PROBLEMA
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DESCRIPTIVE JURISPRUDENCE

Pavlos ELEFTHERIADIS*

Resumen:

Hart sostuvo que la jurisprudencia analítica es descriptiva y general pero no elaboró una distinción explícita entre las preguntas conceptuales que son principalmente teóricas y otras que son principalmente prácticas. En la explicación de Hart, la jurisprudencia analítica busca cierto tipo de claridad acerca de la noción de derecho y las demás ideas básicas tal cual ellas ocurren en nuestra experiencia ordinaria. En el *Post Scriptum*, él explica que la jurisprudencia es el 'estudio teórico o científico del derecho como un fenómeno social', el cual puede, en ocasiones, basarse en la deliberación moral, pero típicamente no lo hace. Esto puede contrastarse con las preguntas "prácticas" acerca de como las personas dirigen su propia vida. Llamo esta tesis "descriptivismo". Esta ha sido una posición muy influyente en la jurisprudencia analítica y ha sido defendida por los seguidores de Hart hasta hoy. En este ensayo despierto dudas sobre su coherencia. Primero, no creo que Hart defendiera esta tesis de forma consistente. Segundo, no creo que la posición haya sido defendida de forma adecuada, ni por Hart ni por sus seguidores. Aún existe una gran ambigüedad acerca de la posición exacta de la jurisprudencia entre la razón teórica y la razón práctica.

Palabras clave:

H. L. A. Hart, jurisprudencia analítica, jurisprudencia descriptiva, razón teórica, razón práctica.

* Fellow in Law, Mansfield College, Oxford.

PAVLOS ELEFTHERIADIS

Abstract:

Hart said that analytical jurisprudence is descriptive and general but did not draw an explicit distinction between conceptual questions that are in the main theoretical and others that are in the main practical. In Hart's account, analytical jurisprudence searches for some kind of clarity about the idea of law and the other basic legal ideas as they occur in our ordinary experience. In the Postscript *he explains that jurisprudence is the 'theoretical or scientific study of law as a social phenomenon', which may, on occasion, but typically does not, rely on moral deliberation. It is to be contrasted to 'practical' questions as to how to live one's life. I shall call this view 'descriptivism'. It has been a very influential position in analytical jurisprudence and it is being defended by Hart's followers even today. In this essay I raise some doubts about its coherence. First, I do not think Hart defended this view consistently —even though he did so in the* Postscript. *Second, I do not think that the position has been adequately defended, either by Hart or by his followers. There is still a great deal of ambiguity as to the precise position of jurisprudence between theoretical and practical reason.*

Keywords:

H. L. A. Hart, Analytical Jurisprudence, Descriptive Jurisprudence, Theoretical Reason, Practical Reason.

DESCRIPTIVE JURISPRUDENCE

SUMMARY: I. *Generalisations.* II. *Semantic Recovery.* III. *Inductive Inference.* IV. *Conclusion.*

Hart said that analytical jurisprudence is descriptive and general.[1] It is descriptive 'in that it is morally neutral and has no justificatory aims'.[2] It is general in the sense that its conclusions are not specific to any particular legal system or legal culture, but aim to give 'an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in this sense "normative") aspect'.[3] Hart does not draw an explicit distinction between conceptual questions that are in the main theoretical and others that are in the main practical. But he unequivocally rejects the view that analytical jurisprudence deals with practical questions. In his account, analytical jurisprudence searches for some kind of clarity about the idea of law and the other basic legal ideas as they occur in our ordinary experience. In the 'Postscript' he explains that jurisprudence is the 'theoretical or scientific study of law as a social phenomenon', which may, on occasion, but typically does not, rely on moral deliberation.[4] It is a theoretical subject, part of theoretical as opposed to practical reason. Hart's theory is therefore interested in improving our view of the world as it is and not saying how it should be. I shall call this view 'descriptivism'. Hart's contemporary followers take these views to lay the ground for their analytical pursuits. In this essay I wish to challenge this view. First, I do not think Hart defended this view consistently —even though he did so in the 'Postscript'. Second, I do not think that the position has been adequately defended, either by Hart or by his followers. There is still a great deal of ambi-

[1] H. L. A. Hart, *The Concept of Law,* second edition (Oxford: Oxford University Press, 1994) 239-40 (henceforth *CL*). For a forthright and clear defence of this view see Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' 26 *Oxford Journal of Legal Studies* (2006) 683.

[2] *CL*, 240.

[3] *CL*, 239.

[4] *CL*, 209.

guity as to the precise position of jurisprudence between theoretical and practical reason.

I. Generalisations

Jurisprudence for Hart is descriptive but not interested in knowing everything about the law. It is interested in suitable generalisations and general connections between its various parts. Hart says that we should give a 'an explanatory and clarifying account of law', rising above trivial specifics. Jurisprudence aims at a deep and illuminating understanding of general truths about the law. Here is a preliminary account of general jurisprudence that remains faithful to the descriptive ambition, which I shall call (DJ):

> (DJ) Analytical jurisprudence is the systematic and rational inquiry aiming at true theoretical generalisations (*explanans*) about the institutions and practices of law (*explanandum*), arrived at through the accurate collection of relevant material facts.[5]

Approaches to law will differ both according to the type of explanation they offer (*explanans*) and in the subject matter they take to be exploring (*explanandum*). The sociology of law, for example, is interested in law as a social phenomenon in its most directly empirical sense. Its subject matter, its *explanandum*, is the whole range of conduct, beliefs and intentions of persons who are implicated in legal practices. The relevant generalisations of the sociologist concern the regularity and other connections between distinct events and actions, beliefs and intentions of persons. The main aim is to establish causal links in terms of general laws or their equivalent. This is because the typical explanation in social science, as in all scientific explanation, is the causal

[5] I borrow the terminology of 'explanans – explanandum' from Carl G. Hempel, 'Studies in the Logic of Explanation' in his *Aspects of Scientific Explanation and Other Essays in the Philosophy of Science* (New York: The Free Press, 1965) 245-295. I intend to use this terminology as a neutral device, without intending to endorse or reject any of Hempel's views on the philosophy of science.

connection. This is the case even if the causal link rests on an implicit theory of deeper motivating reasons or dispositional traits. We may observe, for example, that as a rule when interest rates go up, inflation goes down and may then adjust fiscal policy accordingly. It is obvious that jurisprudence, unlike economics and sociology, is not interested in causal connections of this kind. The most cursory glance at the history and the continuing practice of legal philosophy shows that it is a narrower project. It has a distinct subject-matter or *explanandum*.

