that there was no conflict between the Eighth Amendment and capital punishment, was *legally* correct.[47]

This leaves the possibility of understanding the exclusive-inclusive debate as a debate about normativity. As I argued above questions of normativity are questions on which people need not

---

[46] For proponents of the first view see the papers by Schuaer and Murphy cited in note 28, *supra*. For the opposite view that justifies natural law theory on ethical grounds see, for example, Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Bonnie Litschewski Paulson and Stanley L. Paulson eds., 2002) 29-35; Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law," 26 *Oxford J. Legal Stud.* (2006) 1, 6-7 (originally published 1946).

[47] *See* Priel, *supra* note 36.

have any attitudes and even if they have attitudes on these questions they are not determinative. All that's required is that their legal attitudes be such that we could learn from them that they consider legal practice to be a normative practice. Understood as a debate about normativity, the question is whether or not the correct account of law's normativity entails that morality cannot be incorporated into the law. Indeed, some of the arguments advanced in support of the exclusive-inclusive debate take as their starting point the view that law is, necessarily, an authoritative governance institution. If this is true, and if it follows from this fact that law cannot incorporate morality, then this too is part of the concept LAW whether or not people know that. Indeed, this may be part of our concept LAW even if people believe otherwise.

Some of the arguments in favor of exclusive positivism are perhaps best understood not as arguments about the boundary of law but as arguments about the question of the normativity of law.[48] Therefore there may be an open question about them even if people have no attitude about them. Because the topic of this paper is question of boundaries, whether or not these arguments are successful is not a question I will discuss here. There are, however, two points worth mentioning. First, even if the exclusive-inclusive debate is recast as a question about the normativity of law, it does not follow that it necessarily has a determinate answer. The reason is that if the arguments for the impossibility of inclusive positivism about normativity are unsuccessful (as many believe they are), it does not follow that inclusive positivism is correct. In that case, if no aspect of legal practice gives us reason to think one of the two options is correct, then, just like in boundary questions, there may be no determinate answer to this question.

Second, even if there is a determinate answer to this question, it does not yet follow that the question is worth our attention. There may be certain truths about law that are not worth finding. Some preliminary discussion on this question is the task of the next Part.

IV. WHY JURISPRUDENCE?

If my arguments until now have been sound, they have established the following conclusion: questions of boundary have to be determined according to participants' attitudes, and therefore on many of them it is likely that there will not be a determinate answer. I have also argued that there may be other questions which may be the right sort of questions for legal philosophers to pursue. Finding those questions that philosophers *can* answer is, however, only the first step. Even if those questions are determinate it still remains to be shown that pursuing these questions is *worthwhile*. In the first Section I consider some attempts to answer this question. After explaining

---

[48] See Shapiro, *supra* note 38, at 177 (arguing for the "impossibility of inclusive *guidance*") (emphasis added).

the deficiencies in these suggestions the following Section offers what I hope is a better alternative.

A. *Some Answers that Will Not Do*

What's the point of jurisprudence? Does it even need to have one? It might be contended that to look for a purpose for jurisprudence is already to take the wrong step. Perhaps legal philosophers don't need to find any purpose for their work beyond the discovery of truths about law: as we have seen the second component of Himma's analogy between descriptive jurisprudence and mathematics was that discovering certain truths about law can be justified by the intrinsic value of knowledge.[49]

Himma correctly reminds us that many discoveries in pure mathematics that did not initially have any practical purpose later became the basis for technological advances, so we should be careful before admonishing research for not having practical relevance.[50] But this is not Himma's main point. He argues that despite the fact that much research in pure mathematics may not have any practical relevance, pursuing it may still be justified. Thus, just like the proof of Fermat's last theorem, the question whether the inclusive or exclusive version of positivism (if any) is a more accurate account of law is something that has value even if it would not have any practical use. Both are part of the pursuit of knowledge which "need not be justified by instrumental concerns to be worth discussing. Solving a problem can be worth doing simply because knowing the answer is valuable for its own sake. This, of course, is what is meant by the view that knowledge is intrinsically valuable."[51]

