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What Legal Philosophers Can Learn From Non-Philosophers

About the Concept of Law

By Brian Z. Tamanaha

(Draft)

Two legal philosophers in a jovial mood, well in to their second bottle of wine, leavened their after dinner colloquy about the nature of law with occasional bouts of friendly banter. Leaning forward with a serious look, one philosopher said to the second: “We’ve been going around in circles, so let’s try to approach this differently. For example, what can legal philosophers learn from social scientists about the concept of law?” The second philosopher looked at the first, pausing as if to contemplate the question—and in unison they mirthfully spouted: “Nothing!”

After enjoying a hearty chuckle, they resumed their previous lines of argument.

This scenario would never happen, of course. And not for the obvious objection that legal philosophers would not stoop to such lame humor. No. It would not happen because legal philosophers appear nigh oblivious to the fact that social scientists have long carried on a parallel debate over the concept of law. Social scientists, in their debate, have borrowed freely from the work of legal philosophers on the topic, but the influence is not mutual. Other than occasional references to the concept of law devised by Max Weber, rarely can one find in legal philosophy any sustained discussion of the work of social scientists or social theorists who have grappled with this issue, including

such leading figures as Bronislaw Malinowski, Eugen Ehrlich, and Niklas Luhmann. That is as it should be, one might think, for questions about the concept or nature of law are consummately philosophical, not social scientific questions.

Law is a social institution, on the other hand, so it falls squarely within the purview of the social sciences. As legal philosopher Joseph Raz remarked, “This suggests that the explanation [of the nature of law] is part of the social sciences, and that it is guided or motivated by the considerations which guide theory construction in the social sciences. In a way this is true...”¹ This is true, however, only in a limited sense, according to Raz. Social science does not have any priority because law “is a common concept in our society and one which is not the preserve of any specialized discipline.”²

Legal philosophy, by his account, is one among several disciplines that have something to say about the nature of law. Raz’s modest stance—defending a role for legal philosophy without claiming superiority—is commendable. But it prompts the question again: Why do legal philosophers apparently decline to plumb social scientific work on the concept of law for insights? Law is a social institution and social scientists specialize in the study of social institutions. Legal philosophers typically describe law in functional terms, furthermore, and functional analysis is central to the social sciences. This substantial overlap suggests that legal philosophers might stand to gain from the social scientific discussion.

Perhaps legal philosophers have scoured the social scientific literature but found little worth taking away. Or perhaps they have not bothered to look—not realizing that social scientists have written on this issue or assuming that such work would not be

¹ Joseph Raz, “Can There be a Theory of Law?” in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson (Oxford: Blackwell 2005) 331.

² *Id.*

relevant or useful. The legal philosophy literature to be mastered about the concept of law is taxing enough without the additional burden of searching other fields as well.

The aim of this paper is to persuade legal philosophers that useful insights for their own debate can be gleaned from the social scientific discussion of the concept of law. A general benefit can be stated at the outset: it is always useful to see how the same set of issues has been approached by a discipline informed by a different set of paradigms and concerns. Robert Alexy argues that “reflexivity”—reasoning about reasoning, subjecting basic concepts to analytical testing—is a key feature of legal philosophy.³ Full reflexivity is difficult to achieve, however, particularly when a discipline’s governing assumptions are so entrenched that their contingency or contestability recedes from view. Examining the social scientific debate will help legal philosophers throw a reflexive light on their own starting points, potentially opening up other angles on settled issues.

The ensuing argument that legal philosophers can learn from non-philosophers about the nature of law will be pressed in an indirect fashion. On the assumption that philosophers are more likely to listen to their brethren, rather than focus directly on the social scientific debate I will proceed in the main by invoking alternative *philosophical* perspectives on law that have incorporated the social science discussion.

THE NARROW LEGAL POSITIVIST FRAMING OF *WHAT IS LAW?*

A striking feature of discussions by contemporary legal philosophers of the nature of law is that they are uniformly framed in terms of the debate between legal positivism and natural law. Larry Solum, for example, writes:

³ Robert Alexy, “The Nature of Legal Philosophy,” 17 *Ratio Juris* 156 (2004).

What is the nature of law?...Historically the answer to this question, “What is law?,” is thought to have two competing answers. The classical answer is provided by *natural law theory*, which is frequently characterized by asserting that there is an essential relationship between law and morality or justice. The modern answer is provided by *legal positivism*, which, as developed by John Austin, asserted that law is the command of the sovereign backed by the threat of punishment.⁴

Writing about “The Nature of Law,” Andrei Marmor focuses on the same “two major rival philosophical traditions”—natural law theory and legal positivism.⁵ Contemporary philosophical explorations of the nature of law frequently discuss the Hart-Fuller or Hart-Dworkin debates.

When launching into this familiar exegesis, legal philosophers invariably fail to explain *why* this is the proper framework through which to analyze the question “What is law?” The implicit message is that this is simply the way legal philosophers examine the topic. This has been the presumed position ever since H.L.A Hart reinvigorated the field in the mid-20th century with his reformulation of legal positivism, and his subsequent engagements with Lon Fuller and Ronald Dworkin (supplemented by parries between legal positivists and natural law philosopher John Finnis).

What remains unclear is whether legal philosophers discuss the nature of law through the opposition of these two schools of thought because they are the most viable, sound, advanced, and insightful ways of approaching or understanding the concept or nature of law; or rather, whether the nature of law is taken up in this framework because contemporary legal philosophy—analytical jurisprudence in particular—is caught in the

⁴ Larry Solum, Legal Theory Lexicon 065: The Nature of Law, at http://lsolum.typepad.com/legal_theory_lexicon/2008/05/legal-theory-le.html

⁵ Andrei Marmor, “The Nature of Law,” Stanford Encyclopedia of Philosophy, at <http://plato.stanford.edu/entries/lawphil-nature/>.

grip of legal positivism with its designation of worthy opponents. If the latter is the case, then the framework itself merits skeptical scrutiny. Presumably, the agenda of a particular school of thought should not dictate for legal philosophy the terms of a classic issue in legal theory.

