PROBLEMA
Anuario de Filosofía y Teoría del Derecho **6**

IN PRAISE OF WISHFUL THINKING. A CRITIQUE OF DESCRIPTIVE/EXPLANATORY METHODOLOGIES OF LAW*

Natalie STOLJAR**

Resumen:

Muchos teóricos han prestado su atención a la pregunta sobre si el análisis filosófico moralmente neutral del concepto 'derecho' es un proyecto sostenible. En cambio, se ha prestado menos atención a discutir si el enfoque metodológico basado en descripciones y explicaciones moralmente neutrales, en lugar del análisis filosófico, es un proyecto defendible. Mi objetivo principal en este artículo es argumentar que, si bien la labor teórica descriptiva/explicativa es un proyecto lógicamente posible, no es, sin embargo, defendible. Yo sostengo que no hay razón para aislar la labor teórico-jurídica de los argumentos morales. Por el contrario, es *deseable* que los teóricos del derecho empleen consideraciones morales, de-

* This paper is based on a talk given at the *Problema Seminar*, Legal Research Centre, UNAM, Mexico City, May 2012. Although framed differently, many ideas are taken from my paper, "What Do We Want Law to Be? Philosophical Analysis and the Concept of Law", in W. Waluchow and S. Sciaraffa (eds.), *The Philosophical foundations of the Nature of Law* (Oxford University Press, 2013). Section I and parts of section II rely on the latter paper, although some points have been condensed. For helpful comments on both papers, I am grateful to Imer Flores, Liam Murphy, Veronica Rodriguez-Blanco, Fabio Shecaira, Stefan Sciaraffa, Juan Vega Gómez, audiences at the *Analytic Legal Philosophy Conference*, Law School, University of San Diego, April 2011 and the McMaster Conference on *The Nature of Law: Contemporary Perspectives*, McMaster University, May 2011 as well as to participants in the *Problema Seminar*.

** McGill University.

bido a que es sólo a través de argumentos morales como podemos responder las preguntas que nos preocupan en relación con el derecho.

Palabras clave:

Pluralismo de análisis conceptual, positivismo jurídico metodológico, teoría descriptiva/explicativa, evaluación moral.

Abstract:

Scholars have given attention to the question of whether morally-neutral philosophical analysis of the concept 'law' is a sustainable project. Less attention has been given to whether the methodological approach that relies on morally-neutral description and explanation, rather than on philosophical analysis, is a defensible project. My primary goal in this paper is to argue that although descriptive/explanatory theorizing is a logically possible project, it is not a defensible one. I claim that there is no reason to insulate legal theorizing from moral arguments. Indeed, it is desirable *for legal theorists to employ moral considerations because it is only through moral argument that we can answer important questions we care about with respect to law.*

Keywords:

Conceptual Analysis Pluralism, Methodological Legal Positivism, Descriptive/Explanatory Theory, Moral Evaluation.

IN PRAISE OF WISHFUL THINKING

SUMMARY: *Introduction*. I. *Conceptual Analysis Pluralism*. II. *The Descriptive/Explanatory Methodology*. III. *Is Methodological Positivism Desirable? Conclusion*.

INTRODUCTION

The subset of the philosophy of law that concerns legal 'methodology' addresses questions about the concept and nature of law. Questions about the concept of law are those about the meaning and reference of the term 'law'. They are questions that obtain at the linguistic level. Questions about the nature of law concern the properties of the phenomenon to which the term 'law' applies. These two investigations intersect: for example, if we have an answer to the question about the nature of law, that is, if we know the core or essential properties of the phenomenon, we also know that the term 'law' refers to anything with these properties. If we have an answer to the question of definition at the linguistic level, we know that the term correctly applies to any phenomenon in the world that satisfies that definition.

Methodological legal positivism is the idea that theorizing about the nature and concept of law is and should be morally-neutral (Perry 2000, 311). It claims that theorizing about the concept of law (about what the word 'law' means) should be an exercise in morally-neutral philosophical analysis and theorizing about the nature of law as a social phenomenon should be a morally-neutral process of description and explanation. Scholars have given attention to the question of whether morally-neutral philosophical analysis of the concept 'law' is a sustainable project. For instance, Brian Leiter invokes Quine's rejection of the analytic-synthetic distinction to argue that philosophical analysis is bankrupt (Leiter 2003). Liam Murphy argues that intractable disagreement is rife within debates over the philosophical analysis of the concept of law and hence the

project of conceptual analysis is pointless (Murphy 2005 and 2008). Less attention has been given however to whether the methodological approach that relies on morally-neutral description and explanation, rather than on philosophical analysis, is a defensible project. My primary goal in this paper is to argue that it is not defensible. I claim that there is no reason to insulate legal theory from moral arguments, and hence that it is permissible for legal theorists to employ moral considerations. Wil Waluchow claims that allowing moral evaluation into theorizing is 'wishful thinking' or 'disguising reality behind a sweet coating of moral rationalization' (Waluchow 1994, 17). In this paper I embrace wishful thinking. I argue that legal theory should employ moral considerations to answer questions we care about.

