Saying Something Interesting in Jurisprudence, a Young Scholar's Story

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Lamenting the current state of jurisprudence, Dworkin chose to speak 'directly to young scholars who have not yet joined the doctrinal army'. He asked us to 'abandon the cloak of neutrality' shrouding the subject. We should speak for the claimant or defendant or at least speak to them; we should speak to the judges and lawyers, proffer advice for deciding difficult cases and interpreting statutes. Yet Dworkin also warned us, '...if you set out in this way you are in grave danger of being, well, interesting'.[1] Taking up Dworkin's advice to 'young scholars' this article examines why contemporary jurisprudence risks becoming increasingly dreary and how this regrettable predicament should be remedied. It is agreed with Dworkin that the concept of law is essentially contested. The way to save jurisprudence from tedium and practical irrelevancy is to accept the challenge this contestability presents and to mount a normative, or practical-political, argument for one's preferred concept of law. Dworkin noted that in fashioning such a concept we are guided by a 'larger matrix of ideas' thus we should settle on one that can 'play its part in the larger story'.[2] Any concept of law is then inseparable from this wider narrative, what makes jurisprudence interesting and important, is how the concept influences this broader tale of politics and law. This article aims to advise theorists of the proper approach to telling this larger story. The theorist must engage in initial evaluation, whether termed direct or indirect, of the point or function to be ascribed to law by considering what the participant's beliefs and attitudes disclose as valuable within the practice. He thus establishes a beginning to his story. He then utilises a chosen tool of structure, be that conceptual, linguistic or semantic analysis, or methods continuous with empirical enquiry in the sciences, to present an explanatory account of the features of the practice, forming the main substance of his tale. The final stage, the closing chapters of the story, require the theorist to re-engage with the practice. In this instance he determines what his abstract explanation, prescribes, requires or accepts in terms of tangible institutional design, as a concrete conclusion to his exposition.

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1 R.M. Dworkin, *Justice in Robes* (2006) All quotations from 186.

2 Ibid 179.

I. Methodology: Structuring the Story

A story must flow coherently and be structured in such a manner as to guide the reader on their journey through the events of the tale. Theories, like stories are generated and constructed in the mode appropriate to narratives within that genre, this is the role of methodology in jurisprudence.

There currently exists a fixation with 'meta-theory', in jurisprudence, theorising the methodology of the subject.[3] Dickson's work gives sustained consideration to jurisprudential methods. She postulates a line of thinking which sees developments in the substantive theory of a subject as 'inversely proportional'[4] to concerns with meta-theory, '...such that when one waxes, the other must inevitably be on the wane; interest in jurisprudential methodology flourishing when there is a lack of progress in substantive accounts of the nature of law.'[5] Following Hart's Concept of Law, some have said that the debate over substance has been won by legal positivism.[6] Theorists produce and debate methodological processes as if they could be evaluated separately from the substantive theories of the concept of law they generate. Dickson considers whether the correctness of a particular methodological approach could be assessed as prior to and independent of the substantive theory it produces. To suggest as much would elevate the debate to an undeservedly high plateau. This would be like presenting to readers the bare-boned structure of a story, with no detail to flesh out the action and expecting them to be satisfied that the framework allows for numerous plot twists, which they must use their own imagination to create. But we intuitively know that some formulaic structures are more successful in particular genres, the romance novel, the crime thriller, the action adventure, for example. Dickson is right to advocate a model '...more holistic in nature, holding that methodologies and the theories, which they generate, must be evaluated together and that each can derive support from the success of the other.'[7]

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3 J. Coleman, 'Methodology', in J. Coleman, S. Shapiro and K.E. Himma (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law,* 311-352, 312 '...there may be no issue more prominent in the recent literature than the dispute between the proponents of normative and descriptive jurisprudence, it is difficult to frame the debate in a way that would justify the attention it has received, or the passions that have arisen on both sides of the divide.'

4 J. Dickson, *Evaluation and Legal Theory* (2001) 12.

5 Ibid.

6 B. Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence' 48 (2003) *American Journal of Jurisprudence* 17-51. A. Marmor, *Interpretation and Legal Theory* (2nd ed, 2005) 2.

7 Dickson, above n 4, 13.

The apparent division between advocates of, 'descriptive' and 'normative' jurisprudence has hindered methodological discussions. It has long been recognised that legal positivist and natural law schools do not each represent a singular theory.[8] There rather exists a continuum of positions including, among others, those who see law's identity as a matter of pure social fact,[9] those who include moral tests in the source-based identification of law,[10] those who see law as an interpretive practice,[11] and those who believe in natural law founded on right reason with respect to the common good of the political community.[12] Likewise, then, the descriptive/normative division in methodology ought to be abandoned. Dickson argues that '...the "two camps" model as it is usually understood is overly simplistic and fails to capture some important distinctions between theories and theorists as regards their views on correct jurisprudential methodology.'[13]

The roots of this perceived dichotomy lie, as many theoretical wrangles do,[14] in the Hart/Dworkin debate. Hart famously, and perhaps mistakenly[15], categorised his conceptual analysis as an exercise in 'descriptive sociology.'[16] In response to Dworkin's criticisms, he later pronounced that: 'My account is descriptive in that it is morally neutral and has no justificatory aims'.[17] This assertion should be taken in context, as a response to Dworkin's criticisms, and as a rejection of the Dworkinian approach requiring theorists to provide a moral interpretation of law as justified coercion. This has perpetuated the misguided assumption, that descriptive and normative theorising are mutually exclusive; that the correctness of one excludes the existence of the other.[18]

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8 J. Coleman, S. Shapiro and K.E. Himma (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* chs 1-4.

9 Exclusive positivists such as J. Raz, *The Authority of Law: Essays on Law and Morality* (1983).

10 Inclusive positivists such as H.L.A. Hart, *The Concept of Law* (2nd ed, 1997) and J. Coleman, *The Practice of Principle In Defence of a Pragmatist Approach to Legal Theory* (2003).

11 R. Dworkin, *Law's Empire* (1998) and S. Perry, 'Interpretation and Methodology in Legal Theory' in A. Marmor (ed) *Law and Interpretation: Essays in Legal Philosophy* (1995) 97.

12 J. Finnis, *Natural Law and Natural Rights* (1979). M. Murphy, *Natural Law in Jurisprudence and Politics* (2006).

13 Dickson, above n 4, 30-31.

14 The fissure between exclusive and inclusive positivism developed considerably in response to Dworkin's criticisms and Hart's classification of his 'soft-positivism' in *The Concept of Law.*

15 S. Perry, 'Hart's Methodological Positivism' in J Coleman (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001) 311.

16 H.L.A. Hart, *The Concept of Law* (2nd ed, 1997).

17 Ibid 240.

18 Dickson, above n 4, 30-31. J. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (2001) Intro and Ch 12.

Analysis discloses further divisions, between those who truly believe that normative theorising is the only correct methodology for jurisprudence; Dworkin[19], Finnis,[20] Perry,[21] and Waldron[22] seem to occupy this position. Those who see room for both theories, but make a stronger case for one variant Coleman[23] and Marmor[24] are ardent defenders of 'descriptive' positivist jurisprudence in particular. Then there are those such as Leiter[25] who do not attack descriptive theorising per se, but rather its favoured tool of conceptual analysis, alternatively viewing legal philosophy as continuous with empirical methods in the sciences. There are those theorists who utilise both approaches, Bentham's expositorial and censorial jurisprudence for example, or Raz's isolation of his theory of law from his theory of legal reasoning.[26]

In the theme of the present article one would do better to advocate a particular methodology based on its ability to structure the story in a clear and understandable manner, ultimately enhancing the reader's experience. Just like a story, any theory ought to strive towards engendering certain virtues, '...such as simplicity, clarity, elegance, comprehensiveness and coherence,'[27] and it is to these values that one must now turn.