Unlike social science, jurisprudence is not concerned with the necessary and sufficient conditions of a prediction that X and Y will act in certain ways. Jurisprudential theories of law and rights are concerned with legal practices and legal doctrine. They are interested in the correct formation of propositions of law. This is the sense in which, for example, Hart tells us that the idea of 'validity' contributes to jurisprudence. Validity tells us what is a rule of the system in the sense of an internal rule that constitutes a ground for compliance with its contents: 'For the word "valid" is most frequently, though not always, used, in just such internal statements, applying to a particular rule of a legal system, an unstated but accepted rule of recognition'.[6]

Within such a framework jurisprudence seeks to understand propositions of law in more or less systematic ways. Hart for example concludes that '[w]herever a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation'.[7] Sociologically informed theories of doctrinal law are of course possible, but they are not exactly part of sociology. Such theories seek to explain law with the help of generalisations concerning events, actions, beliefs and intentions. They may find the criteria for the truth of the propositions of law in some kind of pattern of conduct or belief. Austin, for example, finds that in the idea of com-

[6] *CL*, 103.

[7] *CL*, 100.

mands of the Sovereign. But such theories do not offer explanations of conduct or belief by, say, pairing the existence of commands by the Sovereign with any kind of conduct or belief. Austin's theory addresses the traditional questions of jurisprudence, namely how to distinguish law form morals and how to account for the idea of a legal system. As is well known, Austin argued that what makes legal propositions true is a certain pattern of behaviour, consisting in the existence of a sovereign, a habit of obedience and the threat of sanctions and he used empirical observations in order to explain legal doctrine and reasoning. But the link was not causal. It was conceptual. The facts of power operated as necessary and sufficient criteria for the existence of law and a legal system of law. They are not offered as causes. They are criteria for the correct application of the term 'law'. Analytical jurisprudence is therefore about propositions of law, not the conduct or beliefs or dispositions such propositions may bring about.

Descriptivism says that the correct application of such terms depends on criteria that can be successfully described. The appropriate subject matter of legal theory is not, therefore, every fact of current law but the inferences we make about propositions of law on the basis of criteria. The *explanandum* of jurisprudence, what stands to be explained by the best theory, is the fact that such inferences are regularly and effortlessly made and applied by courts and officials in the ordinary course of life. We conclude that the aim of all ambitious theories of jurisprudence is the generalisations that explain how propositions of law are possible.

We can imagine three stages of this process. A descriptive theory should first provisionally fix the domain of relevant propositions of law, at least approximately. It should then propose, at a second stage, a set of principles that explain how legal propositions work within such a domain. It must finally, at a third stage, have the principles tested against our observations. We fix the domain, propose principles

and then test these principles against the facts of the domain.

When descriptivism is put in this way it invites the thought that it is actually paradoxical. We just said that we need to test and improve all our explanations against observation. But a complete description may be self-defeating. Let us say we wish to have a more careful description of our subject-matter, the successful articulation of propositions of law. We fix our domain somehow and then proceed with the *explanans* of the domain. We may select an *explanans* that includes more detail (e.g. that legal offices are held by employees of the state) but narrows down the domain somewhat. We exclude jurisdictions, say, where legal offices are held by private individuals, not state officials. They are not relevant to the inquiry. We narrow our domain in order to offer a more complete analysis. But there is no way of limiting this process. Under the descriptivist framework, it seems that any added detail will be an improvement, even if it covers a narrower domain. More accuracy is better than less. We are always moved to adopt an explanatory generalisation that is closer to the facts. Inconsistencies will suggest that we must adopt a somewhat narrower scope. But once we do so, we have undermined our theory's generality. If adding any one more true feature of the analysandum, is an improvement to our theory, then generality is bound to disappear. Any explanation we offer will succumb to a more detailed version of it. All possible features, properties and stories of the analysandum will eventually become potentially relevant. The fact that the police wear uniforms becomes relevant. The fact that judges may or may not wear wigs become relevant. And so on ad infinitum. If accuracy is our ideal, we are led to a meaningless compilation, a hopeless muddle.[8] The supposed accuracy of a theory turns into a paradox.

[8] It would be perhaps something approaching the perfect map in Borges' story, where the cartographers of an imaginary Empire draw up a map so detailed that it ends up covering exactly the territory. See Jorge Luis Borges, *Collected Fictions,*

It must be evident that descriptivism does not require this. But how does it stop it? There ought to be two corrections. First, we cannot make the domain too narrow. If we are offering a theory of law in general, we cannot limit our observation to law in Britain or in France or in public international law. All relevant domains are to be included. We cannot limit our observation to private law or to criminal law. All areas are included. But the way we do that requires a theory of the scope of our theory. Second, we do not seek perfect, one to one accuracy. Our explanations are not aimed to be perfectly informative. We say then that we seek generalisations over a given domain. Both such aims go beyond accuracy and invite the consideration of other factors. We must replace accuracy with a more complex set of standards.