A curious quality of theoretical work in the field reinforces the latter suspicion: general accounts of legal positivist theory and discussions of the nature of law exhibit a remarkable overlap of themes and content. A discursus on the one topic covers much the same ground as a discursus on the other (albeit with different emphases and degrees of detail).⁶ What explains the fact that these apparently different topics—legal positivist theory, the nature of law—are analyzed in such similar terms? An obvious part of the explanation is that legal positivism is built around a general theory of law. But that does not explain the opposing pole of the standard antithesis. Dworkin’s theory focuses on adjudication—and he denies that there can be a general theory of law. Certain natural law theorists address the question *What is law?* (egged on by the attacks of legal positivists), but the primary orientation of natural law theory is to establish the existence and content of principles of right (or how they are to be discerned), and their implications.⁷ And even if one grants that legal positivism and natural law theory say important things about law—as they do—that does not explain why no other streams of thought on this topic are admitted to the legal philosophy discussion?

⁶ Compare, for example, Marmor’s entry on the “Nature of Law” in the Stanford Encyclopedia of Philosophy with Leslie Green’s entry “Legal Positivism,” <http://plato.stanford.edu/entries/legal-positivism/>. It is important to note that Leslie Green’s work in legal philosophy ranges beyond the field. Thus the overlap in these essays is an indication that Marmor’s views of the nature of law are dominated by legal positivism more so that Green’s views of the nature of law are dominated by legal positivism.

⁷ See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980).

THREE RIVAL STREAMS OF THOUGHT

Leading philosophers outside of analytical jurisprudence have routinely discussed law more expansively than—while still incorporating—the legal positivism-natural law debate, often building on social scientific analyses of law.

A prime example is Jurgen Habermas, one of the leading philosophers in the world today. In his Tanner Lecture, “Law and Morality,” Habermas remarked: “As we learn from anthropology, law as such precedes the rise of the state and of political power in the strict sense, whereas politically sanctioned law and legally organized political power arise simultaneously.”⁸ Legal positivists typically assert that law was absent in primitive societies (because they lacked legal institutions). Habermas, however, asserts that “archaic law” paved the way for and “first made possible the emergence of a political rule in which political power and compulsory law mutually constituted one another.”⁹ Habermas was not just making empirical (non-philosophical) claims in this particular discussion, but was “primarily concerned with the clarification of conceptual relationships” surrounding law.¹⁰ Another example can be found in the detailed analysis of *The Definition of Law* written in 1939 by the prominent German jurist Hermann Kantorowicz. Like Habermas, he engaged with classical natural law and legal positivist theories, but he also extensively considered analyses of law by sociologists, anthropologists and historians.¹¹

A comparison with the conceptual analyses of Habermas and Kantorowicz exposes that contemporary legal philosophers neglect an essential dimension. The

⁸ Jurgen Habermas, *Law and Morality*, Tanner Lectures (1986) 263.

⁹ *Id.* 264.

¹⁰ *Id.* 266.

¹¹ Hermann Kantorowicz, *The Definition of Law* (New York: Octagon Books 1980). Kantorowicz died in 1940. This book was taken from a larger uncompleted work and published separately in 1958.

standard legal positivism-natural law debate over the nature of law focuses on elucidating the boundaries and interaction between law and morality. Habermas and Kantorowicz were concerned with the relationship between law and morality, to be sure, but they also explored the relationship between law, customs, politics, and social goals—a complex of factors I will label, for convenience, the law and society dimension. They consulted the work of social scientists on this social dimension specifically in connection with the concept of law.

Solum and Marmor were two-thirds correct when they asserted that two major traditions have offered rival answers to *What is law?*¹² A third major stream of thought has stood alongside these other two, at times rivaling them in influence.¹³ From ancient times, law has been associated with custom, or with social ordering. In Greek, *nomos* referred to “custom” and “law.” “Customary law” has been considered a form of law in many societies past and present. The common law was known for centuries as “unwritten law”—the common customs of the realm.

In the 19th century, when legal positivism solidified its position as a leading modern school of thought, its main rival in jurisprudential circles was “historical jurisprudence.” The label given to this school is unfortunately misleading because it was not mainly about history. Although the theorists identified with this school differed on many points, the main ideas associated with this school were that the center of gravity of law is society, legal norms reflect prevailing social norms and interests, and law is thoroughly social. As the American jurist James C. Carter put it, “Our unwritten law—which is the main body of our law—is not a command or body of commands but consists

¹² See “Law,” Oxford International Encyclopedia of Legal History (Oxford: Oxford Univ. Press 2009);

¹³ See generally Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press 2001) 27-40.

of rules springing from social standard of justice or from the habits or customs from which that standard has itself been derived; that law is custom and opinion.”¹⁴ Although the historical jurisprudence tradition—whose classic 19th figures were Friedrich von Savigny and Henry Maine—did not survive the twentieth century, core aspects of these ideas endure in the social scientific work of Malinowski, Ehrlich, and their modern descendants.

This is the stream of ideas that Habermas and Kantorowicz seamlessly incorporated into their analysis. Contemporary legal philosophers, in contrast, compartmentalize and separate this stream of thought from their analysis of the nature of law. Solum confirms this when he clarifies that the legal positivism-natural law framework sets forth the “‘What is law?’ question as it has been approached by contemporary legal philosophers.”¹⁵ He acknowledges that “there are other important perspectives on the nature of law,” to wit, “the sociological tradition.”¹⁶ Under this approach, the social scientific perspective on the concept of law is cabined off to the side of the philosophical debate. To repeat this is not a criticism of Solum, who accurately describes the self-delimiting approach taken by contemporary legal philosophers.