The notion of intrinsic value is a difficult one, as are the questions what has intrinsic value, and whether knowledge is among them. Himma does not discuss any of these questions. For the sake of argument we may grant that some things are of intrinsic value and also that the pursuit of knowledge may *sometimes* be among them. But we can still question whether any true fact we gather on any topic can be justified in this way. There are, after all, vast amounts of truths that we do not care about: we do not care about the exact number of grass blades now on earth, nor do we

---

[49] See Himma, *supra* note 16, at 1219-21. Himma gives other arguments as well. Not all are fully worked out. For example, he writes that "conceptual issues at the foundation of any area of law will require a different kind of creativity and skill than are required by issues in substantive areas of law—and *that* is more than enough to justify the[ir] study...." *Ibid.* at 1222. But so do certain forms of torture.

[50] Holmes argued that the same is true of ideas: "If you want examples ... see how a hundred years after his death the abstract speculations of Descartes had become practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte." O.W. Holmes, "The Path of the Law," 10 *Harv. L. Rev.* (1897) 457, 478.

[51] Himma, *supra* note 16, at 1221.

care (to give a slightly more "legal" example) about the exact number of words in the United States Code.

It is hard to tell which kind of knowledge is intrinsically valuable and which is not, but perhaps we can gain some insight by considering the uniqueness of the jurisprudential interest with the boundaries of law. Law is a human artifact, but so are vehicles. And like law, vehicles come in lots of shapes and different kinds of vehicles use different mechanical principles for working. Nonetheless there is no (not yet?) recognized branch of philosophy dedicated to finding the essential features (or boundaries) of vehicles, or the concept of VEHICLE. Why would that other human artifact, law, be any different?

One answer is that laws are important social institutions whereas vehicles are not. But this does not get us very far. There is a lot of research about markets, family, and the state—all social practices of great importance—and this research focuses on their purposes, their effect on human lives, on how they have changed through time, their advantages and disadvantages. There is, however, little discussion on question like "what is a market?" or "what is a state?" But after all, in the same way that Raz argued that it is important to distinguish between law and non-law, because people can govern their lives by legal and non-legal means, we could argue that it is important to answer the boundary questions with regard to these social institutions. People need not necessarily live in a market economy or in a state. And yet political scientists and economists, or even political philosophers and philosophers of social science, do not bother much with the question what features something must have in order to count as a state or a market.

Indeed, even if we set our sights on jurisprudential inquiry because we believe law is an important social institution, it is not immediately clear that every truth about law is valuable "in itself." There are many uninteresting things about law that are true, perhaps even necessarily true, about it. Raz has recently argued, for instance, that law necessarily cannot be in love,[52] and following this example we can extend the list of other things law necessarily cannot be indefinitely. No researcher is after merely accumulating true facts about their object of inquiry, and the philosopher is no different.

A plausible suggestion is that what we are looking for are those truths about our object of inquiry that are also illuminating and important about it.[53] This, however, raises the problem that it may turn out that none of the features that all laws have in common tells us anything

---

[52] See Joseph Raz, "About Morality and the Nature of Law," 48 *Am. J. Juris.* (2003) 1, 3.

[53] Raz, "Theory of Law?," *supra* note 10, at 324 (arguing that jurisprudence is after those necessary truths about law that also "explain" it); see also Dickson, *supra* note 3, at 17. This seems to be what Hart thought about his theory. He believed that the union between primary and secondary rules is the "essence" of law was and that it had "great explanatory power." Hart, *supra* note 6, at 155.

particularly illuminating about it. Again, comparing legal philosophy with research on other social practices is instructive, although of course by no means decisive.

To get out of the impasse and make some progress on this question we should have a clearer understanding of what it is that could distinguish truths worthy of discovering and those that are not. In order to do that I will offer here a definition of "practical relevance" of research as the capacity to change the well-being of people who do not have a stake in the research itself. This definition is rough and vague, but for our purposes it will do. The qualification in the end is intended to eliminate from consideration the effect on the well-being of those concerned with the research, i.e. those who conduct the research or other researchers in the field. They might be intellectually thrilled by the debate, satisfied with their own solutions, or unimpressed by others'. The research might help them get tenure or promotion, and these surely are matters of practical relevance. So we must add this qualification to the definition, or else all research (including the "research" involved in solving crossword puzzles) will be practically relevant.