One such idea available to Hart at the time is that of conceptual 'explication'. Quine described it as follows:

> We have, to begin with, an expression or form of expression that is somehow troublesome. It behaves partly like a term but not enough so, or it is vague in ways that bother us, or it puts kinks in a theory or encourages one or another confusion. But also it serves certain purposes that are not to be abandoned. Then we find a way of accomplishing those same purposes through other channels, using other and less troublesome forms of expression. The old perplexities are resolved.[9]

translated by Andrew Hurley, (London: Penguin 1999). An earlier suggestion of the 1:1 map was made by Lewis Carroll's *Sylvie and Bruno* (London: Macmillan, 1893) vol. 2, p 169, in the section "The Man in the Moon":

"What do you consider the largest map that would be really useful?"

"About six inches to the mile."

"Only six inches!" exclaimed Mein Herr. "We very soon got six yards to the mile. Then we tried a hundred yards to the mile. And then came the grandest idea of all! We actually made a map of the country, on the scale of a mile to the mile!"

"Have you used it much?" I enquired.

"It has never been spread out, yet," said Mein Herr: "the farmers objected: they said it would cover the whole country, and shut out the sunlight! So now we use the country itself, as its own map, and I assure you it does nearly as well."

[9] W. V. O. Quine, *Word and Object* (Cambridge, Mass.: The M.I.T. Press, 1960) 260.

The explanation we require is not a synonym or a paraphrase of the troublesome expression but an 'elimination', Quine says, of the puzzles it causes.[10] In this sense, analysis is not paradoxical. It is not meant to reproduce every aspect of our beliefs and practices, confusions, inconsistencies and all. Accuracy is not our guiding ideal. We seek to create consensus, where there appears none at first sight.[11] Generality is thus more important and accuracy is built around it. This account of analysis suggests why we are not allowed to tinker with the existing domain for the sake of accuracy. We are not to limit it for the sake of convenience, in order to discover a theory that fits. The task is harder. We are offering an analysis of this domain, not another. So at the second stage, the stage of the articulation of explanations, a successful theory of law will provide explanations of inferences the conscious application of which will produce, for the relevant domain, approximately the same propositions of law that we have as a matter of observable fact, other things being equal. The consistency of such conclusions with the conclusions reached by active legal practitioners is the confirmation that the descriptive explanation is correct. Our observations must confirm the theory. If they do, we have offered an explication of the troublesome term. Explication is meant to achieve this fit without perfect accuracy.

Hart's theory of law provides perhaps a good example of an analytical explication of this type. As is well known, Hart's theory set out to answer three questions of law and legal reasoning, namely 'how does law differ from … orders backed by threats', 'how does legal obligation differ from … moral obligation' and 'what are rules and to what extent is

[10] *Word and Object*, 260.

[11] Quine writes (*Word and Object*, 272) that 'the strategy of semantic ascent is that it carries the discussion into a domain where both parties are better agreed on the objects (viz., words) and on the main terms concerning them.… The strategy is one of ascending to a common part of two fundamentally disparate conceptual schemes, the better to discuss the disparate foundations'.

law an affair of rules'.[12] In order to provide an answer Hart's theory rejected the argument for the command theory of law. The explanations it offers are not a reduction of propositions of law to the facts of power, obedience, sovereignty etc. Instead, we are presented with the argument that the rule of recognition and the internal point of view help us outline both the truth conditions for propositions of law and the conditions for the existence of a legal system. Hart's theory replaces the 'salient features' of law that any educated man would be able to identify at least 'in some skeleton way', with an explicit account of law on the basis of the idea of a social rule, the rule of recognition and the internal point of view.[13] These are the abstract generalisations that explain law. When we apply them to our domain, we see that they match more or less the inferences made by ordinary lawyers in the practice of their trade. They track the already known instances of propositions of law, but without the confusion and uncertainty. Unlike Kelsen, our assertion of the truth of the propositions of law is not just 'hypothetical' but is based on the social facts of a given legal order. Such facts are the background to the correct theory of the union of primary and secondary rules under a rule of recognition. This is the sense in which Hart says that the rule of recognition helps us assert the truth of propositions of law here and now. The theory and the associated ideas of 'rule of recognition', 'validity' and 'internal point of view' are offered as less troublesome expressions, as both an explanation and a correction to our practices of law. Hart's theory offers thus a general explanation for the inferences of legal practitioners and scholars.

It must be clear, therefore, that descriptive jurisprudence is concerned with the facts of experience but is more complex than the description of actions and intentions, the

[12] *CL*, 13.
[13] *CL*, 3.

subject matter perhaps of a descriptive sociology.[14] But here we run into problems. The idea of explication does not allow us to assume that a successful generalisation over a given domain is always possible. Quine says that we use the explication to achieve our 'purposes through other channels'. Our traditions and practices may be so varied and conflicting that such no single theory may be able to capture them all. If so, we may have to say that there cannot be a general explication of this domain. If the relevant practices are too confused, no amount of general theory will be able to account for them all. This may well be the case for law, where theories and theorists have been divided for a very long time.[15] Hart himself recognises that the domain of law is full of obscurities and disagreements. There are different theories of law and different theories of rights and other important legal concepts. Such disagreements do not concern only borderline cases but also the very foundations of the terms they seem to explain. Such conflicts and inconsistencies give rise to the 'persistent questions' of jurisprudence' that occupy Hart at the start of his argument.[16] How does Hart overcome the pluralism of the theories and functions of law? There are reasons to be cautious about the prospects of general explanations, even if accuracy is not the only value.

II. Semantic Recovery

Some theorists draw a distinction between the beliefs, attitudes and dispositions about law that people may have and the meaning of law independent of such beliefs. They

[14] *CL*, v. Hart writes as follows: 'Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meaning of words merely throw lights on words is false'.

[15] For a similar line of thought see Stephen R. Perry, 'Hart's Methodological Positivism' in Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001) 311, at 328: 'Because a primary goal of description is presumably accuracy, one would have thought that the external observer should simply describe what is there, confusions obscurities and all'.