A. The Role of Evaluation in Legal Theory

Coleman notes: 'All theories have a revisionist component and ambition, and if we read "normative" too broadly we will be hard pressed to find a debate worth having.'[28] There is a certain sense in which any and all theories are normative, that is they comply with the norms of theory construction. The values noted above, 'simplicity, clarity, elegance, comprehensiveness and coherence,' are according to Dickson:

> ...ones which it is valuable for any theory concerning any subject matter whatsoever to exhibit, and that this is

19 Dworkin, above n 11.
20 Finnis, above n 12.
21 Perry, above n 11.
22 J. Waldron, 'Normative (or Ethical) Positivism', in J Coleman (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001) 410.
23 J. Coleman, 'Beyond the Separability Thesis: Moral Semantics and the Methodology of Jurisprudence' 27 (2007) *Oxford Journal of Legal Studies* 581-608.
24 A. Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' 26 (2006) *Oxford Journal of Legal Studies* 683-704.
25 Leiter, above n 6.
26 A. Halpin, 'The Methodology of Jurisprudence: Thirty Years off the Point', 19 (2006) *Canadian Journal of Law and Jurisprudence* 67-105.
27 Dickson, above n 4, 32.
28 Coleman, above n 23.

> due simply to the nature of theories; in particular, to the fact that they seek to communicate arguments effectively.[29]

As with a story, effective communication is key. Coleman makes a similar point referring to Hart's arguments from 'unification, consilience, systematicity...'[30] If normative jurisprudence simply asserts that theorising about law is governed by ordinary norms of theory construction, then in this 'banal'[31] sense, all jurisprudence is normative.[32]

Any theory must involve some evaluation of the extent to which it satisfies these 'purely meta-theoretical' judgments. By presenting a singular dichotomy, the descriptive/normative division has obscured other relationships between evaluation and legal theory. In characterising his jurisprudence as 'descriptive' Hart was keen to make the claim that '...a jurisprudential theory need not warrant the inference from legality to moral legitimacy.'[33] To allow this would be to beg the question as to the legitimacy of law. Put in methodological terminology, this is Dickson's 'moral evaluation thesis.' The proposition being; '...in order to understand law adequately, is it necessary to morally evaluate the law?'[34] Perry was one of the first to categorise Hart's jurisprudence as normative in a more sophisticated, non-banal, sense.[35] He noticed that Hart was making claims beyond the 'meta-theoretical.' 'Hart is making evaluative claims not about theories, but about the very social practices he is studying.'[36] When Hart identifies the uncertainty, static character and inefficiency of a system of primary rules as salient to remedy, he is '...thus delimiting the concept of law by appealing to the values of certainty, flexibility and efficiency.'[37] One must consider the nature of this species of evaluation. For Perry it consists of evaluation on grounds of political morality. The theorist must choose what is important to study within the practice of law, and this must be relevant to its assumed point or function:

> Jurisprudence requires a conceptual framework. The difficulty is that the data can plausibly be conceptualised in more than one way, and choosing

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29 Dickson, above n 4, 32-33.

30 Coleman, above n 3, 335.

31 Dickson's term, Dickson, above n 4.

32 'That legal theories such as Hart's, which are usually characterised as "descriptive" are necessarily evaluative in *this* sense is a fact recognised by many commentators...'. Dickson, above n 4, 33.

33 Coleman, above n 3, 312.

34 Dickson, above n 4, 25. Emphasis my own.

35 S. Perry, 'Hart's Methodological Positivism' 4 (1998) *Legal Theory* 428.

36 Ibid 438.

37 Perry, above n 11, 118.

> among conceptualisations seems to require the attribution to law of a point or function. This in turn involves not just evaluative considerations, but moral argument.[38]

Perry categorises this as 'moral and political argument intended to show which theory makes the best moral sense of the social practice we call law.'[39] Hence interpretivism usually associated with Dworkin, but on a more abstract level in that the function attributed to law need not be justified coercion as per Dworkin, but can be whatever function makes the best moral sense of law as a social practice.[40] For example, Perry would characterise as interpretivist theories those of Raz, Bentham and Coleman. Each attributes a different point or function to law, for Raz the central feature is authority which is secured by the provision of exclusionary reasons, for Bentham, the law adds to people's reasons for action rather than replacing them, for Coleman the purpose of law extends to principled adjudication.[41]

The difficulty with Perry's position is that it is unclear why the evaluative judgments are a peculiarly moral species of evaluation. Coleman argues that 'Perry's critique of Hart mistakes the conceptual argument for a moral one.'[42] Hart chose to study the function of law as providing rules, which guide human conduct because he felt this conceptualisation would have great explanatory power. Hart's claim was as Coleman explains that, '...by attributing to law a guidance function, we can more adequately understand why law arises, persists over time, and takes the shape it does in its manner and forms.'[43] Such is an evaluation, but for Hart it is a morally neutral one. This can be seen from his debate with Fuller over the so-called inner morality of law.[44] For Hart, compliance with principles of good rule making was purely a matter of efficacy, not of morality. Halpin has astutely noted that '...the theorists discernment of some purpose or point to law is a common feature in different accounts of the methodology of jurisprudence.'[45] Therefore each

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38 Ibid 123.

39 Perry, above n 35, 466.

40 It may be that Dworkin's methodology is separable from his preferred theory, but the criticism is that he slides too quickly and opaquely between the two, see Halpin, above n 26.

41 Perry, above n 11.

42 Coleman, above n 3, 339.

43 Ibid 342.

44 H. Hart, 'Positivism and the Separation of Law and Morals' 71 (1958) *Harvard Law Review* 593. L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart' 71 (1958) *Harvard Law Review* 630.

45 A. Halpin, 'Methodology, forthcoming in D. Patterson (ed) *Blackwell Companion to Philosophy of Law and Legal Theory* (2nd ed.) available online athttp://ssrn.com/abstract=1291154 at 8.

particular theory of the concept of law is guided as much, if not more, by the theorists chosen function or purpose of law, than by his methodological predilections.

B. Indirect Evaluation

As we have seen: 'Legal theories do and must involve evaluative judgments which are more than purely meta-theoretical in nature...However, it is not the case that, by so doing, those theories are involved in morally evaluating the law...'[46] Therefore, some other species of evaluation must be at work here, and this is what Dickson characterises as 'indirect' evaluation. Drawing on the methodological commitments of Finnis and Raz, she develops the methodology of indirect evaluation. Both theorists note that law is a particular kind of concept, it is not like 'mass' or 'electron' but rather it is '...a concept used by people to understand themselves,'[47] a hermeneutic concept. There appears to be a wide, if shallow, consensus among theorists that the social standing of law necessitates its treatment as a hermeneutic concept.[48] Dickson explains, the data that constitutes the subject matter of theorising about law consists itself of 'beliefs and attitudes towards the law on the part of those who are subject to it.'[49] It is not surprising then that Finnis argues evaluation in legal theory extends to '...asking what would be considered important and significant in that field by those whose concerns, decisions and activities create or constitute the subject matter.'[50] Both Finnis and Raz agree that an adequate explanation of the concept of law must thoroughly engage with the views of those ordinary citizens subject to law. Perry congratulates the Razian theorist who:

> '...appears to look at law from the perspective of a participant who identifies himself with the institution..., who uses the normative language and conceptual apparatus of the law, but who does not necessarily endorse the moral authority of the law...[51]

This is where Raz and Finnis part company, whilst both believe that law legitimately claims moral authority, Finnis makes two further propositions, as outlined by Dickson:

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46 Dickson, above n 4, 37.