But is this justifiable? Are legal philosophers omitting something important?

INFLUENCES ON THEORETICAL DEBATES OVER THE NATURE OF LAW

Kantorowicz articulated a sophisticated understanding of conceptual analysis which coincides on crucial points with the position of leading legal positivists. Hart acknowledged that there is more than one way to conceptualize law. “If we are to make a

¹⁴ James C. Carter, quoted in J.W. Simonton, “On the Origin and Nature of Law,” 11 Yale L.J.197 (1901).

¹⁵ Solum, *The Nature of Law*, *supra*.

¹⁶ *Id.*

reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.”¹⁷ Immediately following this passage, Hart briefly addressed the practical, analytical, and moral implications of adopting narrower or broader conceptions of law.¹⁸

Kantorowicz similarly asserted that “That the value of our respective definitions [of law] must be judged by their comparative usefulness.”¹⁹ “The definition chosen, though it can never be true or false in itself, must be fruitful for the purpose of the particular science. It must above all be useful in that, by connecting what ought to be connected and separating what ought to be separated, it delimits a subject-matter about which true and important statements can be made, and it affords an instrument for the production of exhaustive classifications.”²⁰

These assertions by Kantorowicz match the position recently articulated by Joseph Raz,²¹ who likewise grants that there are different concepts of law (though unlike Hart, Raz does not admit that moral and practical considerations figure in the theoretical construction of this concept). Concepts of law are cultural products; it stands to reason, Raz points out, that different cultures may have different concepts of law and concepts of law can change over time.²² Nonetheless, any given concept of law relates to real “things” (real social phenomena) about which true statements can be made. Raz equates “complete mastery of a concept with knowledge and understanding of all the necessary

¹⁷ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961) 204-205.

¹⁸ Frederick Schauer defends the necessity for making such evaluations in connection with adopting a concept of law. Frederick Schauer, “The Social Construction of the Concept of Law: A Reply to Julie Dickson,” 23 *OJLS* 493 (2005).

¹⁹ Kantorowicz, *The Definition of Law*, *supra* 6.

²⁰ *Id.* 7.

²¹ Raz, “Can There be a Theory of Law?”, *supra* 324-28.

²² *Id.* 313.

features of the objects to which it applies.”²³ Echoing Kantorowicz, Raz writes, “We build a typology of institutions by reference to properties we regard, or come to regard, as essential to the type of institution in question.”²⁴

Kantorowicz emphasized that practical and moral consequences follow from the identification of a concept of law, which he played out in connection with international law:

Whether, for instance, a concept ought to be given or refused a name of which important propositions are predicated is a terminological but by no means a ‘mere’ terminological question: the choice does not lie between different terms only, but between the things which they denote. For example, many jurists have declared and continue to declare that what is called public international law is not, or is not yet, law at all, but consists of political or moral postulates, or is, at best, law improperly so called. If this classification should be accepted by public opinion, the practice of States and the schools of law, not only the jurisprudential but also the political, psychological, literary and other ‘practical’ consequences would be enormous: the very grounds on which this view is founded, namely that the rules of international law lack sufficient sanctions, are frequently disobeyed, do not originate from a sovereign will, and so on, would be decisively strengthened, and the precarious validity of the law of nations, on which the very existence of nations and civilization itself depends, would become yet more precarious, if any other name were substituted for international “law.”²⁵

This passage helps make the broader point that debates over the concept of law within legal philosophy are not purely abstract matters—even for those theorists who resolutely *deny* that moral and practical concerns are relevant to the analysis of the concept of law. Time and again the philosophical debate over the nature of law has been prompted and shaped by surrounding factors.

The turbulent mid-20th century witnessed a heated debate over the nature of law by philosophers, legal theorists, and political scientists. Two concerns dominated. One

²³ Id. 326.

²⁴ Id. 330.

²⁵ Kantorowicz, *The Definition of Law*, supra 9-10.

concern was to distinguish good law from bad (Nazi or Communist) law, a debate which ploughed the standard legal positivism-natural law grooves.²⁶ Hart's famous debate with Fuller resonated with this first concern. The second concern, fueled by the same geopolitical turmoil, was raised by Kantorowicz in the above passage—the status of international law.²⁷

Debates over the concept of law motivated by the latter concern were not framed in terms of the contest between natural law and legal positivism. Critics from various positions (not natural lawyers) challenged legal positivist arguments that a sovereign law-giver and the imposition of coercive sanctions are essential characteristics of law. Writing in 1945, jurist Glanville Williams identified the motivation of theorists who attacked Austin's positivist account of law (which international law failed): "they assumed, quite rightly, that if it [international law] ceased to go by the name of law it would lose caste among the governments that were supposed to respect it."²⁸

Theorists defending the legal status of international law found support for their position in social scientific analyses of the concept of law. Several prominent social scientists—especially those who studied law where state law was weak or entirely absent—also denied that a sovereign law-giver and coercive enforcement are necessary elements of law. Anthropologist Bronislaw Malinowski, for instance, insisted that the bulk of social ordering is maintained by "law," regardless of whether "they lack above all the element of sanction as a social response."²⁹ He elaborated on different types of law

²⁶ See Edgar Bodenheimer, "Power and Law: A Study of the Concept of Law," 50 *Ethics* 127 (1940); Luis de Garay, "What is Law?," 16 *Notre Dame Lawyer* 261 (1941).*

²⁷ Glanville L. Williams, "International Law and the Controversy Concerning the Word 'Law,'" 22 *Brit. Y.B. Int'l.L.* 146 (1945).