[16] *CL*, 13-17.

argue that our explanatory generalisations should be tested against the meaning, not against the beliefs. The argument proceeds through a semantic argument about the term 'law' and its cognates: it offers a correct explication of the meaning of law, not of the beliefs or psychological states of any persons. If the argument works, the correct explanatory generalisations about law may disregard dissenting beliefs, however widespread. So the beliefs of the legal realist or the natural lawyer may not be troublesome. They are conceptual errors.

A semantic explication of this kind may defend a theory of law as follows. First, we say that the limits of the relevant domain are the limits set by the relevant language. Second, we articulate appropriate explanatory principles that we imagine may coincide with the underlying semantic standards for the application of 'law'. We then test the theory against our observations of current linguistic practice. The required generalisations emerge thus inductively. They are revealed little by little, in the process of uncovering underlying meanings from each instance of proper application. There is good textual evidence that this is what Hart had in mind as general and descriptive jurisprudence.[17] He said that by looking into the meaning of concepts 'we are looking not merely at words … but also at the realities we use words to talk about. We are using a sharpened awareness of words to sharpen our perception of the phenomena'.[18] The belief that there is a link between semantic questions and appropriate jurisprudential explanations is also appar-

[17] In addition to *The Concept of Law*, see also Hart, 'Definition and Theory in Jurisprudence' in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 21. For these issues see generally Nicos Stavropoulos, 'Hart's Semantics' in Coleman (ed.), *Hart's Postscript* 59 and Timothy A. O. Endicott, 'Law and Language' in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002) 935.

[18] *CL*, 14. The quotation is from J. L. Austin's 'A Plea for Excuses'. For Hart's endorsement of the ordinary language school of philosophy see Hart, 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence' in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 265, at 274-277.

ent in Hart's pursuit of the meaning of expressions such as 'command', 'obedience', 'being obliged', 'having an obligation' and 'a legal system' in the course of the argument on the concept of law. In the preface to his *Essays in Jurisprudence and Philosophy* Hart described how the linguistic philosophy pursued by J. L. Austin in the 1950s and 1960s appeared to him to be in a position to resolve age-old philosophical confusions. It achieved this by pointing out that 'longstanding philosophical perplexities could often be resolved not by the deployment of some general theory but by sensitive piecemeal discrimination and characterization of the different ways, some reflecting different forms of human life, in which human language is used'.[19]

It would be instructive to compare Hart's suggestions with Austin's own. J. L. Austin believed that the analysis of ordinary language could yield significant results in many types of philosophical inquiry, including political and legal philosophy. In his well-known statement on philosophical method Austin employed an example from the law ('excuses') and defended the analysis of ordinary language on the following grounds:

> First, words are our tools, and, as a minimum, we should use clean tools: we should know what we mean and what we do not, and we should know what we mean and what we do not, and we must forearm ourselves against the traps that language sets us. Secondly, words are not (except in their own little corner) facts or things: we need therefore to prise them off the world, to hold them apart from and against it, so that we can realize their inadequacies and arbitrariness, and can relook at the world without blinkers. Thirdly, and more hopefully, our common stock of words embodies all the distinctions men have found worth marking, in the lifetimes of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any that

[19] Hart, *Essays in Jurisprudence* 2.

> you or I are likely to think up in our arm-chairs of an afternoon —the most favoured alternative method.[20]

The mundane way people apply concepts in ordinary contexts already includes philosophically interesting distinctions, for it embodies the judgment 'of many generations'. Austin concludes that when 'we examine what we should say when, what words we should use in what situations, we are looking again not merely at words (or "meanings", whatever they may be) but also at the realities we use the words to talk about'.[21] When we succeed in linguistic analysis, we do not just produce a better dictionary. We also produce a better philosophy. The argument is that linguistic usage already embodies explanatory generalisations. Analysis just recovers them from unthinking obscurity.

Austin's example above gives us an indication of how the method would work. We are to examine the applications of the word 'law'. We are interested in ordinary use. The hope is that the relevant usage might be clear and uncontroversial. But it is not in every case. For example, we speak of the laws of physics and the laws of probability. It is clear that such usage of the word 'law' lies outside our relevant domain. Austin's method explains that we are not interested in the word 'law' in all its manifestations but in the meaning of law in the sense of a tool that helps us understand this social institution. The contextual understanding of words helps us locate the appropriate domain and avoid the confusion caused by homonyms or unrelated senses of the same word.[22] Another advantage of the linguistic method is that we have a way of explaining the derivation of explanatory principles. When we presented the general am-

[20] Austin, 'A Plea for Excuses' in Austin, *Philosophical Papers*, edited by J. O. Urmson and G. J. Warnock, third edition (Oxford: Clarendon Press, 1979) 181-2.

[21] Austin, *Philosophical Papers* 182.

[22] Such was the argument for linguistic analysis offered by Hart in 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence* 21. Hart says (p. 21) that 'I wish to suggest... that legal notions however fundamental can be elucidated by methods properly adapted to their special character'.

bition of legal theory we noticed that there is a gap between the various particular data and the making of generalisations. With semantic analysis the gap disappears. Our data collect usages of the relevant term that already imply the generalisation. We do not derive it, we recover it. We are not examining the beliefs of participants, for it is evident that these beliefs clash, for example in the various debates between legal positivism, legal realism and natural law, or the disagreement between the will and the interest theory of rights. Underneath such disagreements we locate the already formed generalisations immanent in language. By unearthing them, and not making them up, we stay within the limits of a theoretical, descriptive jurisprudence. Semantic recovery vindicates descriptivism precisely because it is direct and transparent.