47 J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1995) 237.

48 Halpin, above n 45, 8.

49 Dickson, above n 4, 41.

50 Finnis, above n 12, 18.

51 Perry, above n 11, 138.

> (1) in order to evaluate which are law's important features, and to explain those features, the legal theorist must morally evaluate the law, and (2) that such an evaluation will lead to the conclusion that the law is a morally justified phenomenon which lives up to its claims that it is morally legitimate and ought to be obeyed.[52]

In order to be explanatorily adequate, a legal theory must evaluate participant's attitudes and beliefs towards law, given the social status of law and its authoritative nature, such are likely to include moral attitudes and beliefs. So can, and indeed should a theory stop short of engaging in direct moral evaluation? Dickson distinguishes between direct and indirect evaluation. Direct evaluations are those, which ascribe value or worth to a particular subject of inquiry. In relation to law, directly evaluative propositions might include, 'the law is morally justified', 'the law possesses legitimate moral authority'. However, picking out a particular feature of law as important to explain does not in itself involve the theorist in judging whether that feature has substantive moral value. As Dickson explains:

> ...asserting that the law's invariable claim to possess moral authority is an important feature of law to be explained does not entail a directly evaluative judgment...In making the former indirect evaluation, we are picking out the existence of the law's claim as important, not directly evaluating its content.[53]

Dickson notes that whilst directly evaluative judgments of moral value can support or justify an indirect evaluation, which identifies some particular feature of law as essential to explain, this does not have to be the case. Indirect evaluations can be supported by propositions concerning the 'distinctive character and mode of operation of law.'[54] As Coleman has noted in relation to Hart, '...by attributing to law a guidance function, we can more adequately understand why law arises, persists over time, and takes the shape it does in its manner and forms.'[55] The law operates in certain distinctive ways through certain distinctive institutions; we identify these ways and institutions as important to understand, without further assessing their moral merit.

Despite its ingenuity as a middle-way position, indirectly evaluative methodology has not been universally welcomed. Some theorists shepherded into this school of thought by Dickson have either sought to distance

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52 Dickson, above n 4, 45.
53 Ibid 55.
54 Ibid 61.
55 Coleman, above n 3, 342.

themselves from its particular precepts[56] or to deny that there is any conceptual space between descriptive and normative theorising.[57]

C. Direct Evaluation?

Having already noted Perry's approach requiring direct moral evaluation of the point or function of law as a proposition of interpretive methodology, one must further consider Dworkin's prior contribution. Dworkin, an adherent to normative theorising outlines a number of different interconnected concepts applicable to legal theory.[58] The 'doctrinal concept' is the concept we use when we state whether the law of a particular jurisdiction requires, permits or forbids a certain action. The 'sociological concept' is that used to describe the specific forms of institutions or political organisations that constitute law, i.e. a certain country has 'law' because it has a legislature and courts. The 'taxonomic concept' distinguishes legal principles from principles of some other kind; some legal positivists would say this concept clarifies a distinction between, for example, legal principles and moral principles. Finally the 'aspirational concept' describes a particular political value, such as legality or integrity. All these are concepts that we may produce in seeking to understand law, or aspects of it. However, Dworkin also introduces another set of overlapping concepts, which essentially form the building blocks of the four possibilities noted above. For example, the 'criterial semantic' concept, that law exists as shared linguistic criteria, this is how Dworkin categorises positivist theories. The concept of 'natural kinds', these are 'real' concepts whose existence does not depend on invention or belief, the features of such concepts can be conclusively established by scientific analysis. The structure of these kinds is physical and not normative, therefore it might seem implausible to think of the concept of law as a natural kind. Finally, there is Dworkin's favoured 'interpretive concept'. Interpretive concepts depend for their explication on moral and political judgments. Which combination is appropriate depends upon the subject matter under consideration and the theorist's own understanding. For example, one might argue that the 'sociological' concept of law is 'criterial' whereas the 'doctrinal' concept is 'interpretive'. Another theorist might state that the 'taxonomic' concept is a 'natural kind' concept, but that the 'aspirational' concept is 'interpretive'. There are, then, numerous possible combinations and the theorist must explain his reasons for adopting a particular combination or combinations.

Dworkin believes that the 'doctrinal' concept of law is an interpretive concept. He uses the analogy of political concepts such as justice, equality and democracy. Ordinary political argument involves sustained disputation of the

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56 Perry, above n 11, and Leiter, above n 6.

57 Marmor, above n 24, and Coleman above n 23.

58 Dworkin, above n 1, Chapter 6, 140-186.

very conceptual issues that political philosophers wish to pin down. One cannot disconnect the conceptual criteria that constitute democracy from the values that democracy serves, from why it is good to have democracy. For these political concepts, '...everyone agrees that the values in question are of at least some importance...but that agreement leaves open crucial substantive issues about what more precisely these values are or mean'.[59] One can see that a 'semantic' concept based on shared criteria does not hold for these thick political values and in Dworkin's view, the same is true for the concept of law. A philosopher can aim to uncover the deep essence of justice, or democracy or law by 'exposing its normative core'. This can still be described as conceptual analysis. 'We cannot sensibly claim that philosophical analysis of a value is conceptual, neutral and disengaged. But we can sensibly claim it to be normative, engaged and conceptual'.[60] For all of these political concepts the philosopher's aim should be to show more precisely where their value lies. Dworkin ambitiously suggests that this can only be done by locating the values as part of an intricately connected 'mutually supporting web of conviction that displays supporting connections among moral and political values...'[61] This is no modest suggestion, but then neither was his constructively interpretive theory of law as integrity when it first caught our attention. For Dworkin, the value of law springs from the value of legality, more grandly known as the rule of law. A specific conception of this value could generate the sources thesis of legal positivism, or other particular approaches like pragmatism that are also part our jurisprudential legacy. One can see how competing conceptions of the value of legality would lead to different concrete outcomes in particular cases before the courts. Dworkin emphatically seeks to tell us the whole story. It has always been his position that the question of what is 'law' cannot be divorced form the question of what is 'the law' governing the case currently in point.[62] His structure is the methodology of constructive interpretation, the beginning lies in the importance of the value of legality; the main body comprises the competing conceptions of that concept and the different answers they might furnish in real life cases. The end, or perhaps more appropriately, the conclusion, is the normative argument that law as integrity furnishes the best conception of the concept with numerous reasons why Dworkin thinks this is so. One can criticise specific aspects of Dworkin's theory, its structure, content, or conclusions. One can even argue that it is incomplete, too parochial: where is the theory of legislation, what real practical political implications does it have? But one cannot describe his story as irrelevant and uninteresting, and these are the strongest forms of censure that any storyteller or theorist alike could receive.

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59 Ibid 148.