²⁸ *Id.* 153.

²⁹ Bronislaw Malinowski, "A New Instrument for the Interpretation of Law," 51 *Yale L.J.* 1237,1244 (1942).

as well as different types of sanctions. Courts and punishment are characteristic of state law, but other forms of law exist as well. The pioneering legal sociologist (law professor) Eugene Ehrlich also asserted that law comes in several forms. “It is not an essential element of the concept of law that it be created by the State, nor that it constitute the basis for the decisions or courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision. A fourth element remains, and that will have to be the point of departure, i.e. the law is an ordering.”³⁰

The details of the two versions of the mid-century debate over the concept of law are not relevant there. They demonstrate that such debates are not conducted in vacuo. The theoretical discussion was prompted and shaped by political and intellectual factors. These factors determined which of the three streams of thought (legal positivism, natural law, social scientific) occupied center stage and which aspects of those approaches were put in issue.

This point is bolstered by going further back to examine the discussion of the nature of law at the close of the 19th century. Again the relationship between law and morality was a topic of concern (although there was hardly any mention of international law), but that was not the main focus. The primary thrust of discussions of the nature of law aimed at establishing the relationships and interaction between custom and law or between written and unwritten law.³¹ This was a major concern of historical jurisprudence, which peaked in the late 19th century. In the absence of detailed historical study, it is impossible to know what factors produced this emphasis. Judging from what

³⁰ Eugen Ehrlich, *The Fundamental Principles of the Sociology of Law* (New York: Arno Press 1975) 24.

³¹ See Simonton, “On the Origin and Nature of Law,” *supra*; Frederick Pollock, “The Nature and Meaning of Law,” 10 *L.Q. Rev.* 228 (1894); John F. Dillon, “Our Law: Its Essential Nature and Ethical Foundations and Relations,” 3 *Counsellor* 99 (1893).

they wrote about, a plausible speculation is that jurists were moved to discuss the nature of law in these terms because the explosion of legislation that occurred at this time altered and threatened the position of the common law system—raising pressing questions about the proper mode and legitimacy of judicial decision making.

It is nothing new to issue a reminder that theoretical debates are affected by surrounding factors. The point bears repeating here nonetheless. Legal philosophers with no historical awareness might think that *What is law?* has always been framed in terms of legal positivism versus natural law. Since Austin (and much earlier) that has indeed been a recurrent theme, but far from the only theme. And past episodes of this debate have featured social scientific accounts of law. Using the past as a guide, forward-looking legal philosophers would be well advised to attend to contemporary social-political factors which raise urgent questions about the nature of law, for that will dictate the terms of the next debate. (A concrete set of such topics will be raised later.)

THE CIRCULARITY OF THE ANALYSIS

To identify the basic elements of law, to describe the nature of law, to formulate a concept of law, to answer *What is law?*—a theorist *must* begin by *first stipulating what law is*. Conceptual analysis of law is unavoidably circular. Without a paradigm example of law to work from, a theorist cannot discern the elements or nature or concept of law.

Hart was plain about this. He designated municipal law—the state law model—to serve as the paradigm from which he constructed his concept of law. He justified his designation by repeatedly asserting that most “educated people” think of “law” as

municipal law.³² Joseph Raz made the same choice for basically the same reason. He supports his designation of the state legal system as the paradigm of “law” on the grounds that it is “our” concept of law.³³ He admits that this concept of law is parochial (being “our” concept of law), but it nonetheless has universal application in the sense that the elements of this concept can be applied to examine other social contexts.

There is nothing scandalous about the fact that a theorist must first decide what law is before producing a concept of law. There is no other way to proceed. What this necessity underscores, however, is that *the* key move in the philosophical discussion of the nature of law is the initial designation of the paradigm of law. Everything follows from the initial choice. Different initial selections produce different concepts of law with different elements. This has crucial implications because contemporary legal positivists uniformly designate state law, whereas other theorists have taken different approaches.

Kantorowicz’s initial designation of law did not center exclusively on state law. Taking a broader view of law informed by historical and sociological analysis, he refused to follow legal positivists in designating coercive enforcement as an essential element of law. “We have already remarked that to admit the element of enforceability into the concept of law would make it useless for the theoretical and historical understanding of law and legal science, since it would rule out entire provinces of law; it would also rule out, within many of its provinces, the ‘natural obligations’ for whose breach no action lies, and the *leges imperfectae*, which lack provision for their compulsory execution.”³⁴ (Hart made a similar point when he softened Austin’s emphasis on coercion.)

³² Hart, *The Concept of Law*, supra 1-17

³³ Raz, “On the Nature of Law,” supra 1-5.

³⁴ Kantorowicz, *The Definition of Law*, supra 60.

The most revealing aspect of this passage is not his underlying view of law but the *direction* of his analysis. When deciding whether to include coercion as an element of the concept of law, Kantorowicz tested this proposed element against his paradigm examples of law. If coercion was included as an element, phenomena that he considered “law” would be disqualified because they lacked coercion; consequently, he concluded, *coercion cannot be an element of law*. He proceeded to isolate other characteristic aspects of law that his paradigm examples did possess.

This mode of reasoning demonstrates the point made above—what matters most in the philosophical analysis is a given theorist’s designation of what counts as law. Kantorowicz did not mention international law in this particular passage, but the discussion clearly bore on the status of international law (which lacked institutionalized coercion).