Stavropoulos' study of Hart's use of the philosophy of language has thrown much light on Hart's methodological views. Stavropoulos confirms that there is a semantic programme of recovery at work in Hart's work and shows that Hart's ambition was to capture not the actual beliefs of speakers but the 'folk theory' of their practices. Stavropoulos concludes as follows:

> Hart's method implies, first, that conceptual analysis is a mode of inquiry that is distinct from and logically prior to substantive theory; and, second, that conceptual analysis aims at recovering some, perhaps idealized, common understandings, in the sense that it articulates but can never transcend the understanding already implicit in ordinary use and reflection. The second claim implies that the intuitions elicited by conceptual analysis reflect the ordinary, conventional understandings of the target concept.[23]

If this analysis is correct, we can find an argument for semantic recovery in Hart's work. According to this argument, the explanatory generalisations we need, the explications that jurisprudence produces, are in some way already im-

[23] Nicos Stavropoulos, 'Hart's Semantics' in Coleman (ed.), *Hart's Postscript,* 59-71.

plicit in current linguistic usage. Our philosophical explanation just unearths them.

Are there shared semantic criteria about law? Ronald Dworkin has argued for many years against this view. For Dworkin, the idea of doctrinal law is an interpretive concept and subject to interpretation. If there are any semantic criteria, these may concern the sociological concept of law at most. Any such criteria fail to resolve the disputes that legal positivists, legal realists and natural lawyers have about the doctrinal sense of law.[24] But the general argument for semantic criteria has also been attacked in its entirety, as a flawed epistemological programme. According to the critics, no philosophical conclusions can be based on linguistic convention at all. For Quine, we do not 'claim to make clear and explicit what the users of the unclear expression had unconsciously in mind all along' and 'we do not expose hidden meanings, as the words 'analysis' and 'explication' would suggest'.[25] Instead, Quine says, 'we fix on the particular functions of the unclear expression that make it worth troubling about, and then devise a substitute, clear and couched in terms to our liking, that fills those functions'.[26] Quine's argument was meant to apply to logic, mathematics and natural science, but it works equally well on social theory. There is no reason to believe that linguistic conventions resolve our questions about the nature and character of any social institution. Explication is more creative than

[24] Ronald Dworkin, *Law's Empire* (Cambridge, Mass., Harvard University Press, 1986) 6-44, Ronald Dworkin, *Justice in Robes* (Cambridge, Mass., Harvard University Press, 2006) 223-240.

[25] *Quine, Word and Object* 258.

[26] Quine, *Word and Ojbect* 258-9. Quine notes that 'the notion that analysis must consist somehow in the uncovering of hidden meanings underlies also the recent tendency of some of the Oxford philosophers to take as their business an examination of the subtle irregularities of ordinary language' (p. 259). But he deplores this narrowness and writes: 'It is ironical that those philosophers most influenced by Wittgenstein are largely the ones who most deplore the explications just now enumerated. In steadfast laymanship they deplore them as departures from ordinary usage, failing to appreciate that it is precisely by showing how to circumvent the problematic parts of ordinary usage that we show the problems to be purely verbal' (p. 261).

this picture allows, says Quine. We look for substitutes that are 'clear' and 'to our liking'.

Let us assume that there are regularities in ordinary usage, such that we can easily and without controversy formulate general rules and principles for the correct use of propositions of law. This is a highly unrealistic assumption, which ignores the long traditional divisions between legal scholars and legal practitioners (and their divisions into legal positivists, legal realists and natural lawyers). Nevertheless, let us assume that these disputes have now died out and that the agreed principles on which competent speakers ground their propositions of law are easily and uncontroversially demonstrated by semantic analysis. What would be the autthority of such principles? The semantic argument assumes that agreement would carry with it some deep philosophical significance. But is this not a surprising leap of faith? It suggests a curious foundationalism: the truths of philosophy are *determined* by the fact of agreement in usage. But it may well be the case that the users are all similarly mistaken. Consider the potential agreement of a linguistic community over a word equivalent to 'miracle'. Under the sway of religious fervour, the word miracle may indeed mean for the users of this language the actual performance of actions that have defied the laws of physics. But this fact does not change anything in the way physics should be understood. Its philosophers and physicists should continue to challenge the plausibility of miracles, on the basis of the experimental methods at their disposal. This modestly suggests that language is always secondary to reality. J. L. Austin admits this much when he says that 'certainly, ordinary language has no claim to be the last word, if there is such a thing' and that 'in principle, it can everywhere be supplemented and improved upon and superseded'.[27] But then why should the philosophy of society or the philosophy of the natural world recover shared meanings?

[27] Austin, *Philosophical Papers* 185.

This applies not just for agreed criteria but also to the case of model 'examples', that allow for some degree of flexibility over interpretation. In *Words and Things* Ernst Gellner made precisely this point with particular clarity.[28] Gellner noticed that the argument from 'paradigm cases' was also question-begging. When we identify the standard or paradigm case of the use of a word we have only done just that. We do not assert that this use has any wider significance. If we did, we would be begging the question in the following way:

> The Argument from Paradigm Cases does not even say that a word is always rightly used, but merely that it is rightly used in the Paradigm Case of its employment: and surely we should be prepared to grant this. Indeed, it is a contradiction to deny it. Words mean what a given language, its rules and custom say they mean, neither more nor less.[29]

For Gellner the fallacy is to treat a *de facto* rule of language as a valid philosophical conclusion.[30] Gellner writes that the 'fact that there are standard cases for the application of the term such as 'miracle' in a given society in no way proves that such terms have a *legitimate* use'.[31] There is no doubt that ordinary speakers use these terms. But this does not mean that they have an empirical application, or that they help explain any area of reality adequately. Philosophical questions are, therefore, about the 'valid use'

[28] Ernst Gellner, *Words and Things*: *an Examination of, and an attack on, Linguistic Philosophy*, revised ed. (London: Routledge and Kegan Paul, 1979). The work was first published as *Words and things: a Critical Account of Linguistic Philosophy and a Study of Ideology* (London: Gollancz, 1959). All references are to the revised second edition.

[29] Gellner, *Words and Things,* 55-56. See also J. W. N. Watkins, 'Farewell to the Paradigm-Case Argument' 18 *Analysis* (1957) 25.

[30] Gellner, *Words and Things,* 59-61. For a similar argument suggesting caution in the use of linguistic and other 'intuitions' in philosophical arguments see Jaako Hintikka, 'The Emperor's New Intuitions' 96 *Journal of Philosophy* (1999) 127.