The position that legal theorizing should employ moral evaluation corresponds to the denial of methodological positivism. However there are two possible strategies for denying methodological positivism, only one of which I adopt here. The first strategy employs what I call *the necessity claim*, the position that moral evaluation is a conceptually necessary element of legal theory because theorizing either about social practices in general or law in particular (conceptually) *requires* moral and political argument. I do not endorse this position here, and indeed, for reasons developed in the first and second sections, I think it is incorrect. Rather, I defend *the desirability claim*, the position that it is desirable for legal theorists to employ moral considerations because it is only through moral argument that we can answer important questions we care about with respect to law. If it is desirable for theorists to employ moral considerations, moral considerations should not be kept out of theorizing, and hence methodological positivism is incorrect.

I develop the argument of the paper in three sections. In section I, I focus on philosophical analysis and argue for what I term *conceptual analysis pluralism*. I first elaborate three possible approaches to conceptual analysis for terms

that refer to social kinds.[1] Two of these inquiries are usually morally-neutral and hence they are compatible with methodological positivism (the third type of inquiry may employ moral considerations). I then argue for *conceptual analysis pluralism*: the different approaches to conceptual analysis are all logically possible procedures that in some cases yield different and incompatible concepts. Thus, conceptual analysis pluralism implies that *the necessity claim* is false because certain logically possible theoretical strategies do not employ moral considerations. In section II, I focus on the position that legal theorizing is morally-neutral descriptive/explanatory theorizing about the social phenomenon 'law'. I agree with proponents of descriptive/explanatory theorizing that their position is logically possible; hence their position implies that the necessity claim is false. Their position also implicitly provides support for conceptual analysis pluralism. However, as I go on to argue in section III, proponents of descriptive/explanatory theorizing have not ruled out *the desirability claim*. Section III sketches and rebuts four possible preliminary arguments against the desirability claim. I conclude that the desirability claim is defensible, and that methodological positivism should be rejected.[2]

I. Conceptual Analysis Pluralism

How do we answer questions of the form 'What is X?': 'What is knowledge?' 'What is gender?' 'What is democracy?'

[1] This taxonomy is taken from work of Sally Haslanger (2000 and 2005).

[2] I am grateful to Veronica Rodriguez-Blanco for pointing out there is a stronger normative position that one could adopt, namely that the strategy that allows moral considerations to be employed in legal theorizing has *normative priority* over the morally-neutral strategies. Hence in some cases it would be not just desirable but *morally* required for a theorist to employ moral considerations when theorizing about law. Although I believe this stronger position is probably correct, I will not be pursuing it here.

'What is marriage?' or indeed 'What is law?'? One common philosophical strategy is to investigate what is meant by the term 'X'. This strategy, that of conceptual analysis, operates at the linguistic level to answer questions about the semantic properties of the term 'X'. What does 'X' mean? What does 'X' refer to? Sally Haslanger has identified three possible modes of conceptual analysis for terms that refer to social kinds (Haslanger 2000, 2005). The first is what she calls a *conceptual* inquiry that 'looks to *a priori* methods such as introspection for an answer' (Haslanger 2005, 12). This approach corresponds to traditional philosophical analysis. It is a process of reflecting on, sifting and organizing the intuitions associated with a term and the cases to which the term intuitively applies. The result of this process is typically an analysis of a concept in which necessary and sufficient conditions for the application of the concept are identified. For example, reflecting on the intuitions associated with the concept 'water' yields the conclusion that 'water' means 'potable, colorless, odorless liquid found in rivers and lakes'. The term 'water' is correctly applied therefore if and only if it is applied to the stuff in the world that satisfies this description. Since the first kind of inquiry relies on intuitions, it leads to a concept that is implicit in common understanding and actual usage. It leads to a 'manifest' concept, a concept that we have *in mind* (Haslanger 2005).

Stephen Perry is an example of a legal theorist who adopts an account of philosophical analysis that yields the equivalent of a manifest concept:

> Typically, the philosophical analysis of a concept attempts to make explicit what the theorist claims is in some sense already implicit in our common understanding. This can take the form of drawing attention to propositions that the theorist argues are either implicit presupposed or necessarily entailed…[or] of an attempt to show that the concept is equivalent…to some other concept…[or]…it will amount to a more

> ambitious attempt to *reduce* one concept to a logical configuration of others… (Perry 2000, 333).

On Perry's account, the common understanding reflected in actual usage is a kind of moral understanding. He argues that conceptual analysis of normative concepts like those of authority and legal obligation, as well the concept of law itself, necessarily employs moral evaluation. Participants in legal practices are practical reasoners who expect the practice to give them reasons for action that they would not otherwise have: 'the idea is to make moral sense of the practice by showing people why and under what circumstances they might have reason to comply with it' (Perry 2000, 350). Elucidating a concept with this aim in mind requires providing a moral justification of the concept because, for instance, if there is no moral justification of the concept of legal obligation, participants in legal practice will have no reason to obey the law. For Perry, theorists analyzing normative concepts such as law are conceptually required to employ moral considerations.[3]

The conceptual inquiry just described that employs intuitions to generate a manifest concept should be distinguished from a second type of inquiry, in which we ask 'what kinds (if any) our…vocabulary tracks. The task is to develop potentially more accurate concepts through careful consideration of the phenomena, usually relying on empirical or quasi-empirical methods' (Haslanger 2005, 12). This inquiry has its roots in the natural kind externalism first elaborated by Hilary Putnam (1973). The meanings of natural kind terms, such as 'gold' or 'water' are not given by the intuitions we associate with our concepts when we reflect

