

# Philosophy of Law: Collected Essays Volume IV

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## Describing Law Normatively

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## Abstract and Keywords

A fundamental reconsideration of the project of a general theory of law, this chapter argues that no general account can be given of what law in fact is without explicit attention to why it has the features or elements it has. The best way in to an explanatory general description of law can start by attending to primal situations such as playground bullying, and to what is needed in such a situation. The primary reality of the law is as a reason for action, a claim on my (its subject's) decision and action. Such legal claims (obligations) fulfil the need for positive law best when they are moral obligations. Brian Leiter's sound objections to theorizing by 'conceptual analysis' do not support his own 'naturalism'. Hart's best work on law was not conceptual. Coleman's criteria for evaluating theories of law are radically unsound. Gardner's new account of legal positivism rightly identifies it as at best a minor fragment of legal theory, and undermines its claim to be any part at all.

Keywords: general theory of law, what and why questions, reasons for action, legal obligation, morally obligatory, Leiter, Coleman, Gardner, legal positivism, Hart, conceptual analysis

I

Suppose we tried to think about law without trying first to describe it or to work out what the concept of it is. Suppose we asked instead whether, and if so why, and when, we—or more precisely each one of us—should favour introducing, having, endorsing, maintaining, complying with, and enforcing

it. We would be trying to think about law, about something not limited to our own time and town, but as something that people of any time and place of which we are aware would, as we can understand, have the same or similar need for and reasons to comply with as we have. But this subject-matter we would be calling law from the outset because we would be beginning these reflections with an awareness, linguistic, experiential, and by report, of *the* law of our own time and town or country. Of that we could give some description, because we have some understanding of the sorts of things referred to in our neighbourhood as parts of or related to the law (of our time and town, our law), and thus a conception or concept of that law, a conception which we could, if asked (or if reflecting), sketch out as a set of beliefs about an aspect of what's going on around us, beliefs which we are quite prepared to amend in the light of new information or of our own reflections about the consistency of these beliefs with each other and with other things we believe.

Structurally our inquiry would be running parallel to the course of inquiry recommended by Aristotle. Take a very different context, a subject-matter of the kind that exist and are what they are whether we consider them or not. For example, eclipses of the moon. People talk about eclipses of the moon, and so one can ask what an eclipse is, not because one's trying either to record or even to attain clarity about their speech, or their ideas (concepts), but because one's interested in the sort of thing or things they **(p.24)** are referring to. They talk about eclipses, referring to a black patch moving over the face of the moon, not nightly or monthly but regularly though quite rarely. Aristotle's counsel<sup>1</sup> is: translate the What? into a Why? Why does a black patch move across the bright face of the moon? I'll skip now to the end of the inquiry. The black patch is the shadow of the earth, that is, it appears *because* the earth is blocking the light from the sun, and so an eclipse of the moon *is* the visible result of the earth coming between the sun and the moon, which can happen not nightly or monthly but only —because of the differing but correlated cycles of the earth and the moon around the sun—more rarely but regularly. That's what a lunar eclipse is. Or take a subject-matter of the kind that are what they are because we have decided to exercise control over natural matter. What is a clock? Perhaps the only ones I'm aware of are worked by chains and pulleys. But why have these chains and pulleys, and a face and hands (or a dial and numbers, or whatever) connected up to each other like this? As an *instrument for* measuring the passing of time relative to some unit or units marked by some perceptible marker such as a hand on or passing, or a frame around, a visible numeral. Or take a subject-matter of the kind that involve our putting our

own thoughts in order. What is an argument? I hear the word used in relation to statements, or connected series of statements, asserting reasons for accepting some proposition; I learn soon enough that some such statements or sets of statements really do give reason for their purported conclusion, while others, intended and perhaps appearing to do so, fail, on reflection, to do so. Why link these statements in a series, or juxtapose the one statement (premise) with the other (conclusion)? In order to compel or justify or warrant accepting the latter. So I come to understand that not everything proposed and spoken of and considerable as a reason is a reason, and that not every argument is really any argument at all for what it is proposed as arguing for. That is, part of coming to understand what argument really is consists in coming to understand that, and why, not all arguments are really arguments at all, even though these non-arguments, failed, fallacious, invalid arguments *are* still, in a secondary or watered down sense, arguments, as eclipses and clocks and people and most of the other subject-matters in this or any imaginable universe are simply not.

So the inquiry we are hypothesizing, the inquiry about law, starts humbly enough as: Why *have* the sort of thing or things that get called the law and **(p.25)** legal system, legal institutions, and processes and arrangements that we call the law of our time and town? 'Why have it?' is of course elliptical for 'Why, if at all, should we have it?' The inquiry is nakedly about whether and if so why I, the reflecting person doing the inquiring, should want there to be this sort of thing, and be willing to do what I can and should to support and comply with it (if I should). It arises in the course of reflection, *deliberative* reflection, on what I should really do, here and now, and with my life as far as I can envisage it.