[31] Gellner, *Words and Things,* 56.

of terms, not about 'how in fact, a word is used'.[32] Answering the second question entails nothing about the first.[33]

All such epistemological objections, however, need not be employed or pursued in great detail. The reason is that, as I already mentioned above, the fundamental assumption on which this account of semantic jurisprudence may be built is manifestly false. As a matter of fact, there is no linguistic convergence about 'law'. The speakers of our language do not speak of law with one voice.

As Dworkin and many others have shown, our beliefs and meanings remain too diverse for a single theory. Some theories dominate one domain whereas others dominate elsewhere. Hence, the most likely conclusion of a semantic theory should be that there cannot be a semantic general theory of law at all. Perhaps there can only be textbooks of the various areas of legal doctrine. The case of *Riggs v Palmer*, made famous by Dworkin is a good example of the persistence of disagreement.[34] Here the propositions of the majority and the minority reflected conflicting and inconsistent beliefs about law, so much so that they seemed to be backed by conflicting meanings for 'law'. For Dworkin, this shows that law is in fact an interpretive concept. Whatever it is, it is not the result of linguistic convergence. The same could also be said of the term 'right'. The currency of the will and interest theories shows that convergence is also lacking. Semantic jurisprudence does not have an effective response to the incidence of such deep disagreements. All it can say is that if the use is inconsistent, there cannot be a general theory. If the facts resist, we should

[32] Gellner, *Words and Things* 60.

[33] It may be that what moves the argument is a hidden conventionalism. Stavropoulos calls it 'communitarian semantics'; *ibid*. 86. He later notes that 'the attempt to distil metaphysical wisdom out of ordinary use, makes no sense without the assumption that ordinary use is founded on shared, common ground that *defines or individuates* the concepts that figure in use'; *ibidem*, 88. Hart himself explicitly distanced himself form such implausible metaphysics in the 'Postscript'; *CL*, 247.

[34] *Riggs* v. *Palmer*, 115 N.Y. 506, 22 N. E. 188 (1889). See *LE*, 15.

perhaps fragment the domain until we locate relevant convergences.

J. L. Austin was well aware of such conflicts and disagreements. He also did not have much to say about them. He said that in cases where language lacks coherence or we have conflicting schemes we can still make some progress. In the first case 'if the usage is loose, we can understand the temptation that leads to it, and the distinctions that it blurs'.[35] If, on the other hand, 'our usages disagree, then you use 'X' where I use 'Y', or more probably (and more intriguingly) your conceptual system is different from mine, though very likely it is at least equally serviceable: in short, we can find *why* we disagree —you choose to classify in one way, I in another'.[36] These types of ambiguities or disagreements should not 'daunt us'. Austin tells us that 'all that is happening is entirely explicable'.[37] Yet the result must be that disagreements or confusions of this kind rule out a single concept and a unified general theory. Whatever the merits and advantages of semantic recovery elsewhere, it seems unable to sustain the idea of a general theory of law.

III. Inductive Inference

Perhaps the appropriate domain of jurisprudence is not language. Perhaps we are to work with the whole range of relevant actions, beliefs, dispositions and intentions about law in order to propose and defend the relevant explanations of jurisprudence. For this view, we fix the domain more loosely. We propose relevant generalisations to cover the facts. We do so not on the basis of linguistic convergence, but on a more general observation of *all* the relevant facts.

Such an approach avoids the problems about the validity of language. Here we appeal directly to the facts of experi-

[35] Austin, *Philosophical Papers* 184.

[36] *Idem.*

[37] *Idem.*

ence. Our disagreement in beliefs and theories may thus turn out to be illusory. Our descriptive generalisation will thus be based on factual, not linguistic adequacy. This is a more directly empirical argument. It is an argument for what philosophers of science call enumerative induction. This is a non-deductive inference that follows the enumeration of relevant facts. In making this inference we infer from the fact that a certain hypothesis explains the evidence, to the truth of that hypothesis. Enumerative induction argues from an observed correlation either to a generalization of that correlation or to correlation in the next instance. So, we may have an inductive inference as follows:

> From premises of the form "Many many As are known to be B," and "There are no known cases of As that are not B," and "C is A," the corresponding conclusion can be inferred of the form "C is B."

Induction does not establish necessary inferences in the mode of a deductive inference. Induction establishes only likelihood and probability, not certainty.

As the actual argument of *The Concept of Law* unfolds, it becomes evident that an empirical reading of descriptivism along these lines is also plausible. Hart does not pursue J. L. Austin's linguistic exercises with any particular tenacity.[38] When he rejects the command theory of law and outlines a new theory based on the internal view of rules he tells us that the command theory was inadequate because it 'failed to fit the facts'.[39] As is well known, Hart's view is that legal relations are not the same as the gunman situation, whereby someone threatens another with violence in

[38] Hart says so in the 'Postscript', *CL* 246: 'Thus, my doctrine that developed municipal legal systems contain a rule of recognition specifying the criteria for the identification of the laws which courts have to apply may be mistaken, but I nowhere base this doctrine on the mistaken idea that it is part of the meaning of the word 'law' that there should be such a rule of recognition in all legal systems, or on the even more mistaken idea that if the criteria for the identification of the grounds of law were not uncontroversially fixed, 'law' would *mean* different things to different people'.