[3] Perry could be classified as adopting traditional conceptual analysis that in the case of law necessarily employs moral evaluation. However, since traditional conceptual analysis is usually thought to be non-moral (because it is 'semantic' or analytic), and also because of the affinity between Perry's view and that of Ronald Dworkin, it may be neater to classify Perry as employing the third 'ameliorative' strategy rather than the first 'conceptual' one.

on them —intuitions such as that water is a colorless, odorless, potable liquid— but rather by features of the physical stuff that we use the term 'water' to track. Haslanger comments that 'scientific essentialists and naturalizers… start by identifying paradigm cases… and then draw on empirical (or quasi-empirical) research to explicate the relevant kind to which the paradigms belong' (2005, 12). It is important however that the externalist model is not limited to articulating concepts that pick out natural or biological kinds: 'Externalism is an option whenever there are relatively objective types' (Haslanger 2005, 18). For instance, the social externalism defended Tyler Burge extends externalism to concepts whose contents are individuated by features of the social environment (Burge 1979). In Burge's famous example, the content of the concept 'arthritis' corresponds to whatever arthritis really is according to relevant medical classifications.

For social externalism, as for natural kind externalism, conceptual analysis proceeds by first picking out paradigms or canonical referents of the type, and then analyzing the nature of the canonical referent(s). Once we have an account of the essential features of the paradigm we know what else falls into the kind. Adèle Mercier, following Putnam and Burge, emphasizes that *being-the-same-kind-as* is different from *being-thought-by-ordinary-users-of-a-word-as-being-the-same-kind-as*. Further, 'not just any user of the language…can extrapolate from canonical referents to whatever bears the *same-kind-of-thing* relation to them' (Mercier 2007, 18). A community of experts works out, through an examination of the canonical referents, the nature of the paradigm. Chemists tell us that the molecular structure of water is H_2O and hence the content of the concept of water is H_2O. Thus, although XYZ may have the same superficial features as water, it does fall into the water-kind. In the same way, rheumatologists tell us that arthritis is a condition of the joints and not a generalized condition, and hence 'arthritis' implies 'condition of the joints.'

Thus, on the descriptive strategy, the correct understanding of concepts is delivered by experts' empirical investigation of the nature of the kind to which the concept refers. The meaning of social concepts is fixed *not* by conventional (ordinary) usage but rather by nature of the kind that is described by experts.[4] Even if there is as yet no standard linguistic usage agreed on among experts, still the descriptive project investigating our operative concept of social kinds or types is a possible one. Its starting point is the paradigm that fixes (by ostension) the reference of the term 'law'. On this descriptive account, conceptual analysis therefore does not necessarily track what we have in mind or what can be articulated through an examination of common understanding.[5] 'Water' means 'H_2O' even if no one knows that it does.

Nicos Stavropoulos is an example of a legal theorist who adopts the descriptive inquiry to elucidate the meaning of legal terms. Stavropoulos' argument for the objectivity of legal propositions employs Burge's social externalism (Sta-

[4] Coleman and Simchen make an interesting argument that I cannot examine in detail here. They propose that Putnam's externalism can be extended to all common nouns like 'chair' and 'pencil'. On their view, 'law' is analogous to 'chair' or 'pencil' not to natural kind terms like 'gold' or 'water'. The key difference between 'chair' and 'pencil' on the one hand and natural kind terms on the other is that the former are not 'linguistically deferential' —*i.e.* they do not 'exhibit a division of linguistic labour' which means that users of terms like 'chair' and 'pencil' do not need to defer to experts to tell them what counts as being in the extension of the terms—. Coleman and Simchen argue that 'law' is not linguistically deferential due in part to 'a perceived lack of agreement among jurisprudents [which constitutes] a key factor as to why the extension of "law" is not fixed by reliance on jurisprudential expertise' (2003, 22).

[5] Another example: 'Being a lawyer is different from being thought to be a lawyer… Ordinary speakers are competent with the word "lawyer" because most of the people whom we think of as lawyers actually are. But none of what an ordinary speaker need know to use 'lawyer' competently determines the individuation conditions for being a lawyer; those are determined by Bar exams, as these are determined by those most informed about what one must know to be a lawyer' (Mercier 2007).

vropoulos 1996). He presents his view as an alternative to the 'criterial semantics' that he attributes to Hart (Stavropoulos 2000, 81–5). Criterial semantics is a version of traditional conceptual inquiry. However, Stavropoulos endorses conceptual analysis on the Burge model in which 'deep' concepts are employed. Analysis does not attempt to elucidate actual usage at all because 'the standard to which actual usage is responsible is given by a projection beyond actual usage itself' (Stavropoulos 2000, 81).[6]

The third possible category of inquiry is an 'ameliorative' inquiry: 'What is the point of having the concept in question… What concept (if any) would do the work best?' (Haslanger 2005, 12–3). This project can be conceived as a kind of *instrumentalism*: it is the project of positing a concept to achieve certain theoretical purposes (Murphy 2008). For example, an ameliorative inquiry could engage in moral or other evaluation of the purpose of the practice to which the concept refers with the aim of refining and improving the concept so that it best serves the purpose of the practice. In legal theory, Ronald Dworkin's notion of constructive interpretation exemplifies this approach (Dworkin 1986). The first step in the process of constructive interpretation is analogous to the identification of paradigms on the descriptive approach. Dworkin proposes that, at the preinterpretive stage, 'we have no difficulty identifying collectively the practices that count as legal practices in our own culture. We have legislatures and courts and administrative agencies and bodies and the decisions these institutions make are reported in a canonical way' (Dworkin 1986, 91). At the second, *interpretive*, stage, substantive answers to questions about the purpose of the social practice are articulated and defended. Dworkin describes the 'interpretive attitude' of participants in rule-governed social practices: first, the practice 'does not simply exist but has value…it serves some interest or purpose or enforces some principle';