This sort of radically practical question first arises, Aquinas suggests,<sup>2</sup> when I am young enough to be in the junior school playground, aged about 7—about as far back as my adult memory of deliberation goes. Someone is teasing or punching or pinching someone else to make them cry. Should I join in? Or try to help the victim? Or call the teacher? Or just hope that the teacher will come and restore order? Or hope that no one will intervene to spoil this fun? Or be completely indifferent to all this and just get on with my sandwiches? If the teacher does come and break things up, should I be glad if she gives both the bully and the victim impartially a slap or detention or expulsion? Or should I hope she'll try to establish what happened, and deal differently with the two, restraining the wilfulness of the one, requiring also some restitution and apology, while comforting and reasserting the dignity of the other? In such primal incidents, at the dawn of the age of deliberative

reason, Aquinas suggests we find the child—you or me—confronted with the need to choose whether to be the sort of person who joins the bully, or instead the sort of person who does what they can to help the victim and the teacher if and when that teacher acts to police the scene, judge the guilty, and make clear to all what will and will not be treated as acceptable conduct in the playground, the classroom, the bus stop outside the school, or anywhere else where one school child can interact with another. The child brings to this primal moment of choice many years of emotional formation, but now for the first time can envisage the choice as one between options which truly are *instances* of benefits which can be found in countless other instances, so that the immediate issue or practical problem of what to do in this situation invites deliberation which, however rapidly it takes place, is open to thoughts of the kind: What if I were the victim in a similar situation of disparate strength and aggressiveness? What if many people were free to do this to others? And so forth.

In such childhood situations one enters what I shall call the moral domain or, fully synonymously, the ethical domain or domain of morality. In that domain, which we never leave save through unconsciousness or a **(p.26)** supervening incapacity to understand options as instances of intelligible benefits realizable in indefinitely many situations, the question is always: What should I decide? 'Decide' straddles two distinguishable aspects of the existential issue: Which of the alternative incompatible courses of conduct (action or inaction) of mine should I think a reasonable option for me here and now? And do I here and now choose and at the relevant time carry out one of those reasonable options, or the one and only reasonable one among the options available, or do I choose and carry out one of the options which I judge attractive even though unreasonable (because cruel, disruptive, or in some other way unfair, and/or because a waste of my opportunities for pursuing and doing good)? *Decision*, then, includes both the practical *judgment* (a judgment of the kind we call judgments of conscience) and the self-directing, self-determining, self-shaping *choice*. In as much as it is obvious to me that I can be mistaken in my judgments about what is and is not reasonable, the issue presents itself more precisely as about *what I truly should decide*. The primary meaning of 'morality'—that is, morality's primary reality—is as the set of considerations that I understand as bearing upon the making of such decisions, and as available criteria for assessing my decisions as good or bad precisely as decisions, that is, as right—because choosing and putting into practice judgments which are true—or wrong because not doing do.

In, and in relation to, such childhood situations as the one I recalled from my playground, we did then and we do now as adults understand the need for a pattern of relationships between ourselves and other persons such that force is not used to inflict pain or other harm but only to preserve or restore a proper pattern of relationships. Among the aspects of this pattern are (a) that what one person reasonably possesses cannot be taken from that person without showing that another person has a better reason—to be sharply distinguished from a stronger desire or stronger capability to impose desire—to have that possession; and (b) that some persons have special responsibility for deciding on behalf of, or in relation to, all persons involved what pattern of relationships will be treated as acceptable, what to do about violations of it, whether or not to change it in light of new circumstances or of new or newly represented arguments, and so forth.

Part of a school's teaching, then, will concern the school's own rules about times of classes, conduct within classes, acceptance of the authority of teachers and perhaps of designated pupils and a headteacher, misconduct in the playground, dress and demeanour on and off the premises of the school on schooldays, and so forth. Another part, small in bulk perhaps but weighty, will be concerned to inform the children that shoplifting, playing truant, vandalism, and such like are offences against the law of the land and **(p.27)** therefore also against the school's requirements of its pupils (even though not part of the school's rules as such), and that they will be enforced not, in the first instance, by the school's teachers but by the police and courts and custodial authorities of the state. To a child who understands the case for not joining the bully in the playground or the cheat in the schoolroom, the need for this Law is obvious, too. And the case for not joining the bully was never merely that I might be hurt by the bully or outranked by the cheat, but primarily that it is unfair for anyone to be. The injustice of the bully and the cheat is what cries out for prevention and restitution and penalty—and for rules written or otherwise posited (put in place) to make this clear in advance to all. The child who thinks that (to put it as H.L.A. Hart did),<sup>3</sup> we need rules (of school, town, and country) promulgated to restrict the free use of violence, theft, and fraud *means* that we need them *for the sake above all of justice*. The primary need or necessity here is precisely a moral one. And any sensible adult clear-headedly thinking practically—that is, in the context of the question what I truly ought to do—likewise means just that. (Influenced by considerations<sup>4</sup> which most of us here know operate, or have operated, in our own thinking, Hart did *not*, alas, *mean* that.) Thus, law is rightly conceived of as *by its nature morally valuable*—not in the sense that Joseph Raz attributes to that phrase,<sup>5</sup> according to which the thesis would