Hans Oberdiek, an American philosopher writing in the 1970s, offered a version of the same analysis. Raising a string of analytical and substantive objections, he too criticized the common assumption among legal philosophers that coercive sanctions are a necessary element of law. Oberdiek argued that, while coercion is commonly attached to law, this should not be “elevated into a definitional, conceptual, or natural necessity” of law.³⁵ His response to Raz contains the relevant passage:

According to Raz, every legal system is coercive ‘...in that obedience to it, and its application, are internally guaranteed, ultimately, by the use of force.’ The existence of international law and perhaps even canon law weakens the generality of his claim, as neither carries any such guarantee; any ‘guarantee,’ to the extent that one exists, is external. Of course, faced with these counter instances, one can

³⁵ Hans Oberdiek, “The Role of Sanctions and Coercion in Understanding Law and Legal Systems,” 21 Am. J. Juris. 71,73 (1976).

take the bull by the horns and simply deny that international and canon laws are really law.³⁶

Oberdiek does not make any effort to explain why this retort—too bad, then, international law and canon law are *not* law—is an inadequate response to his assertion. Shortly thereafter, he reiterates that coercion is not a universal or necessary feature of law, citing international law and canon law as counter-examples.³⁷

Legal philosophers might think Raz has the better position.

This is a standoff, however, a standoff bearing a deep lesson.

Let us see why. Oberdiek argues that coercion cannot be an element of law because (among other reasons he details) that would disqualify international law and canon law; to disqualify them would be wrong because they are law; so coercion must be struck as an element of law. Raz's position (as put by Oberdiek) is that coercion is an essential element of law; accordingly, if international law and canon law lack coercion, they do not qualify as law. The source of the disagreement between these theorists lies in their different initial designation of paradigm examples of law. Raz models his elements on state law. Oberdiek, in contrast, considers state law, international law, and canon law all to be genuine manifestations of law, so the elements of law (whatever they might be) cannot rule these out.

This standoff can be resolved only on the basis of arguments over the initial designation of the paradigm examples of law. The deep lesson in this standoff is that a theorist's choice cannot be justified merely by showing that it makes sense on its own terms; the choice must be shown superior to competing initial designations. This is

³⁶ Id. 90.

³⁷ Id. 92.

precisely where legal philosophers have left a gaping hole: they have made almost no effort to justify their initial designation against alternatives. Hart and Raz confidently designated state law as their paradigm—as if this could brook no reasonable disagreement—then proceeded with their analysis. They thereby hastily passed through *the* crucial decision from which all else follows in the analysis of the concept of law.

ALTERNATIVE APPROACHES TO THE INITIAL DESIGNATION

It would be churlish to snipe at Hart and Raz for failing to supply evidence or empirical support for their (respective) assertions that “educated people” see law as state law and that state law represents “our” concept of law. They are undoubtedly correct that most people see state law as “law,” a view which holds around much of the world today.

But the inquiry does not stop there. A theorist seeking to discover what people think of as law must ask, at least, this additional question: “Is international law *law*?” Most “educated people” in “our” culture would surely answer this question in the affirmative as well.

The initial question can be posed to the lay person in open-ended terms: “What is law?” The person may well answer, “State law is law, of course.” Again, however, there is no reason to halt the inquiry short. A follow-up question should be posed: “Are there any other kinds of law?” Many educated people will add “international law”; in Europe, many people will volunteer European Union law; in Islamic countries many will offer Sharia; in many African countries people will cite “customary law.” [In truth, most people would find these questions strange. Questions like What is law?, or inquiries

whether state law or international law are *law*, rarely arise. Of course they are “law”—that’s what they are called.]

Hart and Raz were well aware that other social phenomena also carry the label “law.” An unstated assumption governing their analysis is that *one* form of law must be chosen from *among* these alternatives to serve as *the* paradigm example of law. They then worked on this singular example to extract the essential elements of law.

In a 1945 article addressing the concept of law, responding to a precursor to the position staked out by Hart and Raz, Glanville Williams raised an obvious alternative: “Now when Somlo refers to ‘the conception of law as generally used’ he evidently means by the word ‘law’ municipal law. But this is only one use of the word; there is also its use to symbolize international law, which has many affinities to municipal law. It is easy to construct a concept that will cover both municipal and international law.”³⁸

Since “educated people” in “our” culture typically see *both* state law and international law as “law,” building a concept of law based upon the elements common to both is a sound way to proceed. If the philosophical objective is to identify the basic elements of that qualify a phenomenon as “law,” this approach, at first blush, would seem more defensible than picking just one accepted version of law to identify the nature of law.

This argument can perhaps best be appreciated through a mundane example. When asked to identify or describe an “album,” music lovers over 45 years of age will immediately picture a black vinyl disc with grooves that plays music on a phonograph; young people will think of a CD. People might also think of a photo album or a stamp album, or an album holding baseball cards, and a few literate folks might think of a

³⁸ Williams, “International Law and the Controversy Concerning the Word ‘Law,’” *supra* 158.

collection of writings. These various manifestations of album have varying elements, varying forms, and varying functions. They have differentiated labels—record album, photo album, stamp album, etc.—although in context “album” alone usually suffices.

It would be obviously problematic to formulate the essential characteristics of “album” based solely upon a record album (which version: vinyl or CD?). An alternative would be to group vinyl and CDs as one type of album sharing similar features (playable music compilations), and photo albums, stamp albums, and so forth, together as another type (organized collections of similar items between bound covers)—then discern the characteristics common within each group. Yet another alternative would be to identify the elements all these various manifestations of album have in common—compilations of separate items contained in a unit (single songs, individual photos, stamps, letters).

Now carry this example over to the legal context.

Hart and Raz worked exclusively from state law to discern the elements of “law.” This is akin to using a CD to extract the elements of “album.” An equally plausible approach is to use a combination of versions of law, either some sub-grouping (state law and international law, for example) or all versions of law taken together. Kantorowicz and Oberdiek adopted variations of this approach. In a later section I will elaborate on yet another way to proceed that social scientists have been groping toward in their struggle to define law, an approach which involves neither picking one version nor grouping several versions.