[6] Both Haslanger and Stavropoulos draw on Christopher Peacocke's example of the mathematical concept of a limit (Peacocke 1998).

secondly, the rules of the practice are taken by the participants as 'sensitive to its point…: People now try to impose *meaning* on the institution –to see it in its best light– and then to restructure it in the light of that meaning' (Dworkin 1986, 47). Dworkin's concept of law —'law as integrity'— is the result neither of a priori reflection on intuitions nor of descriptive theorizing about the nature of a paradigm. Rather, it is a theoretical posit that is introduced because it promotes what Dworkin takes to be the purpose of the social practice of law, namely, to provide a moral justification of coercive legal institutions. On Dworkin's account, therefore, an ameliorative strategy yields a *target* (or *interpretive*) concept: the concept of law as integrity.

I have identified three strategies of conceptual analysis for concepts that refer to social kinds. These different strategies help to categorize the logical space of legal methodologies, because proponents of different legal methodologies adopt one or other of the three strategies. In the remainder of the section, I elaborate a kind of pluralism about conceptual analysis for a particular subset of social kind concepts, those that refer to social practices. Social kind concepts comprise a diverse set, and not all are sufficiently analogous to law to make adequate illustrations for our purposes. 'Arthritis' refers to an objective social type but not one that is relevantly similar to law. A distinctive feature of the social kinds that concern us here is that they are comprised of practices that are used by the participants in the practices 'to understand themselves': Joseph Raz writes that 'it is a major task of legal theory to advance our understanding of society by helping us to understand how people understand themselves' (Raz 1994, 237). Social practices are comprised of explicit and tacit rules that organize and guide human social behavior. Theorists of these practices are engaged in an attempt to 'advance our understanding of ourselves' by advancing our understanding of the relevant aspects of human behavior. For example, theorists of reli-

gion explicate the set of explicit and tacit rules that govern human religious behavior.[7]

Conceptual analysis pluralism has two components. The first is that there are different (and incompatible) yet logically possible concepts of law. One way of characterizing the three strategies identified above is to say that they are merely epistemological inquiries or decision procedures, that is, that they are different approaches a theorist might employ to find out about *the* (correct) concept of law. Conceptual analysis pluralism is not merely epistemological however. It claims that each strategy is logically possible for the analysis of concepts that refer to social practices. None should be adopted as a matter of necessity or excluded from logical space as a matter of necessity. All give reasonable answers to the question: 'What is our concept of law?' The manifest concept corresponds to the concept we take ourselves to have; the operative concept picks out the practices in the world that our vocabulary tracks, and the ameliorative concept corresponds to the normative standard to which our practice is implicitly committed. When the different inquiries deliver different and incompatible concepts of law, each is a logically defensible concept. It follows therefore that there are several different concepts of law and genuine pluralism —not merely epistemological pluralism— obtains.

A second feature of pluralism is that because all three inquiries are logically possible ways of answering the question, 'What is our concept of law?', conflicts can arise both within the different inquiries and between them. As many have pointed out, the manifest concept may be indeterminate or it may conflict with the operative or target concepts. The operative concept may also be indeterminate or may

[7] There is widespread agreement that the task of legal theory is to advance our understanding of how we understand our own legal practice. Although Perry and Dickson adopt very different methodologies of law, the passage from Raz is quoted approvingly by both authors (Perry 2000, 348; Dickson 2001, 40).

conflict with the target concept, and so forth. When such indeterminacies or conflicts arise, it will be desirable or even normatively required to employ a different strategy.[8] For instance, reflection about the *operative* concept may be desirable to disambiguate the *manifest* concept; or reflection on the *target* concept may be required to resolve conflicts between the *manifest* and the *operative* concepts. This process may not fully resolve indeterminacies but it is a valuable method of answering questions we care about and providing a more fully fleshed-out account of the concept.

Let me briefly elaborate conceptual analysis pluralism using another concept that picks out a social practice, the concept of *marriage*. What is marriage? Is same sex marriage *really* marriage? Or does the meaning of 'marriage' imply that the term 'same sex marriage' is a misnomer or even a contradiction? Reflections on the intuitions implicit in our common understanding or day-to-day usage of 'marriage' may reveal that 'marriage' applies only to opposite sex unions, never to same sex unions. Consider an argument to this effect that I adapt from a brief to Canadian courts (Stainton 2001).[9] Our common understanding of the concept of marriage is informed by the history of the institution of marriage. The relevant history —the history that informs *our* concept— is Judeo-Christian religious history in which marriage is necessarily an opposite sex union. Since this history is implicit in actual usage and common understanding, it is also implicit that a core or necessary feature of our manifest concept of marriage is that it is an opposite sex union.

However the manifest concept just outlined may not correspond to the operative concept of marriage, the concept of

[8] As noted above (n. 2), Veronica Rodriguez-Blanco suggested the possibility that a strategy may be not only desirable but normatively required. Although I do not have space in this paper to pursue an argument along these lines, it is plausible that in some cases a particular conceptual inquiry may have *normative priority* over others.