be making a claim about ‘the way [law or the law] is actually implemented in history’, the obviously false claim that ‘law in its historical manifestations through the ages has always, or generally, been a morally (p.28) valuable institution’.<sup>6</sup> Rather, the sense of the thesis is like the sense in which, as Raz accepts, promising is a morally valuable institution. Or the sense in which the doctor says ‘You need medicine’, meaning something which by its nature is curative, without for a moment claiming or imagining that what has been served up as medicine ‘through the ages’ has always, or generally, or even usually been curative.

No need to labour this line of thought much further. It is obvious—as obvious, at least virtually and in rough outlines, to a child as it fully is to any reflective and reasonable adult—that, for the sake of justice and a flourishing community of people in good shape and doing as well as extrinsic circumstances permit, we need a set of rules, arrangements, processes, institutions, and persons with responsibility and thus authority, the set that is commonly called law, legal, legal system, and so forth. For the sake of justice, we need the rules to be public, clear, general, stable, capable of being complied with, and explicable to any fair-minded person; and we need them, again for justice's sake, to be complied with (save where there is an overriding moral obligation not to) by those whose responsibility it is to announce and/or enforce them and/or to resolve disputes about their application. Some finer points about what it is for a society to have its need for law adequately met are elaborated by Timothy Endicott.<sup>7</sup> His discussion proceeds by repudiating any concept of the rule of law that ‘*we should not want*’. That is a sound way of proceeding in legal philosophy, though I am inclined to carp that just as it would be odd to use the phrase ‘moral ideal’ to describe the thought that one should not side with the bully or the cheat and that the teacher should urgently sort things out, so there is something equivocal about the common saying that the rule of law is an ‘ideal’.<sup>8</sup> The principles of the rule of law are, at least in their main lines, moral *requirements*, strong even though not unconditional, unqualifiable, or infeasible.

The life of the law, more precisely its primary reality, is not in the *logic* of conceptual coherence or of understanding what other people have thought or said or stipulated or commanded or enacted, nor in the *experience* of cause and effect and patterns of recurrence. Those are part of its matrix (p.29) of necessary preconditions. The primary reality of the law is rather in its claim, as itself a moral requirement, on my deliberating about what to decide—that is, what to judge about the options available to me, and

what to choose and do once I have made my judgment. This mode of *our positive law's* existence—as a morally legitimate and compelling, albeit conditionally and only defeasibly compelling, *claim on my action when I am thinking what to do* as a plain citizen (child or adult), a judge, a police officer, a tax inspector, and executor, and so forth—is the primary reality of *law*. It is primary because the rational force of this claim is fully intelligible even before one knows anything much about the content of the law and certainly before one has been taught anything about law in general or 'the concept of law'.

That rational force, like all rational force, is at bottom the attractiveness of truth. Because I judge it to be true that, say, the victim's bodily and emotional well-being is as much an instantiation of intelligible human good as the well-being of the bully or of myself, and true that this or any bully's infliction of pain for the pleasure of it is a violation of the master moral principle/requirement that one's choices should always be open to the fulfilment of every human person, and a violation of that master principle's specification in the Golden Rule of fairness, and true that offenders against justice should not be left to enjoy the fruits of their wrongdoing, I should, at the moment of decision, treat as authoritative the positive legal norms empowering somebody to appoint somebody else to the responsibility and authority of adjudicating complaints of bullying and punishing them to an extent specified not only by norms of fairness but also by positive rules adopted 'optionally' for the sake of consistency across wider spans of time and social context. Indeed, if child, I should take the risk of reporting the bully to the teacher, and if teacher, I should exercise the adjudicative and punitive role according to the rules of the school, the law of the land, and the requirements of fairness when the school rules and the law leave something to be decided. And so forth, in reference to any more or less reasonable legally posited rule or principle you like to consider: at the moment of decision on an issue on which that rule bears, any obligation it expressly or impliedly purports to impose, or to authorize the imposition of, is fit to be acknowledged by me as truly what it purports to be, viz. the decisive regulator of my action here and now—so decisive that it could be overridden only by some competing *moral* obligation bearing on me here and now with such weight that anyone with the community's common good in mind would acknowledge the justice of my treating the latter as overriding the law and its legal-moral obligation. (p.30)

But, of course, these purely moral thoughts about *our* law certainly warrant a theory of *law*, a general account of what—because it is so obviously needed

—one should anticipate finding in existence, to one degree or another, in any human community and of what, as historical studies confirm, has indeed existed (with many and various imperfections and reasonable and unreasonable adaptations and approximations) in virtually every human community of which we are aware, and has been and is manifested in the translatable language, that is, the self-understanding and thus the concepts, of every such community.