60 Ibid 155.

61 Ibid 168.

62 Dworkin, above n 11.

Prior to Dworkin's recent pronouncements concerning the value of legality it was argued that his commitment to normative methodology stems from his claim that law's function is to justify the coercive power of the state. Had he merely plucked this function of law from 'thin air?'[63] Having attributed such a function to law we find that we cannot escape substantive moral and political argument, direct evaluation as to whether and how well an intimation of the concept of law fulfils this task. Coleman concludes that Dworkin's argument incorporates a methodological error making it incompatible with either descriptive or normative jurisprudence.[64] Whilst normative jurisprudence requires appeal to substantive moral and political claims in order to uncover the truth conditions of the concept of law, it must also be compatible with a range of substantive theories as to what these truth conditions are, and this includes legal positivist theories. By identifying this moral and justificatory function of law as a starting premise from which to launch his methodological construction, Dworkin has excluded any conception, which eschews a necessary connection between law and morality. Justified coercion was the crude precursor to the value of legality. Dworkin's constructive interpretation incorporates the moral dimension of defending a conception as the morally best interpretation of our legal practice. Coleman recognises this as an argument for normative jurisprudence, but caricatures it as 'Disney-like'[65] not to be taken seriously for the inferences necessary to construct the theory have been plucked from the ether. However, Dworkin has made an intricate argument in Law's Empire detailing the interaction between interpretation, integrity, the community of principle and so on, and in his recent work he makes sustained argument for the value of legality.

The complaint here is that Dworkin's theory is jeopardised by his chosen starting point, the value he attaches to the concept of law, namely legality. Does Dworkin beg the question by championing legality as a morally valuable concept from the outset? Can it be said that legal positivists beg the question in the opposite direction? Stavropoulos would say they do. He notes that legal positivists generally take as their starting point the evaluation that law is an affair of rules appearing to form a system, stemming from an authoritative institution, therefore automatically orienting their theory in

63 Coleman, above n 3, 320.

64 For Dickson this means that Dworkin's theory is not part of analytical jurisprudence, but I do not wish here to introduce further classifications, shifting the dichotomy from descriptive/normative to analytical/normative instead, but rather accept that there are many different theorists with many different positions, and classification is not always helpful, as I think Dickson herself would agree. Dickson, above n 4.

65 Coleman, above n 10, 185.

favour of the positivist commitment to the sources thesis.[66] Whilst Dworkin's theory begins with the assumption that the value of the concept of law is the political value of legality, his substantive theory cannot escape moral commitments. Whereas the positivist assumed function is neutral and could conceivably result in a theory that may or may not be imbued with moral substance. Nevertheless, the positivist's initial assumption that law is an affair of rules negates any consideration of a concept that views law as some other creature, such as an affair of principles or interpretation. This point leads Halpin to postulate whether we can locate the determination of the normative/descriptive divide within the theorists initial attribution of some point or purpose to law, although he ultimately rejects this interpretation as too simplistic.[67] Dworkin ascribes a normative purpose to law, justified coercion, whereas the exclusive positivist Raz views law's function as providing exclusionary reasons, and this is not an inherently moral purpose.

The above analysis shows that methodological approaches are now as bountiful, intricate, individuated and, complex as their substantive counterparts. In this tapestry there may be as many ways of theorising law as there are theories of law. The conflict between competing substantive theories of the concept of law will not be won on the battleground of methodology, but our wartime chronicles will be much richer and varied as a result of expansion on this new front. Coleman notes that each methodological position reflects different '...kinds of philosophical approaches one might take to exploring the nature of jurisprudence – its aims, its philosophical foundations, and the criteria suitable for assessing those theories'.[68] This means that:

> Attributing one or another function to law will orient the analysis of the concept in a particular way...different theories of the concept will fall out of different attributions of function, purpose or value. We can choose among the different conceptions according to appropriate criteria for assessing the theories of the concept of law.[69]

D. Is There a Separate Role for Methodology?

As with a story, it seems that the structure or formula of any legal theory cannot be assessed independently from the substantive content. Murphy, '...argues that there is no defensible methodology that can adjudicate

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66 N. Stavropoulos, 'Interpretivist Theories of Law', in *Stanford Encyclopaedia of Philosophy* available online at http://plato.stanford.edu/entries/law-interpretivist/ (2003).

67 Halpin, above n 45, 8.

68 Coleman, above n 3, 333.

69 Ibid 334.

between the various competing accounts of the concept of law.'[70] Likewise Halpin believes: 'There are no grounds for concluding that a methodology that is appropriate to the theory of law can be developed to act as an arbiter of sound legal theory...'[71] It is uncertain whether anyone really claims such a grand role for methodology. Murphy charts the major developments in legal philosophy since the time of Bentham, through to Hart, Dworkin's ripostes and the catalysed fracture of positivism into its inclusive and exclusive schools. He notes that:

> We have also seen the development of something of a philosophical consensus that one or other of these accounts of the concept of law must be correct and, particularly from Dworkin and Raz, sophisticated accounts of philosophical methodology that, they believe, will show which account that is.[72]

Halpin suggests that our predilection with methodology has led to 'thirty years off the point'[73], for legal theory. The vogue towards focusing on methodology shifts attention from whether the content of the concept is illuminating or accurate to whether it is methodologically sound. Halpin explains, '...if we could identify an appropriate methodology for theorising on that particular practice, then it could be applied equally to each of the competing perspectives to assess which of the theories were methodologically sound'.[74] He describes jurisprudence from this perspective as 'an intellectual pyramid in the air'.[75] Methodology is at the apex, held up by legal theory, which is seen as independent of the practice of law; under this is the practice itself, which is likewise considered to be independent of the values and practices of the social community in which it is observed. Our attempts to theorise a particular practice are often linked to it by aiming to understand some deficiencies within it that could be understood and corrected by theoretical explication. However, whatever deficiency is observed in the practice is likely to be controversial. By abstracting it to the level of theory we only transfer rather than solve the controversy. Likewise by reverting to the realm of methodology we pass on this controversy yet again. We might say that a deficiency in the practice of law amounts to controversy over the point or function of law: is it to guide human conduct by the governance of rules, or is it a means of justified state coercion? We have here two separate, internally

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70 L. Murphy, 'What Matters? Morality and the Concept of Law', available online at: http://nico.stavropoulos.googlepages.com/murphy_WhatMatters.pdf 1-64, 9.

71 Halpin, above n 45, 9.

72 Murphy, above n 70, 8-9.

73 Halpin, above n 26.

74 Ibid 75.

75 Ibid 67.

coherent, theories, those of Hart and Dworkin respectively. However, we cannot agree which is correct by examining them against neutral methodology. We have not managed to articulate a true methodology independent of the point or function of law that the theorist through either direct or indirect evaluation, attributes to it.

For Halpin the, 'theorist's reflection on the practice of law, [for Dickson the "indirect evaluation" of the practice, yields a characteristic which makes a particular methodology appropriate'.[76] Therefore it does not avert the problem of partisanism in methodology described above. He believes it is a misnomer to describe such theories as indirectly evaluative, '...it is direct evaluation of the practice from a particular theoretical position: it represents what the theoretical perspective sees of value in the practice'.[77] By isolating one or another characteristic as fundamental to the practice of law the theorist provides one variant of the concept of law, a variant giving priority to this central feature. For Hart it is the primacy of rules, for Raz it is 'authority' for Dworkin it is 'legality'. We should not forget that the practice of law itself is deficient and controversial and thus any account of the concept of law will reproduce this controversy. We should 'dismantle the pyramid'.[78] If the proper function of law is to provide the clearest and most socially acceptable resolution of controversies, then the proper role of legal theory is to understand how the law achieves this task. There are numerous forms such resolution could take; therefore there will be numerous theoretical perspectives on law. The search for one overarching master concept is an exciting intellectual ideal, but it does not accord with reality. The division between descriptive and normative jurisprudence is a similarly unnatural demarcation. Theorists need to draw on both variants, at the level of methodology and at the level of substantive theory in order to contribute to a greater understanding of law and legal practice, in order to be interesting and to tell a complete story. The theorist should be ready to fight for their preferred concept of law on normative grounds.[79]

Another line of attack in the descriptive/normative debate concerns conceptual analysis. Leiter argues that conceptual analysis is a relic of the linguistic turn in philosophy and that it should be replaced with other disciplines such as psychology, sociology, anthropology and the economics of law. For Leiter the prevalent belief that '...scientific theory construction can't accommodate the distinctive features of hermeneutic concepts...is motivated

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76 Ibid 78.