[9] See Mercier (2007, 4) for a summary of Stainton's argument.

the phenomenon that actual vocabulary tracks. What are the properties of the kind to which the paradigms of marriage belong? (Mercier 2007, 18). Recall that our best epistemological route to the nature of the kind is the understanding of experts. However, the answer to the question of which features are essential to marriage will differ according to which experts on marriage we consult: Roman Catholic theologians may have one answer, and Islamic religious authorities another. Hence there are different operative concepts of marriage. None of the religious operative concepts however correspond to the concept we are seeking: in a secular society, 'our question…is what counts as [marriage] when it comes to the Canadian legal [civil] concept of marriage' (Mercier 2007, 20). In 2012, there is a standard linguistic usage of 'civil marriage [Canada]' that fixes the operative concept and arguably the sense of 'marriage'. But before the 2005 *Civil Marriage Act*, there was no standard usage. How were the relevant experts —legislators and courts— to decide then?

In the absence of a standard usage of experts in the case of a social kind concept like 'marriage' we (or parliaments and courts) need to employ an ameliorative strategy. What is the (secular) point of the institution of marriage? What is the purpose of talking about certain kinds of social arrangements as marriages? Is marriage about promoting procreation and 'traditional' family values, or alternatively is it about respect for persons' rights to identify their intimate relationships as marriages and have them recognized as such by civil society? An answer to the ameliorative inquiry is important because (pace Stainton) the manifest concept will change over time and there will be more than one operative concept. Moreover 'in practice it is difficult to keep the three strategies entirely distinct' (Haslanger 2005, 13). Has the manifest concept of marriage changed in Canada due in part to the word 'marriage' being used operatively since 2005 to refer to same-sex couples? Does our secular or religious operative concept implicitly import an

account of the purpose of talking about marriage as a particular type of social arrangement?

If I am right that there are three strategies of conceptual analysis, and these three strategies can be used to analyze the concept of law, then no single strategy is *necessary* for conceptual analysis. Methodological positivism as exemplified in the morally-neutral conceptual and descriptive strategies is logically possible. Thus, one cannot adopt the necessity claim; one cannot argue against methodological positivism by proposing that moral evaluation is a logically necessary element in legal theorizing.

II. The Descriptive/Explanatory Methodology

A prominent form of descriptive approach within the methodology of law —the descriptive/explanatory approach defended by Julie Dickson (2001 and 2004)— does not correspond directly to Haslanger's descriptive strategy. The three strategies of conceptual analysis identified in the last section operate at the linguistic level. For instance, the descriptive approach that relies on semantic externalism aims to elucidate the meaning and reference of the term 'law' by investigating the nature of the phenomenon to which the term refers. Dickson and others advocate an alternative descriptive methodology claiming that the task is to provide, not a philosophical analysis of the concept or linguistic item 'law,' but rather an explanation of the social phenomenon of law. For example, Wil Waluchow proposes that theorizing about law is analogous to scientific theorizing that is 'guided by meta-theoretical-evaluative judgments, (partly) moral judgments as to what is important to highlight as distinctive about law as a social phenomenon, and the desire to avoid making legal participants look stupid [a principle of charity]' (Waluchow 1994, 27). Dickson proposes that the goal of legal theorizing is to articulate an 'explanatorily adequate' account of the phenomenon of the modern legal system. The inquiry is morally-neutral because it does not require

the theorist to engage in direct moral evaluation of the phenomenon that is being described. Brian Leiter also claims that morally-neutral descriptive theorizing about law is possible. He distinguishes between epistemic values and moral values. The former comprise values 'we aspire to in theory construction and theory choice: evidentiary adequacy…, simplicity,… explanatory consilience, and so forth' whereas the latter 'bear on the questions of practical reasonableness' (2003, 34-5) According to Leiter, the latter set of values is not required for theory-construction: 'Descriptive jurisprudence says that epistemic norms, alone, suffice to demarcate legal phenomena for purposes of jurisprudential inquiry' (2003, 35).

The descriptive/explanatory project just described does not take itself to be engaging in conceptual analysis or offering an account of the meaning of the term 'law'. However it does provide an answer to the question at the linguistic level of what the term 'law' means. Recall that, when a concept refers to an objective type, the 'meaning is determined by ostension of paradigms…together with an implicit extension to things of the same type as the paradigm' (Haslanger 2005, 18). The descriptive/explanatory account must also assume that there is some pretheoretic consensus about what we are theorizing about. It must assume a paradigm, standard case or canonical referent of 'law'. Once a paradigm has been identified, descriptive/explanatory theorizing about the empirical data of the paradigm delivers the core or essential features of the paradigm and hence the necessary conditions for counting as a member of the same kind. The term 'law' is correctly applied to whatever in the world instantiates the essential features of the kind.

Let me focus here on Dickson's descriptive/explanatory project. For Dickson, there is no such thing as 'pure' descriptivism:

> I share the view that all theorists, no matter the subject matter of their theories, must make value judgments of a certain kind and that these value judgments are required simply in

> virtue of the nature of theoretical accounts; namely, that they attempt to construct cogent and structured explanations that can assist others in understanding as fully as possible the phenomena under consideration… I term these kinds of value judgments 'purely metatheoretical' value judgments and include simplicity, clarity, elegance, comprehensiveness, and coherence among the virtues that any successful theory attempts to live up to (2004, 135).