At the same time well-being should be understood broadly: first, it should be clear that the effect on well-being might not be an easily quantifiable one. For instance, historical research that answers certain puzzles about the history of a certain nation can have practical relevance in affecting the way members of a certain nation conceive of themselves or the relations, responsibilities, or claims they have towards other nations or other people, and this would count as an effect on people's well-being in the sense I wish to capture by my definition. Second, my notion of practical relevance is not limited only to improvements. A scientific discovery which would show that a certain religion is false might distress many people, and may even have an overall negative effect on their well-being, but it will nevertheless have practical relevance in the sense defined here.

Are jurisprudential debates on the boundaries of law practically relevant in *this* sense? One possible suggestion is that the practical relevance of jurisprudential discussion of boundary questions could lie in the courts' reliance on such debates. But this does not seem very likely. As far as courts go there is no reason to think that they are less competent than legal philosophers in drawing the boundaries of law, and doing so *exactly to the degree required for answering the question before them*. The case *Members of the Yorta Yorta Aboriginal Community v. Victoria*,[54] decided by the High Court of Australia, is illuminating. The Court was asked in this case to determine whether an aboriginal community had native title to certain lands and water. In order to succeed

[54] (2002) 214 C.L.R. 422.

in their claim the plaintiffs had to show that they had title to those lands according to their own laws prior to the colonization of Australia. This raised the question what counts as law.

Though in answering this question the High Court's decision mentions Hart's discussion of what counts as law and what distinguishes law from other normative systems, the Court's treatment of Hart's work seems like a cursory nod towards long-forgotten questions of jurisprudence from the distant days of law school, mentioned only to be set aside. The Court says:

> A search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign, may or may not be fruitful. Likewise, to search in traditional law and traditional customs for an identified, even an identifiable, rule of recognition which would distinguish between law on the one hand, and moral obligation or mere habitual behaviour on the other, may or may not be productive ... What is important for present purposes ... is not the jurisprudential questions that we have identified.[55]

There is one more thing we can learn from *Yorta Yorta*. It is plausible to think that law imposes some limits on what counts as the considerations that judges are permitted to look into when adjudicating, and at least a large chunk of those considerations are what is known as "law."[56] But when the court has to deal with such a question, it does not care for abstract considerations that are supposed to be "conceptually" true of all law. Rather, the Australian High Court looked into the text of the relevant statute and the historical facts relevant only to the jurisdiction in question: it treated the boundary question as jurisdiction-specific, not as part of the "nature" of the practice in the abstract.

For those worried that my argument is based on a sample of one case, upon examination it turns out that Hart's *Concept of Law* is mentioned in exactly two reported cases in the United Kingdom, and in neither case in a comprehensive or detailed way. In the United States the situation is only slightly better with some fifty citations in Federal and State court cases. The references are usually to familiar Hartian ideas (open texture, conventional and critical morality, or his example about the rule prohibiting vehicles in the park etc.), but in no case, as far as I could see, was there a serious discussion of questions of boundary Hart discusses in his work. A search

---

[55] *Ibid.* at 442-43 (footnotes omitted). Raz, incidentally, seems to agree: "judicial use of jurisprudential ideas may sometimes be in place, but it is analogous to the judicial use of ideas from biology." Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison," *supra* note 12, at 33.

[56] I use this qualified phrasing first, because judges are surely required to rely on some considerations (for instance some rules of logic), that are not considered part of the law, and also because at least some legal philosophers, in fact some who maintain the importance of the boundary questions, insist that judges must sometimes rely on non-legal considerations. See Raz, *supra* note 1, at 3-4.

for terms like "exclusive legal positivism," "inclusive legal positivism," "hard positivism," "soft positivism," and other similar possibilities in databases of U.S. and U.K. law reports did not return even a single hit.[57]

A different argument may be gleaned from the work of some legal philosophers. It has been suggested that legal philosophy is required for providing conceptual clarification and inquiring into the question of the boundaries of law is important, because it enables us to properly conduct other inquiries such as the effects of law on society.[58] If this is true, then we have a straightforward answer for our questions: jurisprudence is required as a preliminary clarification for other inquiries about law.