77 Ibid 79.

78 Ibid 91.

79 Halpin, above n 45, 8. Haplin postulates whether, '...the existence of normative controversy *accompanied by* the acceptance of the challenge to engage with the controversy is what marks a theory as normative.'

by bad philosophy of science.'[80] The main historical task of conceptual analysis appears to have been delimiting the necessary or essential characteristics of law. Leiter's argument is that there are no such a priori necessary qualities discoverable by conceptual analysis alone. As we have seen, the distinguishing features of any particular concept of law are heavily informed by the initial evaluation of the point or function of law chosen by the theorist. Thus conceptual analysis cannot supply the one true concept of law. Nevertheless, there are numerous other important roles it can fulfil. The use of conceptual analysis within jurisprudential inquiry is a topic of recently renewed interest.[81] The developing and detailed arguments will not be discussed here; suffice it to say that we use conceptual analysis to aid discussion. Concepts are developed that are then used in argumentation, we determine to what extent they are compatible; we articulate the concrete solution each concept might offer to a particular problem. It is not incorrect to describe conceptual analysis as normative analysis. Dworkin argues: 'We understand legal practice better, and make more intelligible sense of propositions of law, by pursuing an explicitly normative and political enterprise: refining and defending conceptions of legality and drawing concrete claims of law from favoured conceptions.'[82] Normative jurisprudence does not eschew conceptual analysis. As Waldron notes, 'It still requires the analytic legal philosopher to do his work first, to establish the conceptual possibility of that which the normative theorist represents as desirable'.[83] The key word here is possibility. We do not need to establish that one particular analysis is conceptually correct in a way that excludes the accuracy of others. All we can do is establish it as an internally coherent possibility. Once we accept that there are numerous competing concepts of law, we must also accept the necessity of mounting an explicit argument for one's favoured concept. Attacking conceptual analysis itself does not displace the initial evaluation of the point or function of law. Likewise, turning to linguistic, semantic, or other philosophically sophisticated analytical methods will not obviate pre-selection of point or purpose. As Halpin explains:

> ...the pervasive influence of the theorist's judgment is still to be found: in selecting a particular type of semantics; or in discerning an essential property and

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80 Leiter, above n 6, 38.

81 A. Halpin, 'Methodology and the Articulation of Insight: Some Lessons from MacCormick's "Institutions of Law"', in *Z. Bankowski and M. Del Mar (eds) Law as Institutional Normative Order forthcoming* (2008) available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152453

82 Dworkin, above n 1, 170.

83 J. Waldron, 'Normative (or Ethical) Positivism', in J Coleman (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001) 410, 414.

> elaborating its quality in the tension between its recognition and the basis for its selection.[84]

II. How do we Evaluate Competing Concepts of Law? The Plot Thickens

If methodology structures the story, then choosing a favoured concept of law comprises the plot. Ought we to choose our favoured concept of law according to its moral or political merits, rather than just its descriptive, explanatory capacity? Could such reference to substantive moral and political qualities provide Coleman's 'appropriate criteria for assessing the theories of the concept of law?' One could observe the practical consequences adopting a concept might have for real world institutions of law. This would certainly lead one perilously close to saying something interesting. Murphy once argued that we should choose our preferred concept of law on 'practical-political'[85] grounds. Sustained consideration of the status quo will not furnish determinate answers to important philosophical questions about law and legal practice. We should accept such is the case and proceed by mounting a 'practical- political' argument in favour of our chosen theory and concept of law. The remainder of this article focuses on evaluating why we might choose legal positivism, predominantly because normative positivism has become a popular phenomenon. Perhaps also because Dworkin has always accepted that law is a contested concept and so he must produce an argument for law as interpretation and his integrity conception of it. In many ways his story has already been told. Likewise it is an essential element of natural law theories that they articulate the moral case for preferring their understanding of law.

A. Inclusive and Exclusive Positivism

In assessing positivistic concepts of law, should one plump for the inclusive or exclusive variant? This fracture grew out of opposing responses to Dworkin's attack that positivism could not incorporate legal principles among the sources of law. The contest has taken on a life of its own with Leiter describing it as, 'the most important on-going debate in recent analytical jurisprudence'.[86] The contenders alight on two main analytical theses: The 'separability thesis' that law and morality are not necessarily connected but may be contingently so and the 'sources thesis' which claims that propositions of law are true because they flow from an authoritative source. The associated

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84 Halpin, above n 26, 9.

85 L. Murphy 'The Political Question of the Concept of Law', in J Coleman (ed) *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001) 371, 373.

86 Leiter, above n 6.

'social fact thesis' narrows this down, asserting that source authority should only be ascribed to empirically identifiable facts.

The 'separability thesis' once championed as the positivist's master rule, is falling out of favour. The paradigm expression was Hart's, 'it is in no sense a necessary truth that laws have to reproduce or satisfy certain demands of morality, though in fact they have often done so'.[87] This belief that there are no necessary connections between law and morality formed the most striking cleavage with anti-positivists: it is little wonder that positivists clung to this mantra for so long. Nevertheless, Hart's aim was to insist that the necessary criteria for legal validity do not include morality, that there should be no inference of legal validity from moral legitimacy. This does not deny that there may be many important connections between law and morality. Legal positivists nowadays accept that there are both contingent and necessary connections between law and morality.[88] Rejection of the inference from moral legitimacy to legal validity is compatible with the law's necessary display of moral virtue. This rejection also allows positivist methodology to resort to evaluation, which Dickson describes as 'indirect,' in contradistinction to moral evaluation. This recognition helps lay to rest the argument that positivist and natural law theories are logically incompatible. Contemporary natural lawyers such as Finnis accept the importance and necessity of positive law and reject the caricature tenet of natural law, 'lex inusta non est lex.' Again this enhances the case that we should argue for a concept of law on normative or 'practical-political' grounds; theorists themselves accept a degree of compatibility betwixt their theoretical propositions. MacCormick was one of the first to recognise the need to argue for a concept of law on normative, or in his words, 'moral' grounds, and that in accepting this we also accept that the 'mutual opposition' between positivism and natural law, should be considered 'closed and unfruitful'.[89] Waldron concludes that the development of normative positivism also displaces this mutual exclusivity.[90] Simmonds and Coyle believe that neither positivism, nor natural law, idealism, is supreme; but rather that our jurisprudence 'oscillates'[91] or 'shuttles'[92] between the two.

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87 Hart, above n 16, 185-186.

88 Even Kramer, analytical positivism's most vociferous defender accepts many contingent connections between law and morality and whilst rejecting most necessary connections, even he admits there are some, though he characterizes them as unimportant. M.H. Kramer, *Where Law and Morality Meet* (2004).