A theorist does not 'merely passively record and reproduce the passing legal scene, hence not providing an elucidation or analysis of aspects of law at all' (2004, 132).[10] Rather, a theorist attempts to 'construct cogent and structured explanations.' In so doing, she must employ evaluative judgments in three domains: in the use of meta-theoretical values, in selecting what is of significance to be explained, and because the data to be explained is evaluative data and includes people's moral attitudes. Dickson writes that 'any explanatorily adequate legal theory must, in evaluating which of law's features are the most important and significant to explain, be sufficiently sensitive to, or take adequate account of, what is regarded as important or significant, good or bad about the law, by those whose beliefs, attitudes, behaviour, etc. are under consideration' (Dickson 2001, 43). Since it employs values in the three domains, Dickson calls the kind of theorizing she has in mind 'indirectly evaluative'. The key question is whether legal theorists can avoid introducing a *morally* evaluative component in constructing such explanations. Dickson acknowledges that law is a hermeneutic practice and hence,

[10] Dickson suggests that Perry attributes this implausible conception of descriptivism to Hart, and hence that in critiquing Hart, he is attacking a 'straw man' (Dickson 2004, 133). It is true that Perry does not think Hart can plausibly be said to be engaging in a descriptive/explanatory enterprise. But this is not because he attributes the implausible conception to Hart. Rather, according to Perry, there is no evidence that Hart does in fact theorize about the legal data employing the metatheoretic values that Dickson advocates (Perry 2000, 321).

following Raz, that a successful legal theory must 'take adequate account of how law is understood by those living under it' (2001, 44). However, it 'need not take a stance on whether the participants are correct in their ascriptions of… moral value' (2001, 69). In the same way, an agnostic studying the Roman Catholic Mass or an anthropologist studying a foreign culture need not herself morally evaluate the Mass or the commitments of that culture, even to make evaluative judgments about which features are significant or important to investigate.

For a parallel argument, consider Leiter's comments about John Finnis' claim that:

> [T]he evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order. For the theorist cannot identify the central case of that practical viewpoint [the internal point of view] which he uses to identify the central case of his subject-matter, unless he decides what the requirements of practical reasonableness really are (Finnis 1984, 16: quoted in Leiter 2003, 33).

Leiter writes that there is a 'non-sequitur' in Finnis's argument from the obvious claim that evaluations by the theorist are necessary to identify central cases to the claim that *moral* evaluations, that is, those made from the standpoint of practical reasonableness, are required (2003, 34). In other words, Leiter challenges Finnis' assertion that theorizing about law *requires* the theorist to make —in Dickson's terminology— directly evaluative judgments about the phenomenon under consideration. Leiter and Dickson argue that non-moral descriptive/explanatory theorizing is possible. They have opened up logical space for non-moral descriptive theorizing and implicitly rejected what I have termed the necessity claim that moral evaluation is logically necessary in theorizing about the social phenomenon 'law'. Their arguments can be taken as providing further support

for the pluralism defended in the last section: morally-neutral descriptivism is one of the logical possible strategies open to theorists of law.

III. Is Methodological Positivism Desirable?

Dickson, Leiter and Waluchow argue convincingly that theorists *can* do without moral evaluation. The question is: *should* they? Is it always desirable for the theorist to act as a morally-neutral observer even of her own practices? Why limit the theorist to a morally-neutral approach? This section addresses in an exploratory manner four potential arguments for limiting the theorist to morally-neutral inquiry, that is, to the descriptive inquiry. I argue that none of these arguments is convincing.

The first reason for insulating the theorist from moral argument is to prevent a slippery slope to substantive non-positivism. Perhaps, once we allow moral considerations in at the methodological level, we are led down a slippery slope to allowing moral considerations in at the substantive level, *e.g.* as ultimate tests for legal validity. Both Waluchow and Dickson are positivists not only at the methodological level but also at the substantive level. Waluchow defends inclusive positivism and Dickson defends the positivism of Hart and Raz against the challenges of Dworkin and Finnis (Waluchow 1994; Dickson 2001). This suggests that the commitment to methodological positivism is required to secure substantive positivism.

The fear that moral theorizing at the methodological level will lead to substantive positivism is unwarranted however. Methodological positivism is a conceptually separate position from substantive positivism (Perry 2000, 311) Consider again Dickson's defense of methodological positivism. She implies that from mere 'indirectly evaluative' description of the behavior and internal states of the participants in our legal practice, we can draw substantive conclusions about the conditions of legal validity. She writes that 'officials in a

legal system must regard themselves as bound in common by a rule that is manifest in their official practice and by means of which they identify what counts as valid law —that must be present in order for a legal system to exist' (2004, 126). This seems to be intended as a statement of a substantive positivist thesis that allegedly follows from a descriptive/explanatory methodology. However, suppose our descriptive theorizing yielded the result that legal officials took themselves to be bound by moral or religious precepts. It would seem to follow from this conclusion of descriptive/explanatory theorizing that moral and religious precepts are legitimate sources of law and hence that positivism at the substantive level is false. Thus non-moral theorizing could lead to the denial of positivism at the substantive level.

Conversely, moral theorizing could lead to the endorsement of positivism at the substantive level. Well-known positivists have employed moral arguments in support of their position. As Liam Murphy and others have noticed, Bentham and Hart both considered consequentialist arguments for positivism (*e.g.* Murphy 2000, 387-8; Perry 2000, 311). In 'Positivism and the Separation of Law and Morals', Hart writes that:

> [If we adopt] an assertion that certain rules cannot be law because of their moral iniquity, we confuse one of the most powerful, because it is the simplest, forms of moral criticism… [W]hen we have the ample resources of plain speech we must not present the moral criticism of institutions as propositions of a disputable philosophy (Hart 1958).