But whatever the case about other peoples and their concepts, it is clear to us why we need such rules, institutions, processes, and so forth. Thus it is clear to us *what* law—positive law—is, at least so far as we need it and find we, by and large, have it. Nor is this core of clarity impaired by the fact that *some* elements of what has been posited in our community in response to our shared moral need are, in my judgment or yours, so unreasonable that the presumptive moral claim on us of these elements is, in my judgment or yours, defeated in whole or part. Posited (enacted or judicially pronounced) rules of the latter kind are analogous to contracts which have been made in full compliance with every formality and other procedural condition specified by the law of contract but are void for illegality. Or, to take two perhaps closer analogies, they are like medicines which prove futile or lethal and are thus *not medicinal* at all, or like *arguments* the formal elegance of which only masks their invalidity: *no argument*. Unjust laws are not laws, though they may still count in reasonable conscientious deliberations, and certainly warrant attention and description. So, too, invalid arguments may win a place both in manuals of rhetoric as the art of persuasion, and in guides to fallacies for young logicians, quack and lethal medicines are sold as medicines and listed in histories of medicine and on warning notices, and contracts void for illegality earn a place both in books on the law of contract and, more interestingly, in books on restitution where their apparent validity, or their widespread acceptance as valid, may affect the success or quantum of a restitutionary claim. It should go without saying that some people are persuaded by fallacies, that parties may for years consider themselves legally bound by a contract in fact void for illegality, and that the police and the hangman may act against me in accordance with unjust laws. The excitement and hostility aroused by the old saying that unjust laws are not laws is quite needless.<sup>9</sup> **(p.31)**

The course of practical moral deliberation and reflection which concludes by acknowledging the need for and presumptive obligatoriness of posited law is obvious and obviously reasonable. So there is nothing surprising about the plain historical fact that the first articulation of *positive law* as a

category or a technical term, and the first adequate explanations of that term's referent, were by moralists.<sup>10</sup> These theorists had little or no interest in either undertaking or adopting any general descriptive theory of human affairs, except insofar as understanding representative patterns of human behaviour and misbehaviour is and was one element in a general reflection which from beginning to end focused upon the question what should I—first of all the very person doing the reflecting—truly decide and do.

The work of moral reflection, whether it is contemplatively and anticipatorily general-practical or here and now deliberately practical, always—as I have said—takes the world as we know it, and shuns utopianism and Rawlsian hypotheses of a world of 'full compliance' with justice. So it is also no surprise that the moralist Thomas Aquinas, as Lon Fuller says, identified<sup>11</sup> each of the eight elements pulled together by Lon Fuller as the components of the Rule of Law, considered as structural requirements of justice which bear on the institutional and procedural implementation of the justice-required response to the need to have law rather than either mere anarchy or the masked anarchy and oppressive unfairness of tyrannical or arbitrary government or government which treats its subjects as mere pawns, mere instruments in some game or managerial project of the governors. (And it is no surprise that the Thomist account of law includes 'success conditions' of the kind desired\* by Joseph Raz: law must be directed to the *common* good, must not go outside the domain of justice, which is *external* acts affecting *other* people,<sup>12</sup> is subject to equitable override, and so forth.)

In short, a complete and fully realistic theory of law can be and in all essentials has been worked out from the starting point of the 100 per cent normative question, what should I decide to do and, equivalently, what kind of person should I resolve or allow myself to be. I can think of no interesting project of inquiry left over for a philosophical theory (p.32) of law with any different starting point. Perhaps someone will be able to suggest one.<sup>13</sup>

## II

Some people have thought there is room for a theory with a different starting point, a theory which is not even a tiny bit normative (directive of my decisions) but instead enjoys what Brian Leiter, appropriating a phrase of John Gardner's, praises as 'comprehensive normative inertness'.<sup>14</sup> This theory does not, Leiter says, endorse what law-abiding and just judges or officials or citizens do, or criticize what lawless and unjust judges, officials, or citizens do. Instead it identifies all or at least some of the 'necessary

features' of what judges, other lawyers, and I suppose officials and law-abiding citizens do in making and/or abiding by the law.<sup>15</sup> It aims *merely* to state—describe—what features 'all legal guidance necessarily has'.<sup>16</sup>