89 N. MacCormick, 'Positivism and the Separation of Law and Morality', in R. George (ed) *Natural Law Theory: Contemporary Essays* (1995) 105-134, 130-131.

90 Waldron, above n 83.

91 S. Coyle, 'Positivism, Idealism and the Rule of Law' 26(2) (2006) *Oxford Journal of Legal Studies,* 257-288, 287-288.

There is increasing recognition that both the traditionally opposed concepts of law inform our jurisprudence, as do all the many other individuations along this continuum. It is more fruitful to understand the relationships, the connections and the divergences between the numerous positions, rather than to argue that one alone can stand as our 'true' concept of law.

Rejection of the 'separability thesis' has diverted positivistic attention towards the 'sources thesis' and more importantly the 'social fact thesis' in order to bolster their territory. The 'sources thesis' favoured by inclusive positivists accepts that the truth conditions of law can incorporate moral tests, such as those included in constitutional provisions and bills of rights. The main claim of the inclusivist is that such recourse is only contingent. It seems an obvious flaw in this position to be built on such a flimsy proposition, namely the criteria of legal validity might almost always include moral tests, but if it is possible to conceive of a legal system in which they do not, the inclusivist thesis wins. Logically coherent it may be, interesting most definitely not!

What of the alternative exclusive positivist position? Raz, for example, believes that law necessarily claims authority; the directives issued by legal institutions should be based on certain dependant reasons that are readily applicable to subjects. Those directives are intended to provide pre-emptive reasons displacing the subject's own assessment of the situation. The claim is that the subject will be better off complying with these pre-emptive reasons, rather than relying directly on their own reasoning. Once the authority has occupied the territory and supplied pre-emptive reasons, the dependant reasons are redundant. This 'service conception of authority' depicts law's mediating role, individuals surrender their judgment to the authority, but the authority cannot introduce new dependent reasons; rather it exists to 'mediate between ultimate reasons and the people to whom they apply'.[93] Thus Raz cannot accept the inclusive positivist, natural law or interpretivist theories since to do so would allow the validity of legal propositions to be determined by the very dependent reasons that law exists to settle. To use Raz's example, if the identification of tax law were to depend on settling certain questions about what a morally infused tax law would provide, then this makes the identification of the law turn on the very moral questions which the authoritative directive was supposed to have settled. Thus the identification of law must depend on social facts alone, 'Moral argument can establish what legal institutions should have said or should have held, but not what they did say or hold'.[94]

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92 N. Simmonds, 'Between Positivism and Idealism' 50 (1991) *Cambridge Law Journal* 308-309.

93 Raz, above n 47, 231-237.

94 Ibid 321.

III. Normative Argument: The Beginning of the End of the Story

One can imagine from the foregoing descriptions of competing concepts, what form a normative argument for each might take. Murphy, who coined the phrase, practical-political argument has supported the exclusive positivist position, arguing that law should be identified by authoritative sources not requiring resort to moral or political evaluation on the part of the individual. The alternative inclusive positivist, or even more so any variant of natural law, presents the danger that 'the overall political climate created by a view of law that merges with morality',[95] would be inadequately questioning of the moral legitimacy of legal directives. This is the view to which Hart has pledged allegiance. Hart considered the issues of morality and justice facing the post-war German courts, such as the nature of legal and moral obligation and the status of retroactive criminal laws, opining that:

> A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them.[96]

Even Hart thought there were competing concepts over which we have the power of choice. Hart's concerns were shared by his predecessors, Bentham[97] and Kelsen,[98] who both believed that in some way a conflation of law as it is with law as it ought to be would lead to quietism, an uncritical acceptance of political power. It has been lamented that Hart later distanced himself from his normative contributions. Lacey notes:

> ...in focusing his argument on the representation of his own early theory as entirely descriptive, he was turning his back on an insight which had been powerfully defended in his own early work...This was the argument...that there was a strong moral case for espousing the inclusive positivist conception of law according to which even morally unappealing standards may count as valid legal rules.[99]

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95 Murphy, above n 85, 391.

96 Hart, above n 16, 211.

97 G. Postema, *Bentham and the Common Law Tradition* (1986)

98 R. Tur and W. Twinning (eds), *Essays on Kelsen* (1986).

99 N. Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (2004) 351.

Among the first to rekindle moral argumentation was MacCormick. He made 'a moralistic case for amoralistic law' on the basis that, 'When evil is done in the name of the law, the greatest evil is that whatever is done in the name of the law is also and inevitably done in the name of public morality'.[100] He argued that ultimate sovereignty should remain with one's individual conscience. There seems something disconcertingly thin about these 'practical-political' arguments. It might be more appropriately characterized, as one 'practical-political' argument. As Murphy summarizes:

> The two parts of the practical-political argument for the social thesis are the practical claim that convergence on a concept of law that rejects the social thesis brings the threat of quietism, and the political claim that this effect is undesirable.[101]

Soper, has argued to the contrary, that since no legal theory can 'ensure conscientiousness' of its citizens, nothing important turns on the quiestism argument. 'A good positivist knows there is no necessary connection between law and morality. But nothing in that knowledge explains whether he knows what morality is or, more importantly, whether he cares about finding out'.[102] That positivism endows individual conscience with ultimate sovereignty does not guarantee individuals will embrace this responsibility. What makes us think the average citizen has any attitude at all towards the issues of conceptual clarification that so titillate purveyors of inclusive and exclusive positivism?

A. Indeterminacy Revisited

Perry criticised Hart's methodology as offering the theorist's perspective of what is valuable and salient to understand about law, rather than engaging with the participant's view of what is so valuable. We have seen how he applauds the Razian theorist for engaging with participant's beliefs and attitudes towards the law. Likewise, all those who are characterised by Dickson as following an indirectly evaluative method are engaged in evaluating what participant's in the social practice of law see as valuable to it. Priel argues that the contest between inclusive and exclusive positivism is a boundary issue over which participants' have no view and that such condemns it to irrelevancy. He explains that:

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100 N. MacCormick 'A Moralistic Case for Amoralistic Law' 20 (1985) *Valparaiso University Law Review* 1-41, 10-11.

101 Murphy, above n 85, 389.

102 P. Soper, 'Choosing a Legal Theory on Moral Grounds', in J. Coleman and E.F. Paul (eds) *Philosophy and Law* (1987) 35.

> ...law consists of social phenomena which are understood by members of a particular society to belong to it, the theorist has to follow the participant's attitudes as to what counts as the object of inquiry to be explained...their attitudes constitute the object of her inquiry.[103]

People's attitudes about law will concern matters of practical significance; where there are no pragmatic implications people are likely to hold no view and therefore the concept of law in reference to these issues remains indeterminate. Disputes such as the inclusive/exclusive debate and that over the boundary between law and morality generally, have no real implications for the practice of law. This in turn means that the participants in the practice will form no attitudes towards the debate. Even if the participants were to form views about the issue, such may conflict not only with each other but also with the theorist's own view, as long as all these views are consistent with the practice, there is no way of determining which is more accurate. The participants' may have good reason for wishing to keep boundary issues such as the relationship between law and morality, as vague as possible. An advocate would wish, perhaps, for maximum room to manoeuvre in fashioning a relationship between law and morality that best supports his client. For Priel, as far as questions such as these go, '...the object (law) does not have "in it" an answer...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'.[104] Priel's argument suggests that traditional boundary theorising over what constitutes the concept 'law' is irrelevant, because indeterminate. The irony here is that all theorists appear to begin their expositions by orienting analysis towards a point or function chosen as significant or central to the practice of law, from the perspective of the participants; whether that be; rules,[105] authority,[106] or principled adjudication,[107] for example. Yet, the substantive theories generated by these initial evaluations or starting points appear to bear little relation to the true concerns of participants.