A host of threshold questions immediately come to mind: What are the appropriate criteria for groupings? How are different groupings to be evaluated to determine the best starting point? Who is seeking to identify the nature of law (a theorist,

a social scientist, a human rights activist, a judge in a case involving customary law, etc.)? What is the objective of the inquiry? What consequences might follow from the various answers? (Consequences can be considered at the outset because, as the discussion of circularity shows, the initial designation foreordains the tenor of the answer.)

What works for certain purposes will be of little value for other purposes. For instance, a theorist who decides to build a concept of law upon the characteristics common to all recognized manifestations of “law” (like all versions of “album”), including state law, international law, canon law, Sharia, and customary law. They all revolve around rules and make claims authority. Beyond this bare minimum, it appears that they share little. A legal philosopher may object that this formulation of law is too minimal to be useful for analytical purposes. It does not, for example, provide a basis to distinguish law from morality, which makes the same claims. If that is the goal at hand, a useful concept of law will have to be based upon a narrower grouping. (This can be accomplished, for example, by appending to the common elements a conventional labeling requirement: “law” involves rules that make claims to authority in the name of law.)

This bundle of issues was not addressed by Hart or Raz when making their initial designation. Operating on the contestable assumption that the concept of law must be built on a single paradigm of law, they picked state law alone without considering alternative possible formulations, including plausible sub-groupings. Since all else follows from the initial designation, this omission was a major flaw.

THE MISLEADING ANALYSES OF HART AND RAZ

The “album” example nicely illustrates another serious problem with the approach taken by Hart and Raz. It is perfectly legitimate to formulate the essential elements of a record album. But it would be absurd to apply the elements devised in this manner to render a judgment that “photo albums” or “stamp albums” are not “albums,” properly understood, because they do not play music.

Hart and Raz abstracted their defining elements of law from the state law paradigm. No problem in that (although there were other ways to proceed). Where they went wrong was in suggesting that these conceptions of law have application beyond state law. Hart did this explicitly; Raz was more subtle but essentially suggested the same.

Again Glanville Williams offered acute mid-century observations that bear on the issue. He was a jurisprudence scholar (holder of the Quain Chair of Jurisprudence at University College London, later Professor of Law at Cambridge) with a sophisticated grasp of philosophy. Like Habermas and Kantorowicz, his analysis of the concept of law was informed by the work of legal anthropologists and sociologists.

Williams concluded that “Austin’s insistence upon the test of enforcement was a perfectly sound point, so long as he was speaking of municipal law.”³⁹ His “major mistake” was to transform this into “a touchstone of the ‘validity’ of any and every application of the term ‘law’.”⁴⁰ Williams observed that this error is committed not just in arguments over whether international law is law, but also in arguments over whether “customary law” is law. Every form of law stands on its own. “By all means let us

³⁹ Williams, “International Law and the Controversy Concerning the Word ‘Law,’” supra 146.

⁴⁰ Id. 146-47.

examine the characteristics of early common law,” William opined, “and compare and contrast it with modern law. But let us not argue about the propriety of calling it ‘law’. If we dispute about the latter we shall not (whatever we think) be discussing the nature of law, but shall simply be arguing about each other’s peculiarities of expression.”⁴¹

Hart committed the error Williams warned against. Hart based his account of primary and secondary rules on state law. He certainly could, and did, draw illuminating conclusions about how primitive systems and international law compared in connection with primary and secondary rules. Hart could not, however, venture any position on the question “Is customary law truly ‘law’?” or “Is International law ‘law’ (properly understood)?” These questions are out of order because his criteria were taken exclusively from state and pertain to social institutions with those features alone. Nonetheless, Hart considered at length precisely those questions. He concluded that primitive systems lacking secondary rules are “pre-legal,” and he suggested that international law in many respects resembles pre-legal primitive systems, while acknowledging that it shares aspects with real “legal” systems as well.⁴²

Hart was wrong to say anything at all about whether they are “law.” As Williams argued, “The word ‘law’ has one meaning in relation to early customary law and a different meaning in relation to municipal law.”⁴³ The same is true of international law. Williams’s central point was that the perennial quest to identify the essence of nature of law can never be completed satisfactorily because the word law does not have a single proper meaning and is not attached to a single object or single social phenomenon. This point holds regardless of whether the analysis is couched in terms of the meaning of

⁴¹ Id. 151-52.

⁴² Hart, *The Concept of Law*, supra 91,226-31.

⁴³ Id. 142.

words (as Williams did) or in terms of conceptions of law attached to those words (as Hart and Raz did): either way, “law” is conventionally attached to several social phenomena.

Other mid-century legal philosophers had come to the same conclusion. Huntington Cairns published an immensely learned survey in 1949, *Legal Philosophy from Plato to Hegel*, which addressed the analysis of “the nature of law” or the “concept of law” by first rank philosophers spanning two millennia. Cairns observed: “What warrant have we for assuming that the term ‘law’ is *univocal* and that it has an *essence*? Although the question ‘What is law?’ is still asked by jurists, the history of the efforts to respond to it show that there is little likelihood that it can ever be answered in the sense intended by Socrates [searching for the essence of law].”⁴⁴

Raz acknowledges that there are several concepts of law. “Talk of *the* concept of law really means *our* concept of law...Different cultures have different concepts of law. There is no one concept of law, and when we refer to the concept of law we just mean our concept.”⁴⁵ These assertions about the sources of concepts of law are correct—except, as pointed out above, for Raz’s failure to seriously consider that more than one concept of law circulates in our culture.