[39] *CL*, 80.

case of non-compliance, but are situations where one is 'under an obligation'. The distinction between being obliged and being under an obligation is a distinction made in ordinary language. But Hart's point is not that the notion of obligation fits usage, whereas the notion of command does not. The point is rather that being under an obligation fits better with the whole set of facts of the law, facts that run deeper than linguistic meaning. The fact that law as an institution can be understood better from an internal rather than an external point of view is not simply an observation about what we say, but a result of the much broader observation of conduct, attitude and belief. Hart writes as follows: 'Most of the obscurities and distortions surrounding legal and political concepts arise from the fact that these essentially involve reference to what we have called the internal point of view: the view of those who do not merely record and predict behaviour conforming to rules, but *use* the rules as standards for the appraisal of their own and others' behaviour'.[40] The point is that the internal point of view is required 'for the analysis of the basic concepts of obligation and duty'.[41] The argument against the command theory of law is not, therefore, an argument from the use of the word 'law' or any other word or set of words. It is that its own explanatory generalisation does not correspond to important features of the existing legal system. Hart's criticism seems concerns the correspondence of a theory with the facts of the case, not the practices of language. Hart tells us on many occasions that the command theory of law failed because, legal systems 'do not fit' its description,[42] it did not 'fit the facts'[43] whereas his own theory of law does.[44] Earlier he had stated that the command theory was 'mis-

[40] *CL*, 98.

[41] *CL* 98. See also Hart, 'Commands and Authoritative Legal Reasons' in H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) 243-268.

[42] *CL*, 48.

[43] *CL*, 80.

[44] *CL*, 81.

leading, since there is little in any actual system which corresponds to it'.[45]

Hart's argument can be seen to follow in the footsteps of an empiricist tradition of social philosophy originating in Hume and Mill. Hume, for example, warned us that the only solid foundation we can give to the study of human nature and the science of man 'must be laid on experience and observation'.[46] Pursuing the same line of thought, Mill sought to apply the methods of physical science to society, 'by generalising the methods successfully followed in the former inquiries, and adapting them to the latter' so as to 'remove this blot on the face of science'.[47] For this school of thought a social theorist is concerned with the facts of the social world, leaving speculation about the right and the good behind. Induction, not deduction, is the preferred method of descriptivism. Nevertheless, there are important problems with this reading.

The first problem concerns the criteria with which we judge the success of inductive inference. The empirical argument is roughly as follows. From the fact that all observed relevant instances A of the relevant domain (e.g. legal rules in our legal order) are B (e.g. are viewed from an internal point of view by the relevant officials) we may infer that all As are Bs (all legal rules are generally viewed from an internal point of view by the relevant officials). Under what conditions is one permitted to make the inference? The inference is not a deduction and its truth is not demonstrated.

Gilbert Harman has shown that induction is theory rich. It works as an 'inference to the best explanation', on the basis of a number of independent criteria.[48] So an inductive

[45] *CL*, 27.

[46] David Hume, *A Treatise of Human Nature*, second edition by L. A. Selby-Bigge and P. H. Nidditch (Oxford: Clarendon Press, 1978; first published 1739) xvi.

[47] J. S. Mill, *A System of Logic Ratiocinative and Inductive*, eighth edition (London: Longmans, Green & Co., 1900; first published 1843) 546.

[48] Gilbert Harman, 'The Inference to the Best Explanation' 74 *Philosophical Review* (1965) 88. See also Gilbert H. Harman, 'Enumerative Induction and Best Ex-

argument is not exactly a report of facts, it is a theory about these facts. Gilbert Harman has called the theories that inform inductive inferences intermediate lemmas.[49] The role of lemmas is to confirm the truth of the inference. One of Harman's examples involves us inferring that a man's hand hurts by seeing how he jerks it away from a hot stove which he has accidentally touched. The inference is from behaviour to pain and to the reflex reaction. The lemma involved here is the proposition that the experience of pain causes the sudden removal of the hand. In the theory of law the lemma must be something a great deal more complex. The requirement of the internal point of view, for example, is hypothesis that grounds Hart's conclusion about the role of the rule of recognition. Hence, the inductive inference in this case is not just the result of observation but part of a theory, which gives content and substance to the hypothesis. If we described the inference merely as the result of enumeration, we would have missed the role of the intermediate presuppositions. Harman's conclusion is that we should speak more accurately of an inference to the best explanation that exposes the role of intermediate lemmas.

Showing that induction is theory-rich affects descriptivism in an important way. There is no problem fixing the domain or proposing a hypothetical explanation. But we face some uncertainty about *testing*, the third stage of confirming a descriptive theory. Hart's theory offers the rule of recognition and the internal point of view as a general explication of the concept of law. But it is evident that it is not confirmed by all cases. For example, when a legal realist or a follower of natural law sit as judges, they will provide instances that contradict the theory of the rule of recognition. It seems, for example, that the result of the majority in *Riggs* contradicts it. Hart says that the internal point view

planation' 65 *The Journal of Philosophy* (1968) 529. For further discussion see Peter Lipton, *Inference to the Best Explanation*, second edition (London: Routledge, 2004).

[49] Harman, 'Inference to the Best Explanation' 91.

is 'normally' the case for officials, but there may be mistakes. We must take him to be saying that the hypothesis is confirmed by a sufficient proportion of instances. Other theories may have less success with the facts. Yet, we are not given any evidence for this assertion. There is no comparison of competing inductions. Can the argument work without this factual, i.e. empirical, testing?

The problem under the empiricist argument is that descriptivism does not allow us to choose without such evidence. Hart's theory is presented as the better or more 'normal' description. And here is the problem with the inductive argument. Hart —and his followers, as Dworkin notices— offer no empirical argument of this kind. Instead they test the theory on different grounds. They argue for its analytical clarity and coherence. But such considerations must be secondary. We need a better description, not the description of something better. The latter commits us to the error of wishful thinking. Harman, for example, states that in cases of inductive inference the best explanation may be preferred because it is 'a better, simpler, more plausible' hypothesis. But this assumes that it has the facts right and has adequate predictive force. The argument from induction suggests that: 'as long as the hypothesis that the next A will be similar is a better hypothesis in the light of all the evidence, the supposed induction is warranted'.[50] Here is then the problem. Hart's assumption concerning the internal point of view is not defended as the explanation that matches the most or an adequate proportion of instances of law.