The distinguishing conceptual claim of inclusive positivism is that the criteria of legal validity might almost always include moral tests, but that it is possible to conceive of a legal system in which they do not. In relation to its counterpart exclusive positivism, Raz does not deny that judges utilise moral

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103 D. Priel, 'The Boundaries of Law and the Purpose of Legal Philosophy', available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1086389 9.

104 Ibid 16.

105 Hart, above n 16.

106 Raz, above n 47.

107 Coleman, above n 10.

and political reasoning, but argues that when they employ these methods they are not doing 'law' but something else. This leads Dyznehaus to declare that: 'The substantive thesis of authority is confined by his methodological commitment to describing legal orders as they are, not as they should be, which leads to the peculiar conclusion that much of the practice of law is done outside the scope of authority. The substance in the still fundamentally methodological theory condemns it to practical irrelevance.'[108] These abstract conceptual premises, or theses such as, 'separation,' 'sources,' 'social facts,' or 'authority,' cannot be the end of the story. If they were it would be a very disappointing conclusion, quite a let down for the reader who has persevered with the plot's complex and intricate twists. The thin practical-political argument supporting these premises does not take us much further. Murphy himself, perhaps so disillusioned with the apparent end to the tale, has now opined that even practical political argumentation in favour of one's chosen concept of law should be abandoned as fruitless. He has recently noted that whilst law can be viewed as a contested concept analogous to concepts like liberty and justice, it is also different because of its practical significance to our every-day lives.[109] When we are wearing our philosophers cap we are free to conclude that the concept of law is indeterminate, but when we go about our every-day lives we would not, for example, dispute the tax collector's or parking inspector's claim, on the grounds that the concept of law is unsettled. Likewise a judge on the bench believes that he is applying law, even if intellectually he is aware of the arguments that law may be just a prediction of what he is about to decide, or it may consist of his moral and political reasons for so deciding. We have an intuitive understanding of the concept of law, at least at a very thin level.[110] Likewise there is significant overlap in what the competing concepts of law would require practically, and therefore the doctrinal contestation does not really touch on our every day lives.[111] Hence why the 'boundary' issues or conceptual 'indeterminacies' identified above are devoid of practical relevance. However, Murphy notes that the incomplete overlap does matter: 'It matters primarily to our political discourse about the way legal decisions should be made and the way legal institutions and legal materials should be designed.'[112] He goes on to argue that the ambiguity in the concept of law:

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108 D. Dyzenhaus, 'Positivisms Stagnant Research Programme' 20 (2000) *Oxford Journal of Legal Studies* 703-722, 715.

109 Murphy, above n 70.

110 P. Koller, 'The Concept of Law and its Conceptions' (2006) (2) *Ratio Juris* 19, 180-196.

111 Murphy, above n 70, 53. 'If the overlap is significant, the conclusion that there is no right answer to the question of the content of the concept of law may be compatible with the common sense presumption that there are right answers to many questions about what the law is'.

112 Ibid 61.

> ...becomes relevant when we reach political questions about how legal materials and institutions should be designed, and how officials should act, such that the ideal of the rule of law is not compromised. In those discussions, the discussions that really matter, both practically and within political philosophy, we would be better off agreeing not to talk about law.[113]

Whilst I grant with Murphy that institutional design is an important question, one must not accept that we should, or in fact could, engage in such debates of practical political philosophy without also examining the nature of law. Murphy inadvertently demonstrates how to complete the story, how it can be brought full circle to re-engage with the participants and re-establish practical relevancy. The theorist initially evaluates the point or function to be ascribed to law by considering what the participant's beliefs and attitudes disclose as valuable within the practice. He then utilises some methodological tool such as conceptual or semantic analysis, or scientific inquiry, to present an abstract explanatory account of the chosen features of the practice. Such analysis is worthy and important in itself as part of our search for knowledge, but it is abstracted from practical reality. Hence the final stage, the closing chapters of the story, require the theorist to re-engage with the practice. In this instance he determines what the abstract concept, prescribes, requires or accepts in terms of concrete institutional design. The theorist must also be intellectually honest, acknowledging that his tale, though important and interesting, is not the only true concept of law, it is just one chapter in the complete anthology.

What then does this final stage involve? In presenting a favoured concept of law, one must engage with participants, judges, legislators, officials and citizens, explaining to them why choosing a particular concept of law would have favourable implications. This is a much more ambitious task than many legal theorists of the 20th century have wished to embrace, but it is certainly an exciting and interesting one for Dworkin's 'young scholar' to pursue. Dworkin asked us to speak for the claimant or defendant or at least speak to them; speak to the judges and lawyers and proffer them advice as to how to decide cases and interpret statutes. One must also speak to the legislators and tell them how to design their institutions, their procedures and their measures in the most effective way, determine why it is better to keep certain areas of social life regulated by law and not others, explain why law is good at achieving certain political and social goals and bad at others. Consider what answer the preferred concept provides to such age-old questions as the proper relationship between the legislative and the judicial branches, the nature and status of the rule of law, separation of powers, parliamentary

113 Ibid 60.

supremacy, democracy, liberalism and constitutional rights. There are now significant moves to commence the task here commended and some understanding of such provides a fitting end to our story.

IV. Political Positivism: A Possible Conclusion

In its heyday legal positivism was a revolutionary, politically motivated theory seeking to challenge the status quo. That it has become detached from its political moorings is precisely why it can now furnish the singular quietism argument in its favour. In his review of Kramer's, In Defense of Legal Positivism, Dyzenhaus criticizes positivism as a 'stagnant research programme,' so characterised because it 'no longer accounts for the data of legal practice'.[114] Legal positivism fails to accord with the reality of law creation and application in developed legal systems. A number of theorists have begun to articulate a revitalised form of legal positivism. Variously referred to as neo-Benthamite, normative, ethical, democratic or political positivism, its revenge has been a long time coming and it is establishing itself as a persuasive force in legal philosophy. Here the term political positivism is preferred since there have been normative positivist propositions that seem somewhat weak, focusing only on arguments from quietism, or the serviceability of the rule of law in evil systems. By tracing the genealogy of legal positivism to its classical roots, one can find much stronger arguments in its favour.

Campbell explains, 'The revolutionary rehabilitation of legal positivism has to start with an awareness of the strong normative aspects running through the writings of Hobbes, Kant, Bentham, Austin, and more recently, Kelsen and Hart'.[115] These positivists were motivated by moral and political concerns permeating their theoretical conclusions. If Bentham is famous for his utilitarianism, Postema is equally famous for his examination of Bentham's positivism. He notes:

> Bentham's defence of his conception of the nature of law rests not on normatively neutral and/or conceptual considerations, but on his analysis of fundamental human and social needs and the way in which law can be used to meet them. Jurisprudence draws directly on political theory.[116]

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114 Dyzenhaus, above n 108, 703-704.