My argument in sec. I was that such an enterprise is redundant: everything you could want as an accurate and factual description of what judges, officials, and law-abiding citizens do, and why they need to do it, is supplied by the theory which is as robustly normative in its starting point and conclusions as anything could be, though taking in, along the way, all that the world offers in the way of variegated implementations, improvements, distortions, abuses, and so forth. But there is, as Leiter reminds us, another question: Is a purely descriptive, normatively 100 per cent inert theory of law even possible? Can such a theory identify what features all legal guidance *necessarily* has? He argues that it is possible, and that it can identify these necessities while remaining normatively entirely inert.

His argument brings him to conclude that 'the defense of descriptive jurisprudence turn[s] on a rather uncritical invocation of the claim that we [are] describing "our" concept, where the first person plural possessive [is] to be cashed out in terms of statistical frequency',<sup>17</sup> a procedure capable of delivering, as he says, 'no more than ethnographically relative results'.<sup>18</sup> Such results, I think he hints, are scarcely worthy of the name of *philosophy* or *general theory*. And certainly they fall far short of warranting, or even making sense of, the initial claim—sponsored, curiously, by Leiter himself—to have identified what features law *necessarily* has. Whatever (p.33) Leiter's final position, in his paper, about this question of necessities,<sup>19</sup> I myself fully agree with these conclusions about the project of a normatively 100 per cent inert descriptive philosophy or theory of law.

Unhappily, Leiter is not in agreement with my own argument for those conclusions. He does think I have an argument; showing why my argument is wrong will go a long way, he says, to resolving some main issues in the present debates about method in legal theory. His demonstration that my argument is wrong consists of a quotation from *Natural Law and Natural Rights* and the brisk observation that at its core there is a non sequitur. Here's how he puts it:

The non-sequitur occurs in the slide from ... the 'Banal Truth' that 'evaluations ... are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order' to the claim that the evaluation in

question involves 'decid[ing] what the requirements of practical reasonableness really are.' I take the Banal Truth to be the uncontested legacy of post-Kuhnian and post-Quinean philosophy of science: there is no such thing as a presuppositionless inquiry, of facts that are 'theory-free,' and so on. But that goes no distance at all to establishing that the presuppositions of the descriptive enterprise require judgments about what Finnis calls 'practical reasonableness' or that the viewpoint from which 'importance' and 'significance' are to be assessed is the 'practical viewpoint'.<sup>20</sup>

And with that last sentence I fully agree: the Banal Truth of post-Kuhnian and post-Quinean philosophy of science certainly goes no distance at all in establishing my conclusion, and I've never imagined or suggested it does.

Part of the trouble here is that the passage Leiter has quoted contains none of my argument, but only its conclusions. The sentence which begins his key quotation from me begins, not where he starts, but like this:

Thus by a long march through the working or implicit methodology of contemporary analytical jurisprudence, we arrive at the conclusion reached more rapidly (though on the basis of a much wider social science) by Max Weber:<sup>21</sup> namely, that [and (p.34) here Leiter begins quoting] the evaluations of the theorist are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order.

My argument and its conclusion has nothing to do with a general philosophy of science or of theory-construction, post-Kuhn, Quine, or anybody, and nothing to do with the fact that if you are to undertake some research or reflection you must think there is something valuable in doing so and something important about the subject-matter. My argument is, as the sentence says, about *social science* and 'such aspects of *human affairs as law and legal order*'. What differentiates subject-matter of this broad kind from anything in the sciences of nature or mathematics and logic is stated on pp. 1 and 2 of *Natural Law and Natural Rights*: unlike what I there call 'natural sciences including a part of the science of psychology', human actions, practices, dispositions, and the discourse partially constitutive of some such practices, cannot be understood without understanding their point, objective, significance, or importance '*as conceived by the people*

*who performed them, engaged in them, etc.*' I here took for granted and implied, but treated as too obvious to need stating, that those conceptions of point, objective, and so forth, the conceptions concrete people have actually had, can be well described without being shared and, indeed, can be well described without any sharing in the practice of evaluation at all. That is what biographers, military historians, and others do all the time. And it is precisely this that gives rise to the problem that set my chapter off on the 'long march through the working or implicit methodology of contemporary analytical jurisprudence'.