Murphy analyzes this argument as Hart following Bentham's lead in rejecting what the latter called 'quietism', namely the position that 'if people think that bad law is not law, they will be less inclined to subject what the legal system presents as law…to critical appraisal' (Murphy 2000, 387-8). Thus, there is no requirement of non-moral legal theorizing at the methodological level to safeguard positiv-

ism at the substantive level.[11] The slippery slope argument in favor of methodological positivism fails.

A second potential argument for methodological positivism of the descriptive variety is that a descriptive approach offers a neutral or objective and hence uncontroversial methodology that will yield determinate answers at the substantive level or determinate truth conditions for propositions of law. For example, Stavropoulos employs a parallel with the natural kind externalism described in the previous section. He argues that determinacy or objectivity can be secured for legal propositions because the semantics of legal concepts parallels that of the semantics of terms like 'arthritis' (Stavropoulos 1996). (There are objective and determinate medical classifications that fix the reference and meaning of 'arthritis'). Objectivity will be delivered by the descriptive strategy however only if the operative concept is determinate as it is for concepts that refer to natural kinds or social kinds like 'arthritis'. As I noted above, in jurisdictions in which legal experts have not yet pronounced on the legal concept of marriage, there will be no determinate legal (operative) concept. Should the legal concept correspond to the secular operative concept, to one of the different religious operative concepts, or to the target concept that tracks the implicit moral purposes of marriage?

Further indeterminacy arises within descriptive/explanatory accounts due to questions about which metatheoretical values take priority as well as the need to make evaluative judgments about what is significant or important to explain. For example, consider two competing theories of law —*e.g.* Austin's command theory and Hart's position that a legal system is comprised of a hierarchy of social rules— and suppose that the empirical data is roughly compatible with both.[12] How would descriptive/explanatory theorizing

[11] Tom Campbell's argument for ethical positivism is another example of a moral argument for substantive positivism (Campbell 1996).

[12] Note that I am supposing just for the sake of argument that both theories fit the empirical data. Dickson claims that in fact Hart's theory

adjudicate between the two theories? The question of which theory to adopt will have to be resolved by the application of metatheoretical values. Which theory is simpler, more unified and so forth? Hart often mentions the simplicity of Austin's theory of law (*e.g.* Hart 1994, 51). Finnis observes that an attractive feature of "the notions of command, political superior and habit of obedience was precisely their simplicity and definiteness" (Finnis 1980, 5). This suggests that employing the value of simplicity to break the tie would yield Austin's rather than Hart's version of positivism. Perry also observes that, on the descriptive/explanatory approach, distinguishing between the two theories would require employing metatheoretical values to argue that one has superior explanatory power.[13] Hence, it is likely that different operative concepts will be delivered by different metatheoretical values and that there will be theoretical conflict over how metatheoretical values should be ranked against each other and over which value should have priority. Adopting metatheoretical values will not eliminate indeterminacy or controversy.

The selection of paradigms and the problem of extrapolation might also introduce indeterminacy into the operative concept. There are at least two plausible candidates for the canonical referent of *our* term 'legal system'. First, there is Hart's approach in which the paradigm is the 'modern municipal legal system' and hence includes the legal systems

does better on that score. She writes that 'the shift of emphasis [from commands to rules] illuminated a whole range of data which was inadequately dealt with by earlier versions of legal positivism, which, even in their more sophisticated manifestations, offered "external" accounts of legal phenomena' (Dickson 2001, 24).

[13] Indeed it is precisely because Hart did not engage in an argument over which theory best exemplifies superior predictive power that Perry thinks it implausible to attribute descriptive/explanatory theorizing to Hart. He says that Hart does not claim that a theory such as Austin's which describes "social phenomena in purely behavioristic terms and treat[s] the internal point of view as epiphenomenal at best is deficient in the scientific sense of failing to have predictive power" (Perry 2000, 321).

of European civil law countries (Hart 1994); secondly, there is Dworkin's approach in which the paradigm is the Anglo-American common law legal system that does not include European civil systems (Dworkin 1977). The difference in the selection of paradigms has had significant consequences for legal theory. Since judicial decisions are an important component of the common law system, any descriptive/explanatory account of the paradigm 'Anglo-American common law' requires us to evaluate data about adjudication as well as the common law and moral principles that inform adjudication. When one assumes that the referent of 'law' is Anglo-American common law, it is plausible that the moral principles employed by common law judges in adjudication will be among the essential features of the canonical referent of 'law' that the theorist uses to extrapolate from the local to the general case. It is a short step from here to the conclusion that moral considerations can constitute criteria of legal validity for the general case of law.

If I am right, descriptive/explanatory theorizing about law is likely to be indeterminate first because there is no determinate ranking of metatheoretical values, and secondly because there may be more than one plausible canonical referent of our term 'law'; different referents lead to incompatible theoretical accounts. Morally-neutral theorizing is unlikely to be *more* determinate or *less* controversial than moral theorizing. There is no reason therefore to prefer methodological positivism simply on the basis that it will provide a neutral and determinate justification of a substantive legal theory or a *more* neutral and determinate justification than would moral theorizing.