Although this answer contains a grain of truth, I believe it is of very limited assistance to justifying debates on boundary questions. True, in order to investigate, say, the question whether law is a good tool for bringing about social change we need to know what we are talking about. Without even a rough understanding of what law is, such inquiry will not be possible, and without some conceptual clarification it is possible—in fact, it is highly likely—that disagreement among theorists will be the result of implicit reliance on different concepts.

So we need to know what we are talking about. But debates on boundary questions go far beyond that, and it does not seem likely that scholars in other disciplines need to wait until legal philosophers' debates about the boundaries of law are resolved in order for them to begin with their research. The fact is that social researchers succeed in reaching worthwhile and illuminating conclusions about law (and other social phenomena) without delving that deeply into conceptual questions and without waiting for legal philosophers to come up with resolute answers to debates about the boundaries of law. Given the amount of disagreement among legal philosophers about the nature of law, it is not clear that if sociologists were to look into jurisprudential debates they would find there the sort of illuminating groundwork that the answer under consideration seems to suggest. Moreover, even if the philosopher does succeed in giving a descriptive account of the boundaries of law, social scientists may have good reasons for carving the division of social phenomena differently from the way described by the philosopher. The social scientist might

---

[57] This finding is also relevant to my claim in Part II that the practice does not have an answer to questions of boundary. If discussion of those issues by judges, the foremost legal practitioners and the ones that are likely to be most concerned about the boundaries of law is so scant, this provides *some* support to my claim that the practice itself does not contain answers to the question of boundaries, that is, that the practice is indeterminate on this question.

[58] See H.L.A. Hart, "Analytical Jurisprudence in the Mid-Twentieth Century: A Reply to Professor Bodenheimer," 105 *U. Pa. L. Rev.* (1957) 953, 974; Hart, *supra* note 10, at xv ("the elucidation of fundamental legal notions [in John Austin's work] is not to be confused with the exposition or the criticism of particular legal systems though it is an indispensable preliminary to both."); John Stuart Mill, "Austin's Lectures on Jurisprudence," in 21 *The Collected Works of John Stuart Mill* (John M. Robson ed., 1984) 53, 55-56 (originally published 1832) (reviewing Austin, *supra* note 10); *cf.* Jules L. Coleman, "Methodology," in Jules Coleman & Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 311, 350-51.

prefer to see how law operates together with other normative systems to achieve certain goals. For those who believe that law is just one of several normative systems operating in society, trying to chart clear boundaries between law and those other normative systems that control human behavior, may seem a hopeless (or at least pointless) endeavor.[59]

In fact, in contrast with the claim that we need to get our concepts right before we begin social research, arguably it should be the other way around: as we have seen, to explicate the concept LAW the philosopher must be examining law and not anything else. But if this is the case, then the social data with which the philosopher works must come *before* philosophical analysis can take place. It might be argued that the philosopher does not need more than she can find by observing at the examples of law she is familiar with. But this claim is hard to accept if the philosopher aims (as legal philosophers concerned with boundary questions surely are) at providing a general account of law that transcends the confines of a particular legal system. At the very least, it seems like legal philosophy and social research should reciprocally interact with each other, with neither discipline assuming priority. Thus, the data provided by sociologists (as well as legal historians, anthropologists, comparative lawyers) can tell legal philosophers what it is that they are talking about, whereas social scientists could look for the work of legal philosophers to find in it clear articulations of prevalent attitudes in a particular community of what counts as law, thus helping them understand what data to gather and how to interpret it. This topic, no doubt, requires more discussion than I can give it here, but it is evident that the suggestion that clarifying the boundaries of law for the sake of enabling other research to begin, cannot be sustained.

B. *Towards an Alternative*

The lesson from the last Section is not necessarily that jurisprudence is not valuable. Rather, that it is not enough to just say that jurisprudence is concerned with the pursuit of knowledge for its own sake. So is there anything else we can say on the matter?