115 T. Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (2004) 7.

116 Postema, above n 97, 301.

Classical positivism should be understood as a political tradition that rejects the separability thesis. We have seen how attempts to defend this thesis have led to practically irrelevant squabbling and reluctant acceptance that there are at least some necessary connections between law and morality. History tells us that attempts to fit the square peg of Diceyan common law reasoning within the round hole, Austinian conception of sovereignty, have failed.[117] Once the legitimacy of judicial reasoning on moral and political grounds was accepted, positivists had their work cut out in trying to conceptualise this concession in a way that stays faithful to both the 'sources' and 'separability' theses. The two proffered solutions were either to accept that in some legal systems such moral and political tests could form part of the sources of law, and save the 'separability thesis' on the grounds that there could conceivably exist a system where this was not the case. Or to state that where judges resort to this kind of reasoning there is no law and they are legislating to fill the void. These responses broadly represent the inclusive and exclusive approaches. The better solution would have been to seek solace in the political pronouncements of their ancestors. Both the Benthamite and Hobbesian approaches to reasoning are concerned with ultimate sovereignty of fact, untempered by moral and political evaluation. The prescriptive positivism to which they subscribed aimed to eliminate so far as possible, the common law method of reasoning as an illegitimate usurpation of power. Whilst allowing that law may possess moral authority and therefore accepting a necessary connection between law and morality, these theorists advocated a particular variant of the 'social fact thesis.' Dyzenhaus explains, 'Positive law, properly so-called, is not merely law whose existence is determinable by factual tests, but law whose content is determinable by the same sort of tests, here tests which appeal to facts about legislative intention'. He continues, '...the very values that underpin the design of legal order which Bentham and Hobbes favour, are supposed to issue in non-evaluative legal reasoning by judges, reasoning which does not involve moral deliberation'.[118] It is to these political arguments that positivists are returning in order to defend their concept of law. If we accept the need to choose our concept of law on its 'practical-political' merits, the structure and workings of legal and political institutions that it advocates and the concrete claims flowing from it, political positivism is a strong contender.

One can summarise shared themes in the accounts of political positivists. As we have seen Halpin not himself a political positivist, suggested that the proper role for progressive jurisprudence is to consider the controversy inherent in law, to understand its nature and the institutions and procedures that can be used to contain it. Dworkin too understands law as an essentially

117 D. Dyzenhaus, 'The Genealogy of Legal Positivism' 24 (1) *Oxford Journal of Legal Studies* (2004) 39-67.

118 Ibid 45.

contested and controversial concept. Controversy is another word for disagreement; political positivists consider that society is marked by serious and intractable disagreement. For Waldron, '...the point of law is to enable us to act in the face of disagreement...'[119] Individuals and groups in society subscribe to differing and opposed theories of justice '...yet social decisions are reached, and institutions and frameworks established, which then purport to command loyalty even in the face of disagreement'.[120] Campbell too presents a political philosophy whose '...central preoccupation is with mechanisms for resolving and living with conflict and disagreement in pluralistic and diverse societies'.[121] Bentham was writing at a time of societal transformation, characterised by increasing levels of disagreement. Postema concludes, in place of historical harmony,

> ...arose a conception of a pluralistic, individualistic society bound by agreement or the perceived need – to abide by certain rules of the game which organised and co-ordinated otherwise chaotic activity of individuals in pursuit of individually defined goals.[122]

For Bentham, the common law failed as an attempt to remedy disharmony.

The concern to manage disagreement and the inability of the common law to do so provokes increased consideration of legislatures and legislation. Waldron aims to discover the relevance and importance to jurisprudence of institutional decision-making, the authority commanded by legislation, the citizens willingness to obey it, the status of such legislation in relation to other sources of law, and how such legislation ought to be interpreted. Bentham wished to replace the inconsistent common law with clear, coherent and publicly ascertainable rules, with statute, or even better with a single uniform code. All political positivists champion the importance of rules for expressing and determining propositions of law, as opposed to principles, rights or other standards of moral and political reasoning. Campbell's 'ethical positivism' privileges statute as a source of law and is preoccupied with understanding its nature and form. He considers that despite problems of interpretation, legislative texts offer our best hope for agreement on what the law requires. For both Waldron and Campbell, combing the importance of 'textuality' and the authority of the legislative process leads to a conservative theory of legislative intent that disallows reference to individual author's intentions. The argument is stooped in democratic justification. Legislatures are entitled to make law

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119 J. Waldron, *Law and Disagreement* (1999) 7.

120 Ibid 2.

121 Campbell, above n 115, 3.

122 Postema, above n 97, 310.

because they have been democratically elected to do so. Campbell considers therefore, that the legislature has a duty '...to enact statutes which make formally good law, that is, law that is clear, unambiguous, readily applicable and unproblematic in that it can be understood and followed without difficulty'.[123] Bentham too was an advocate of literal interpretation. As Postema notes, '...laws had to be conceived as propositions of some sort, regimented to some canonical verbal formulation...'[124]

Focus on legislation leads to a corresponding limit on the extent of judicial interpretation and commanding of judicial restraint. It is either recommended to outlaw the process of judicial review entirely, or to limit it to enforcing procedural rights that ensure representative democracy, such as the right to vote, free expression and association. The most important political argument shared by the theorists is the commitment to democracy. Campbell has devised a 'politic-legal framework of principles' that he calls 'democratic positivism'.[125] Aiming to provide some 'answers and guidance...' that '...enable the setting up of democratically accountable legal processes and procedures for the resolution of such disagreements and direct those who operate such institutions as to how they should conduct their business'.[126] In essence positivism can guide us in designing effective democratic procedure; the theorising of legislation so central to political positivism is directed towards enhancing the democratic legitimacy of the legislative process. Campbell shares this aim with Waldron, who describes contemporary jurisprudence as 'intoxicated' by a fascination with constitutional adjudication, fixation with judicial reasoning blinds theorists to the democratic importance of legislation. Waldron asks us to consider; 'What would it be like to imagine a jurisprudence that was comfortable with democracy?'[127] Outlining his project he attempts to articulate:

> ...a philosophy of law that pays something more than lip-service to the ideal of self-government; a philosophy of law which indeed puts that ideal to work...in its account of the nature of law, the basis of legitimacy, the task of interpretation, and the respective responsibilities of legislatures, citizens and courts.[128]

It is arguments such as these that should conclude our story; this is where the plot unfolds. The theorist must engage in initial evaluation, whether that is termed as direct or indirect, of the point or function to be ascribed to

123 Campbell, above n 115, 87.
124 Postema, above n 97, 317.
125 Campbell, above n 115, 270.
126 Ibid.
127 Waldron, above n 119, 9.
128 Ibid.

law by considering what the participant's beliefs and attitudes disclose as valuable within the practice, thus establishing a beginning to his story. He then utilises a chosen tool of structure, be that conceptual, linguistic or semantic analysis, or methods continuous with empirical scientific inquiry, to present an explanatory account of the selected features of the practice, giving us the main substance of his tale. The final stage, the closing chapters of the story, requires the theorist to re-engage with the practice. In this instance he determines what the abstract explanation, prescribes, requires or accepts in terms of tangible institutional design. If we want to keep anyone, of any age and any level of understanding, interested in our subject of jurisprudence, we have to pique their attention. The best way to do this is to tell them a story. The whole story, from evaluation of the point or function of law, through to the analytical concept generated and on to the practical consequences of adopting this concept. We cannot simply proffer disconnected debates, chapters that in isolation fail to be relevant or interesting. As with great literary masterpieces, this ending leaves plenty of room for a sequel.

Book Symposium-

Scott Veitch, Law and Irresponsibility: On the Legitimation of Human Suffering