A third argument for methodological positivism is that it is desirable or normatively required that the theorist limit herself to descriptive/explanatory theorizing. Recall that Dickson's descriptive strategy requires that legal theorizing be 'descriptive' not in the sense that it is non-evaluative, but rather in the sense that the theorist avoid direct *moral* evaluation of the practice. She brings this out using an ex-

ample of an agnostic's descriptive/explanatory account of a Roman Catholic Mass. Precisely because she is agnostic, she does not seek to take on the perspective of the participants in Catholic religious practices to morally evaluate their commitments. It is certainly true that the theorist *can* insulate herself from the task of moral evaluation, and *could* always act qua anthropologist or agnostic and never qua participant in the practice. But is it desirable for the theorist *always* to be limited to the position of agnostic?

It is artificial to claim that someone reflecting on her own community's practice must always limit herself to the role of the agnostic. Recall the discussion above of the notion of marriage. I suggested that when the manifest and operative concepts conflict, or when the operative concept is indeterminate, an ameliorative inquiry might shed light on our secular concept of marriage. Are there implicit moral purposes in our practices that justify using the concept 'marriage' to demarcate opposite sex unions from same sex unions? As a participant in the practice herself, it is natural for the theorist to employ an ameliorative inquiry to work out the meaning of 'marriage'; in so doing the theorist does not remain 'agnostic' but rather evaluates the moral purposes of marriage that are implicit in her practices. The same applies for theorists of the concept of law. When a legal theorist herself is a participant in a practice, her stance is analogous, not to that of anthropologists of agnostics, but rather to that of Catholic theologians who theorize about their own practice by adopting an ameliorative strategy to work out the meaning of Catholic doctrine. In the absence of other arguments —for example the slippery slope argument or the neutrality argument just outlined— the onus of proof is on the proponent of descriptive/explanatory theory to show that it is desirable for the theorist to avoid moral evaluation of her practice. Indeed, when the descriptive project leads to indeterminacies, it may be that *only* evaluation of the moral purposes implicit in the

relevant practices can produce a more resolved account of the concept or phenomenon in question.

Fourth, it is claimed that descriptive/explanatory theorizing is sufficient to yield theories that are explanatorily adequate. Dickson claims that morally-neutral, indirectly evaluative theorizing will be explanatorily adequate to a social phenomenon like law. To have explanatory adequacy:

> Jurisprudential theories must not merely tell us truths, but must tell us truths which illuminate that which is most important about and characteristic of the phenomena under investigation. Moreover, in so doing, those theories must be sufficiently sensitive to the way in which those living under the law regard it. (Dickson 2001, 25)

Dickson's notion of explanatory adequacy as it is articulated here is vague and open to interpretation. What does explanatory adequacy really require? Dickson acknowledges that evaluative judgments will have to be made as to 'what is most important about and characteristic of the phenomenon under investigation' but claims that such judgments will not include moral judgments. However, one might argue that what is most important to explain about law is its connection to morality, and hence any explanatorily adequate account of law requires moral evaluation of the law (Priel 2010, 646).[14] Further, consider the requirement that in order to achieve explanatory adequacy, a theory must be 'sufficiently sensitive to the ways those living under the law regard it'. Dickson claims that the command theories endorsed by Bentham and Austin do badly on this dimension of explanatory adequacy because 'they failed to understand law from the internal point of view, *i.e.* as it is understood by those who are subject to it and who use it to guide their behaviour' (2001, 24). One could take this argument a step further. Perry points out that the participants in legal prac-

[14] Dan Priel points out that judgments of importance are highly subjective and vary from theorist to theorist. They are unlikely to be morally-neutral (Priel 2010).

tices are practical reasoners or rational agents and hence will expect the law —since it is coercive— to give them reasons for action that they would not otherwise have. A coercive practice like law must provide participants with at least minimal moral reasons to comply (Perry 2000, 350). If this is the case, the theorist will be unable to give a full explanation of the impact of a particular set of laws on the rational agents subject to them without asking, as rational agents themselves, whether the reasons offered by the system would be persuasive to them. This will require the theorist to take a stand on the content of the reasons provided by the legal system under consideration, *i.e.* to evaluate whether it *in fact* provides moral reasons to participants. In other words, a theorist may be able to provide an even better account of 'the way in which those living under the law regard it' than that of Hart by evaluating directly whether the moral reasons offered by the law would be persuasive to the rational agents operating under it.

Conclusion

I have attempted in this paper to set out some preliminary reasons to reject methodological legal positivism. The argument does not rely on establishing the necessity claim that moral evaluation is necessary for legal theorizing but rather on establishing the desirability claim that moral evaluation is a valuable component in legal theorizing. I argued in Section I that the necessity claim is false due to conceptual analysis pluralism and therefore I agree with proponents of the descriptive/explanatory approach that theirs is a possible methodology in legal theory (section II). Proponents of the descriptive/explanatory methodology have not shown however that it should be the *only* methodology adopted to answer theoretical questions about law. I argued in Section III that limiting the theorist to the descriptive/explanatory methodology is not desirable. It does not have the advantages that are implicitly attributed to it:

it does not secure substantive positivism or avoid the need to resolve theoretical indeterminacies. Moreover, placing restrictions on theorists to ensure that they keep moral considerations out of legal theorizing is not desirable because in so doing theoretical questions we care about are left unanswered.

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