Hart argues that rules have an internal point of view in the sense that they 'are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon them to those who deviate or threaten to deviate is great'.[51] Hart's argument is that the external point of view, which

[50] Harman, 'Inference to the Best Explanation' 91.

[51] *CL*, 86.

limits itself to observable regularities of behaviour, cannot 'reproduce the way in which the rules function as rules in the lives of those who *normally* are the majority of society. … For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility'.[52] The internal point of view is an explanation of the 'normal case', not every case that involves legal propositions. But how is the idea of the 'normal case' vindicated? Hart says at the beginning of the book that he will try to 'advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences and differences between law, coercion, and morality as types of social phenomena'.[53] He is referring to a municipal legal system, most likely the legal system of the United Kingdom in 1961.[54] Perhaps the British of the time endorsed routinely the 'internal point of view' and so did, more importantly, the legal officials. Nevertheless, Hart does not defend the theory on this ground. He says that his account is what is 'normally' the case, meaning generally true. But he gives no evidence that this is the case.

What if we showed that it was the most frequently occurring in the United Kingdom? It would not be enough for the kind of general theory we seek to establish. We need explanatory generalisations about law. Hart's is offering an idea of law that is state-based, institutional and positive. This account of law follows British law in that it puts a high premium on the consistency of its sources and the rationality of its own principles of reasoning. But not all *prima facie* legal systems share the features of this paradigm case. For example, some legal systems do not have the element of state enforcement, international law being a well-known ex-

[52] *CL*, 90.

[53] *CL*, 17.

[54] Brian Simpson challenged the claim that Hart's theory fits the facts of English law by drawing attention to the customary basis of the common law. See A. W. B. Simpson, 'Common Law and Legal Theory' in A. W. B. Simpson (ed.), *Oxford Essays in Jurisprudence, Second series* (Oxford: Clarendon Press, 1973) 77.

ample. Some systems are strongly customary. Other legal systems are in force only as a matter of the external point of view, in that they are less reliant on institutions and reasoning and more based on the likelihood of sanctions and violence. They do not involve a principled commitment to the rules and no criticism against transgressors, e.g. the dictatorship. Other legal systems derive from faith as an essential requirement, e.g. a theocracy.

How do we account for this diversity? Our concept aims at generality. If we limit our domain to Britain, we have arbitrarily limited our domain and are offering a theory of British law, not a theory of law. So the empirical-descriptive argument is not immediately general. It is the general introduction to all the textbooks of British law, but not a general theory of law. Hart asserts a set of properties that it considers 'normal' for a legal system and then builds the theory around them. But such observations, even if true, are not enough to warrant a general theory of law, a theory that applies across jurisdictions. Although this descriptive theory seeks to be confirmed by empirical observation it never tells us exactly of what.[55]

Empirical descriptivism does not seem to have an effective response to the diversity of jurisdictions and the pluralism of theories. Such views cause indeterminacy that we do not know how to manage. We can only report the various tensions and inconsistencies that the views create. We can propose various explanations in terms of various lemmas as tentative accounts but such lemmas cannot be idealisations and must be confirmed by observation. Yet pluralism eliminates them all, since none meets the test. If Hart's theory meets the test in the British legal system, it does not meet the test in international law, or Saudi Arabian law, or German law. If it meets the test for some legal practitioners, it does not meet it for many others (say those believing in legal realism or natural law). It seems thus that empirical

[55] For a similar argument see Gerald J. Postema, 'Jurisprudence as Practical Philosophy', 4 *Legal Theory* (1998) 329, at 335-341.

descriptivism is thus forced to scepticism about law and jurisprudence. There may not be any essential truth about law with universal value. Pluralism leads to fragmentation. But we know that Hart was neither a pluralist nor a sceptic about the concept of law or rights. He defended both a clear general legal positivist theory of law and a clear and general will theory of rights. The problem is that they cannot be the result of descriptivism.

How did Hart get there? There is an answer, taking us beyond descriptivism. In *The Concept of Law* Hart states that the purpose of legal theory is not 'to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an *improved* analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena'.[56] This suggests that the project is more constructive than we have so far assumed. Jurisprudence is improvement on and not a mirror image of legal practice. In one of his later essays Hart said that in the course of jurisprudence we pick out and collect 'clusters of features frequently recurrent in the life of a legal system, to which it was important to attend for some statable theoretical or practical purpose'.[57] But that project, Hart's own, is not a descriptive project.

IV. Conclusion

Hart's account of his own method and his execution of that method is still puzzling. Description and generalisation seem to pull towards entirely different directions. Hart's programmatic statements set out to vindicate descriptive jurisprudence, a kind of jurisprudence that goes beyond

[56] *CL*, 17 (emphasis added).

[57] Hart, 'Legal Rights' 162, at 164.

the morally laden constructions of the past but still achieves general conclusions. He rejected the moralism of Blackstone, Kant, Aristotle and, of course, the natural lawyers. But when he set out to perform the task of description, he left accuracy behind. If the arguments above are correct, his approach was neither semantic nor one based on induction. Generalisation cannot result from accurate description for a number of reasons. First, there are distinct jurisdictions with different traditions and practices. Second, there are different areas of law with different internal modes of reasoning and persuasion. Third, there are different theories of law, such as legal realism, interpretivism and natural law, whose adherents practice it at every level. Fourth, there are different tasks of the law depending on whether is a judge, an official or an advocate. If we set out to construct distinct sociologies for these different things, i.e. the jurisdictions, the areas of law, the theories and the roles, we would create a complex and largely useless tableau. Every theory of law must somehow deal with this complexity. If we are to vindicate a general theory of law, in the way Hart wished to defend it, in the face of the fragmentation of the materials and the pluralism of legal ideas, we need to go beyond the model of description. Hart's actual argument about law as a union of primary and secondary rules seems to me to go well beyond that model. One of the greatest failures of Hart was that he did not see the conflict between his programmatic statements and his own practice.