The problem is that biography and history are one thing and a *general* social theory or a *philosophy* of society or power or authority or coordination or law is (or are) something purportedly quite different. There is only one italicized sentence in Chapter I, and it is right here at the top of p. 2: '*How, then, is there to be a general descriptive theory of these varying particulars?*' There is no problem of principle or method in describing with complete value-freedom, purity, and complete normative inertness the concerns, self-interpretation, conduct, institutions, vocabulary, and discourse of as **(p.35)** many people as you like. But can you finish up with anything more than what I called, on the same page, 'a conjunction of lexicography with local history, or ... a juxtaposition of all lexicographies conjoined with all local histories'—a mere list or heap? My concern had much in common with Leiter's: the concern that conceptual analysis and appeals to intuition can deliver no more than 'ethnographically relative results',<sup>22</sup> a lexicography or 'glorified lexicography'<sup>23</sup> or 'pop lexicography'<sup>24</sup> the results of which are 'strictly ethnographic and local',<sup>25</sup> a 'banal descriptive sociology of the Gallup-poll variety'.<sup>26</sup> What the long march through contemporary jurisprudence (as it extended from Bentham to the late 1970s) made manifest can be summarized in two propositions: (1) any plausible theory that results from an effort to describe law, a subject-matter considered as something transcending any local history, has not been and will not be normatively inert; (2) this is in large part because, given that any general theory of law, however merely descriptive its ambition, necessarily prefers one concept of law over countless others—given (that is to say) that the theorist's is always a more or less new concept, one that the theorist considers an improved concept, better fitted to answer the questions people have about how law relates to other things and why its various elements hang together as they do—explanations of why this concept is an improved one, to be preferred to other concepts, are designed to show that this concept, this theory, makes better sense of the complex idea that law is something there is reason to have.

If there is a worthwhile general theory, or philosophy, of human cities or the human city, as Leiter imagines but I rather doubt, it will have much the same character: neither human laws nor human cities exist in any interesting way unless human persons, who could think and choose otherwise, understand the set of interlocking good reasons there are for trying to create them and maintain them. They (the laws and cities) are not part of the world of the naturally given, though the reasons for wanting to create and maintain laws, if not cities, are so important for the well-being of creatures whose life and capacities are part of the naturally given, but whose flourishing is not, that those reasons have reasonably—though at the hazard of countless misunderstandings—been called elements of natural law (in a sense of which natural scientists, as such, are entirely innocent).

Back to that long march through contemporary jurisprudence. No question, however, of repeating it here. And no question of repeating my own direct dialectical argument<sup>27</sup> for the conclusions Leiter quoted: that **(p.36)** there must be and is a central case of that so-called internal point of view which plays so structural a role in every contemporary jurisprudence. A reminder or two must suffice. Hart argues, against Kelsen and (in a different way) Bentham and Austin, that rules conferring private power on individuals (for example to make a contract) should not be described as mere fragments of obligation-imposing rules. His argument adduces or describes no fact that Bentham, Austin, and Kelsen had failed to describe, other than the truth that there is reason to want and value private powers, a kind of reason different from the reasons to want and respect rules making certain kinds of act or forbearance obligatory. About this truth Hart was not normatively inert. Precisely in order to argue for his theory as against Kelsen's, Bentham's, and Austin's, Hart called the kind of private powers resultant from power-conferring rules 'a huge and distinctive amenity',<sup>28</sup> 'at least as valuable to society as duty'.<sup>29</sup> Of course, he begins by saying that, to understand these rules (and their distinctness from obligation-imposing rules), we must look at them 'from the point of view of those who exercise them'.<sup>30</sup> But this point of view proves to be simply (or at least primarily) his, yours, and mine, not because they are his, yours, or mine, but because it seems true to him, you, and me, that there is *value* in having the rules at stake, *reason* for having them (which is not in the least incompatible with our also understanding that there might be circumstances where countervailing reasons might give sufficient reason not to have them).

Further on in *The Concept of Law*, Hart argued that law should be understood as, centrally, a union of primary with secondary rules. The former are,

he said, to impose obligations to abstain from violence, theft, and fraud, and other obligations. The latter are, he said, to remedy the defects of a set-up in which rules of the primary kind were unaccompanied by rules conferring powers to change them and adjudicate about their application—rules which although logically secondary are so important to a society that their introduction ‘is a step forward’ comparable to the invention of the wheel.<sup>31</sup> Talk about valuable amenities and steps forward cannot reasonably be described as normatively inert.

Hart's discussion is particularly illuminating when he takes up the precise question whether there are, as Leiter and Gardner propose, some ‘necessary’ features of law or legal systems or what lawyers do. Hart does so in relation to ‘the traditional question whether every legal system *must* [his italics] provide for sanctions’.<sup>32</sup> There are, he says:

two unsuitable alternatives which are often taken as exhaustive: on the one hand that of saying that this is required by ‘the’ meaning of the words ‘law’ or ‘legal (p.37) system’, and on the other hand of saying that it is ‘just a fact’ that most legal systems do provide for sanctions.<sup>33</sup>

(So here he is also taking up, in order to set aside, the statistical typicality criterion that Leiter's paper seemed for a time to be proposing.)