One thing must be clear: there probably cannot be any way of articulating in advance a general account that will determine what needs to be investigated and what not. But I believe it is possible to spell out some guidelines that will help distinguish between important and unimportant questions. In my view, one illuminating starting point for thinking about the practical relevance of jurisprudence was offered by Joseph Raz when he argued that "[l]egal theory contributes ... to an improved understanding of society. ... It is a major task of legal theory to

---

[59] See Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (2001) 116, 173-75 (describing the work of legal pluralists who argued that there is no way to distinguish between law and other forms of social control).

advance our understanding of society by helping us understand how people understand themselves."[60]

I think these sentences provide a key for understanding the point of legal philosophy. However, this is not an empty statement of purpose to be fired and forgotten. I believe it sets a limit to the sort of questions that legal philosophers should be concerned with: if there are debates that go under the heading of the "nature of law" and that do not in any way help us in the admittedly elusive aim of self-understanding, then they are not debates we should be concerned with. Put differently, our self-understanding explains how legal philosophy can be practically relevant, because self-understanding could affect our well-being. But if there is nothing about a particular debate that is helpful for our self-understanding, then this casts doubt on whether there is any point in pursuing it.

The term "self-understanding" seems at first so nebulous that it could not give us any guidance as to which questions are practically relevant. But I think it does: we seek self-understanding by examining the role of social institutions in society, what they try to achieve, and how they do so. By understanding what is important about them and the reasons that make them important for us we learn more about what we care about, why we care about it, and through this about who (or what) we are. This self-understanding need not always be related to moral or political values. But given the role that law plays in our society (and here again we see how, in order to avoid circularity, the legal philosopher will have to rely on the findings of the legal sociologist) it is very likely that better self-understanding will be achieved through consideration of the moral or political role law serves in society.

If all this is along the right lines, what are the questions of jurisprudence that are likely to be of greatest and most pressing practical relevance? One obvious candidate is theorizing on particular legal doctrines. Understanding those is an obvious way for learning how particular societies understand themselves, since values like equality, liberty, and community, and concepts like personhood and responsibility figure prominently in the law. Inquiry about such questions can be of practical relevance even if not done with the aim of bringing about a change in the law.

Even at the higher level of jurisprudential abstraction, in trying to understand questions about law in general, philosophy of law could contribute to self-understanding. I believe this can be best achieved by understanding the place of law within political philosophy: questions such as why we want to keep certain aspects of life unregulated or regulated by institutions other than law, and this will require us to understand why law is good at achieving certain political and social goals

---

[60] Raz, "Authority," *supra* note 12, at 237. Ironically this sentence appears in an essay dedicated to defending, among other things, exclusive legal positivism. See also Dickson, *supra* note 10, at 64.

and bad at others; or questions about the different ways in which different legal traditions have understood the role of law in their society and what we can learn from this about the political ideals they had and those we should have. Close attention to the law could also help us understand the realities about issues like distributive justice: in debating the best theory of distributive justice theorists often forget the realities and enormous complexities of translating abstract theories to working statutes. Knowing more about the law could be helpful for understanding both people's real commitments to distributive justice, as well as which theories of distributive justice could be put into practice.

In addition, many "traditional" questions of legal theory are located exactly at this juncture of the relationship between law, political morality, society, and language (as an aspect of society): it is exactly here, for instance, that questions about adjudication and interpretation, usually treated separately from questions about the "nature" of law fit within the larger picture. Different theories of adjudication and interpretation are not really debates about meaning, and philosophy of language has little to contribute to them: they should more properly be understood as debates about the proper relationship between political and judicial branches, democracy, separation of powers etc. These are all questions relevant for our self-understanding.

Notice that even though the argument developed here is independent of the arguments in Part II, the conclusions of the two arguments are quite similar. This is not surprising: those questions on which we are likely to find determinate answers are exactly those on which the answer is likely to be of some practical relevance. People are likely to have clear attitudes on the practice—what belongs to it, who can participate in it, how it is to be practiced—exactly on those matters which are of some practical relevance.