Unfortunately, everything else Raz says about the concept of law, especially his manner of saying it, buries this correct point of departure. Here is a representative passage:

⁴⁴ Huntington Cairns, *Legal Philosophy from Plato to Hegel*, (Baltimore: John Hopkins Press 1949) 9 (emphasis added).

⁴⁵ Joseph Raz, “Can There Be a Theory of Law?,” *supra* 331.

We talk of the ‘nature of law,’ or the nature of anything else, to refer to those of the law’s characteristics which are of the essence of law, which make law into what it is. That is those properties without which the law would not be what it is....

Naturally, the essential properties of the law are universal characteristics of law. They are to be found in law wherever and whenever it exists. Moreover, these properties are universal properties of the law not accidentally, and not because of any prevailing economic or social circumstances, but because there is not law without them....When surveying the different forms of social organization in different societies throughout the ages we will find many which resemble the law in various ways. Yet if they lack the essential features of the law, they are not legal systems.⁴⁶

In the closing lines of this passage, Raz (like Hart) suggests that his conception of law can be applied to determine whether primitive societies have institutions that qualify as “law.”

Raz may protest that he makes it very clear that what he really means is that these earlier societies do not have “law” by *our* lights (according to our concept of law). But his phraseology unconditionally sweeps beyond this at every repetition—“essential properties of law”, “nature of law,” “universal,” “not ‘law’ without them.” His caveat that these assertions involve only the application of “our” concept of law drops from view. It appears as if Raz is trying to have it both ways—acknowledging (because he must) that his concept of law is historically and culturally contingent, while using his concept to issue broad, unreserved claims about law.

Indeed, this subtle terminological substitution—replacing “state law model” with “law” in every assertion—conceals what amounts to an empty tautology. Raz asserts that if a society lacks institutions with the essential properties of the concept of law, then “law” will not exist in that society. This assertion appears to be saying something

⁴⁶ Id. 328.

profound. Translating his terms back to their original import, however, shows that Raz has merely repeated himself: A society lacking institutions that have the essential elements of state law (his model for law), will lack institutions that have the elements of state law (“law”). Or more explicitly, his point is: “Societies that do not have state law, do not have state law.” The above passages sound momentous precisely because they appear to be telling us about “law” (as such), but they do not—they are merely repeating what is entailed by his adoption of the state law model then using this model to examine other contexts.

Legal philosophy aspires to conceptual clarity. This demands that accurate characterizations be utilized in the analysis. The correct terminology here is easy to apply and understand: Hart and Raz have constructed *concepts of state law*, identified the *nature of state law*, or extracted the *elements characteristic of state law*. Equally important, this more precisely terminology would signal that it is impermissible to use a concept based upon state law to render judgments about whether other social arrangements qualify as “law” (just as it makes no sense to use the elements of record albums to determine whether stamp albums are “albums”). The most that can be said is that those other systems *lack the characteristics essential to state law*.

These more precise ways of framing the issues will make it clear that Hart and Raz, and theorists who share their approach, are not discussing law as such (which does not exist), but rather a narrower category derived from state law alone. This reminder is essential because one of the major advances of legal philosophy has been the recognition that there is more than one concept of law. Their singular, universalistic mode of characterizing and discussing the concept of law obscures this advance.

MULTIPLE VERSIONS OF LAW

Social scientists debated the concept of law throughout the 20th century, especially during the first and last quarters.⁴⁷ A wide mix of interests and concerns fueled the debate. Early anthropologists studied societies that lacked state legal systems. Because law was widely considered a mark of a civilized society, analysts who wished to persuade others that these societies were “civilized” felt compelled to demonstrate that they had legal orders (though in a different form than state law), which made it necessary to come up with a concept of law that fit those societies. Moreover, many colonial and post colonial legal systems accorded legal status to indigenous “customary law.” This made it necessary to come up with some way to identify which customary norms or institutions qualified for legal status. Anthropologists studying these societies observed, furthermore, that in many social arenas the state legal system had little power; the fact that non-state social institutions maintained social order in these situations implied that they qualified as “law,” at least in a functional sense.

Sociologists interested in identifying the sources of social order came at the issue *What is law?* in a number of ways linked to functional analysis. Questions revolved around whether law could be characterized in terms of its function (dispute resolution, enforcement of norms, coordination of social behavior), or a combination of form and function (governmental social control, institutionalized enforcement of norms). These inquiries in turn generated secondary questions. Societies are filled with a multitude of institutions that enforce norms, resolve dispute, and coordinate behavior. Thus it became

⁴⁷ See Brian Z. Tamanaha, “An Analytical Map of Social Scientific Approaches to the Concept of Law,” 15 *Oxford J.L. Stud.* 501 (1997).

urgent to locate criteria that could distinguish which among these functionally equivalent institutions are specifically “legal.”

Disciplinary concerns also played a role. The desire of academics to establish and delimit the emergent fields of “legal sociology” and “legal anthropology” prompted questions about what counts as “legal” for the purposes of their sub-discipline.⁴⁸

It should come as no surprise that social scientists could not resolve these various debates over the nature of law. Theorists adopted inconsistent initial paradigms of law, and they approached the task with different interests, concerns, and purposes.⁴⁹

Moreover, over time it increasingly became evident to those involved (as legal philosophers too realized) that there can be no single concept of law.⁵⁰ The quest to formulate a single concept of law or definition of law was misconceived. A variety of phenomena with different characteristics are considered “law.” These instantiations of law serve different and often multiple functions; other social institutions, it turns out, also often serve the same functions. Accordingly, neither conceptual analysis nor functional analysis can produce a single concept of law that is demonstrably superior (for all purposes) to other possible formulations.