Neither of these alternatives is satisfactory. There are no settled principles forbidding the use of the word ‘law’ of systems where there are no centrally organized sanctions, and there is good reason (though no compulsion) for using the expression ‘international law’ of a system which has none. On the other hand, we do need to distinguish the place that sanctions must have within a municipal system, if it is to serve the purposes of beings constituted as men are. We can say, given the setting of natural facts and aims which make sanctions both possible and necessary in a municipal system, that this is a natural necessity; and some such phrase is needed also to convey the status of the minimum forms of protection for persons, property, and promises which are indispensable features of municipal law.

Six pages earlier he had given this form of necessity a description more illuminating than the opaque term ‘natural’; he had called it ‘rational’: ‘It is important to stress the distinctively rational connexion between

natural facts and legal or moral rules',<sup>34</sup> and again 'the facts mentioned [about vulnerability and so forth] afford a *reason* [Hart's italics] why, given survival as an aim, law and morals should include a specific content'.<sup>35</sup> This content must—that is, there is a strong rational requirement that it—include sanctions. Why? Because:

submission to the system of restraints would be folly if there were no organization for the coercion of those who would then try to obtain the advantages of the system without submitting to its obligations. 'Sanctions' are therefore required [necessary, Leiter and Gardner might say] not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger what reason demands is *voluntary* co-operation in a *coercive* system.<sup>36</sup>

Nothing normatively inert about all or any of this.

But, of course, Hart wanted to keep to a minimum the normative virility of his explanatory-descriptive account. Only the minimum of purpose or purposes (conception(s) of value) is meant to get into the account, and in this minimum the only identified component is the purpose or good of survival. Concern for survival might indeed explain well enough why a legal system *must* contain rules against the free use of violence and sanctions against violation of *those* rules. Concern for survival does not seem a plausibly **(p.38)** sufficient explanation for the alleged necessity of rules providing even 'minimum forms of protection for ... property, and promises which are similarly indispensable [necessary] features of municipal law'.<sup>37</sup> And it has virtually no explanatory power in relation to the other great feature of law which Hart's whole book argues is necessary: the set of secondary rules of change, adjudication, and recognition which together move us from the pre-legal (or the non-paradigmatically 'legal' like international law) to the paradigmatically or centrally legal instantiated by mature systems of municipal law. The defects which these rules are needed [necessary] to remedy have little to do with survival. One cannot speak of defects and remedies without presupposing some good diminished or damaged by the defect; if the good is merely a supposed good, the defect will be merely a supposed defect. But Hart speaks of defects, not supposed defects. Still, he does not identify the goods harmed by these defects, beyond glancing references to uncertainty, waste, vendettas, and the absence of that earlier-

mentioned amenity and great step forward of being able to change and shift and vary the obligations imposed upon one by general rules.<sup>38</sup> What matters, however, is that he has here, at the heart of his theory, quite left behind the concern for *minimum* purposes.

According to Leiter:

Finnis admits ... that positivism—understood either in Hart's or Raz's version—gives an adequate account of 'what any competent lawyer ... would say are (or are not) intra-systemically valid laws, imposing "legal requirements" '.<sup>39</sup>

And then he intimates surprise that I do not treat this 'concession' of mine as an admission of 'natural law theory's demise'. Even if I had made this admission or concession, Leiter's surprise would be misplaced because, as I have argued above, natural law theory can do, did, and does all that is needed to describe law's positivity—to describe, that is to say, the kind of law that has among the necessary conditions for its existence the sheer fact that it has been made or adopted by some person or persons at some identifiable place and period. But I made no admission about the 'adequacy' of anyone's account. Here is the passage containing the sentence that Leiter has, I'm afraid, misunderstood. It makes no reference to Hart or Raz or their accounts, and neither asserts nor presupposes that their accounts have the normative inertness to which paradigmatic positivism aspires.<sup>40</sup> It is, as the sentence and paragraphs preceding it make explicit, a sentence (p.39) concerned with laws that, though widely treated as valid, and rigorously enforced, are very unjust:

Positivism never coherently reaches beyond reporting attitudes and convergent behaviour (perhaps the sophisticated and articulate attitudes that constitute a set of rules of recognition, change and adjudication). It has nothing to say to officials or private citizens who want to judge whether, when, and why the authority and obligatoriness *claimed* and *enforced* by those who are *acting as* officials of a legal system, and by their directives, are indeed *authoritative reasons* for their own conscientious action. Positivism, at this point, does no more than repeat (i) what any competent lawyer—including every legally competent adherent of natural law theory—would say are (or are not) intra-systemically valid laws, imposing 'legal requirements' and (ii) what any street-wise observer

would warn are the likely consequences of non-compliance....  
Positivism is ... redundant.<sup>41</sup>

So far from admitting that a normatively inert description of law gives an adequate account of anything, I was saying there, and—subject to an important qualification that I shall come to later—I am happy to repeat, that positivism in Leiter's sense gives no *account*, no theory or what Hart would call *elucidation* or explanation, at all, let alone an adequate one. The aspiration to be normatively inert makes it impossible to provide any explanation of the kind Hart was seeking throughout his work.