Our interest in the question of law's normativity could be explained along similar lines. Law is a significant institution saturated with "oughts," so understanding the question of normativity is an important question. As I see it, an important part of the explanation of law's normativity must be dedicated to the question in what ways does law's normativity differ (if it does) from a host of other sources of obligations in institutions such as friendship, family, and nation, and in what sense its normativity differs from that of social institutions such as language.

Even though when reading philosophers' discussions on such matters one sometimes loses sight of the ultimate goal, as I see it the purpose of these debates is to explain one of the great puzzles of our lives. The answer to this question could potentially have significant ramifications on understanding how social life is created, indeed what we mean by "social," that is distinct from (if it is) from the aggregate of individuals. This may or may not lead to change those institutions,

but understanding these institutions could contribute to our self-understanding, and thus be practically relevant to our lives.

Before the end I would like to point out one implication of this discussion. Some questions regarding our self-understanding are enduring. Others are likely to change from time to time: an issue that is of great practical relevance at one time will be less practically relevant at other times. Academic fashions cannot be explained by a single factor, and practical relevance might not be even among the most significant among them, but its importance cannot be dismissed even in areas that are supposed to be highly abstract. Even philosophy, seemingly concerned with the universal and eternal, is affected by such concerns. Perhaps this is not true of other philosophical branches like philosophy of language.[61] But it is surely the case with philosophical reflection on a changing social practice such as law. This conclusion can be reached by showing that the attitudes that constitute law change from time to time and consequently the concept LAW changed along with it. If that is true (and I suspect it is), then the aspiration of legal philosophers to find those features that all laws necessarily have may be in serious trouble. But for the sake of the argument made here we need not go that far. There is a weaker sense in which this claim is true even if the nature of law and the concept LAW remain constant. Even if that is the case, changing concerns are going to affect the kind of issues about the concept whose explanation is going to be of greatest impact for our self-understanding. This means that we are likely to see different explanations, or at least different emphases, at different times. The recent history of legal philosophy provides a host of examples: the question of the relationship between law and morality was pressed in full force on legal theorists in the 1950's when the experience of the Nazi regime was still on everyone's mind.[62] This question, which seemed at that time of paramount importance for understanding what law is and what functions it aims to serve, seems, at least in the context of the Western world, less pressing today. Similarly, in *The Concept of Law* Hart gave a rather detailed discussion of the continuity of law in times of regime change.[63] Today such a discussion seems quaint and "academic," but at the time of writing, when the great European empires (and in particular Great Britain) were undergoing the final stages of devolution from their former colonies and new states were being formed at a unprecedented rate, such a discussion was concerned with a very practically relevant and live political issue.

---

[61] Compare, however, Allan Janik & Stephen Toulmin, *Wittgenstein's Vienna* (rev. ed. 1996) 167-201 for the argument that Wittgenstein's seemingly abstract and ahistorical philosophy of language cannot be separated from the environment of *fin-de-siècle* Vienna in which he grew up. Endeavor

[62] Most famously in H.L.A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harv. L. Rev.* (1958) 593, 615-18, and Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 *Harv. L. Rev.* (1958) 630, 648-60.

[63] See Hart, *supra* note 6, at 120-23.

V. Conclusion

This is no doubt not the end of the debate. The arguments in this Essay were not deductive proofs, and ultimately, there are bound to be differences among people as to what counts as important and worth researching. Legal philosophers, and philosophers generally, are not alone here. Even in the natural sciences there are questions one might consider not worth our time, money, and effort. Given vastly different views on what is important, it seems obvious that different people are likely to differ on what questions people should research. Someone who for whatever reason believes that the number of blades of grass on Earth is of great importance would probably not be moved by any of the arguments made here. Legal philosophers, however, do not think their work is on a par with such inquiries. They believe that their work, even if "knowledge for its own sake," is of value for contributing to our understanding of one central practice that affects humans' lives in many different ways. But if the arguments advanced here are correct, they suggest that the preoccupation of legal philosophers with these questions cannot be justified.

Perhaps I am wrong about this; perhaps there is a good defense for the importance of contemporary debates among legal philosophers even if such debates are not practically relevant in any way. Even then, I believe legal philosophy need not be justified on such narrow grounds, for there is a different and more fruitful route for it to take.