In lieu of formulating a single concept of law, therefore, it seems sensible to examine each such phenomenon on its terms to identify its core characteristics. This was the alternative approach alluded to earlier—not using a single version of law, nor a combination of versions to devise a concept of law, but instead conducting conceptual

⁴⁸ See generally Brian Z. Tamanaha, “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism,” 20 *J. L. & Soc.* 192 (1993).

⁴⁹ For an explanation of why the debates could not be resolved, see Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, supra; Tamanaha, “Law,” supra.

⁵⁰ A more detailed case for this is set for in Brian Z. Tamanaha, “A Non-Essentialist Concept of Legal Pluralism,” 27 *J. L. & Soc.* 297 (2000).

analyses of separate manifestations of law that stand on their own (which can then be compared with one another on various aspects). Malinowski and Ehrlich haltingly began versions of this project but met with withering resistance thrown up by the prevailing unitary understanding of law.

Now there are pressing reasons to renew conceptual analysis on multiple versions of law. The earlier discussion of the social-political influences on debates over the concept of law is directly relevant to the current situation. In the late nineteenth century debates about the nature of law revolved around “unwritten law” and the role of judges in a legal system increasingly dominated by legislation. In mid-century these debates were occupied with Nazi and Communist law, and the status of international law. At the outset of the twenty-first century, the debate over the concept of law has erupted again in what is known as the study of legal pluralism. Scholars across several fields are attempting to come to grips with a seeming proliferation of legal forms on local and global levels, the apparent devolution of legal powers away from the state, and the rise of competing forms of law within society.⁵¹ It has proven impossible to analyze legal pluralism without some way to identify *what law is* because many of the phenomena implicated have fuzzy legal status—in some respects they appear to be “law” while in other respects not.

A great irony about contemporary legal philosophy goes generally unrecognized, although it is ripe for exposure. Legal positivism is a theory of law constructed around state law. This legal theory came to dominate legal philosophy in the late twentieth century when the monopoly power of state law had reached its apotheosis (though short of completion), just as its decline began.

⁵¹ For an overview, see Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global,” 30 *Sydney L. Rev.* 375 (2008).

To support this assertion—which might well strike legal philosophers as fanciful—it is useful to reiterate the vision of law conventionally espoused within legal philosophy. Raz is representative. He asserts that “we would regard an institutionalized system as a legal one only if it is necessarily in some respect the most important institutionalized system which can exist in that society.”⁵² He then identifies three features which characterize legal systems: 1) they are comprehensive in that “they claim authority to regulate any type of behavior”; 2) legal systems claim supremacy over all other institutionalized normative systems in society; and 3) legal systems “maintain and support other forms of social grouping.”⁵³ Based upon these feature, Raz asserts, the “law provides the general framework with which social life takes place.”⁵⁴ This an apt depiction of the unitary, state-centered vision of law exercising a monopoly as institutionalized guarantor of normative order within society.

Modern circumstances, however, have rendered this vision quaint. A glaring counter-example was already present when Raz penned it. The law and legal institutions of the European Union are neither fully domestic law nor international law, while bearing qualities of both. The cohabitation of member state law and EU law raises doubts about Raz’s insistence that law claims comprehensiveness and supremacy. Which of these systems is “the most important” in society?

Other troubles dog the standard vision. A number of European countries, including the United Kingdom, face hard questions about the status of Islamic law. Many of their citizens and residents view Sharia as binding, even above state law, and follow its dictates on matters inconsistent with state law (polygamy, divorce, treatment of women,

⁵² Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford Univ. Press 1979) 116.

⁵³ *Id.* 116-20.

⁵⁴ *Id.* 121.

blasphemy versus free speech, to name the most pressing conflicts that have emerged). In these situations, neither state law nor religious law appear to be comprehensive, monopolistic, or unequivocally supreme (certainly not in the eyes of adherents). For believers, which constitute a sizable subsection of the population, it is not clear that either state law or Sharia provide “a general framework” for social life. And what say legal philosophers about whether Sharia is “law.”

Another counter-development is the apparent shift of a variety of stereotypically legal activities into non-state hands. Private security forces have taken over policing in gated communities, public neighborhoods, universities, corporate facilities and malls, public recreation facilities, and more; a substantial proportion of disputes are handled by arbitrators instead of state courts; many prisons are run by private corporations. The increasing reliance upon these private bodies—in the U.S. more cases are dealt with through private arbitration than by courts, and money spent on private security exceeds the amount expended on public policing—to handle classic legal activities is an undeniable loosening of the monopoly power of state law. Are these actions and institutions “law”? If not, why not? The participants engage in directly law-related activities, they perform legal functions, and the institutions they work in are almost indistinguishable from state legal institutions. (Not coincidentally, the arbitrators are often retired judges and private security personnel are often retired or moonlighting police.)

At the transnational level, moreover, various legal regimes are thriving without strong ties to any particular state legal system or international law. To offer just one example, a body of transnational commercial law called the new *legal mercatoria* has

developed through the efforts of lawyers and parties. Disputes that arise are resolved almost entire through private arbitration. There is no law-declaring sovereign; Hartian secondary rules are mostly absent; institutionalized coercion is lacking. But it nonetheless has law-like qualities, with standard legalistic norms and arrangements that are treated as binding by the parties. Is the *lex mercatoria* law?

As should be evident, these developments bear in multiple ways on issues surrounding the concept of law. Legal scholars and social scientists have struggled with these issues. Legal philosophers a well positioned to make a contribution to the discussion; they may in turn gain insights about the concept of law from the discussion.

Thus far, however, legal philosophers have said almost nothing on any of this.

What is the nature of law? Legal philosophers inform us that two great rival traditions have debated this classic question, legal positivism and natural law theory...