Leiter says my objections 'seem to reflect, at bottom, misunderstanding of ... the "comprehensive normative inertness" of legal positivism.'<sup>\*</sup> I don't doubt that I may misunderstand it from top to bottom. But if so, it will not have been for want of attention to this aspiration to normative inertness, and to the travails of theorists who struggle to reconcile that aspiration with their other aspirations: to identify what is and is not necessary in law and legal systems, and to add some explanatory or elucidatory content to what every competent lawyer or citizen already knows. My first published essay on general practical philosophy, nearly thirty-five years ago, began with a study<sup>42</sup> of Kelsen's efforts to determine whether positivism's comprehensive normative inertness (called by him purity) requires or permits legal theory to say that legal systems make sense, that **(p.40)** is, whether it is a necessary feature of legal systems that they exclude the juristic finding that completely contradictory legal rules (norms) coexist, each equally valid. In the end, Kelsen came to the same conclusion as I did in that paper: that a theory does not have comprehensive normative inertness unless it holds that contradictory legal norms can coexist, each equally valid. To treat non-contradiction as a necessary feature of law is to surrender to natural law methods of theorizing, he judged.<sup>43</sup>

Most other people who wish to think of themselves as normatively inert when doing legal theory have denied that their aspiration requires of them this late-Kelsenian austerity. They think a purpose of giving *coherent* guidance should be included among the 'minimum purposes' of any legal system and is thus a necessary feature of law. I cannot think of any good reason, compatible with normative inertness, for their thinking this. As I argued thirty-five years ago: Why should not some régime wish to use the law's norm-creating capacities to keep the population at its mercy by confronting them with contradictory legal requirements, so that the régime's judges and other officials can enforce against selected persons whichever of a pair of

contradictory legal norms those officials choose: either, or both, or neither? And I would now go on to add: Why should it not do so in accordance with some further secret rule of law? How can one justify the legal-theoretical (or so-called conceptual) claim that law must be promulgated? How can Austin justify his legal-theoretical claim that one type of particular command of a sovereign is a law but another is necessarily not? How can Hart justify his claim that a rule of recognition is a necessary feature of legal systems? Or power-conferring laws, distinct from obligation-imposing laws? Or rules of change? How can Joseph Raz justify his claim that it is a necessary feature of laws that they claim legitimate moral authority? Why should not some regime set up a legal system which has every feature of, say, Hart's concept of law but expressly asserts that morality is for sissies, and that its authority as a system of law is nothing more, and nothing less, than its willingness and ability to impose sanctions, damages awards, injunctions, requisitions, etc., for non-compliance? **(p.41)**

In all such cases, it seems to me, there is no necessity to be had save necessity of the kind that good practical reasons pick out for us when we are deliberating about what to want and choose to try to have, necessities that thus earn a place in a normatively virile theory or philosophy of law.

### III

A word about 'earning a place in the theory or philosophy of law'. Like Leiter, Jules Coleman argues that the norms for evaluating theories 'are pragmatic, theoretical, epistemic, and most importantly, discursive'.<sup>44</sup> Unlike Leiter, Coleman thinks that theories of law are theories of the concept of law, and he says:

We are choosing a theory of the concept—the best theory of the concept—as part of a construction of a general theory of the world and the concepts we employ to structure it. Different theories of the concept allow us to nest law and the concept of it differently: some emphasizing its centrality to the guidance of conduct; others to the theory of political obligation; others to an ideal of the person that can be realized only given certain social forms and institutions.

For my part, I think theories of law are concepts of law, not theories of concepts.<sup>45</sup> I think no good theory is ever chosen; it is a matter of judgment, not choice: the subject-matter is in command, and our only choice is whether to pursue the questions that occur to us about it, and to respect

the disciplines of truth: evidence, coherence, and the like. We don't, strictly speaking, *construct* a general theory of the world, we develop one. And I cannot imagine why a theory of law could not and should not say what is true about law's 'centrality to the guidance of conduct' *and* to political obligation *and* to the reality of persons and the way in which their flourishing 'can be realized only given certain social forms and institutions'. No need at all for 'different theories'. A page or two earlier, Coleman had been speaking more realistically, about what is and is not 'inherent in the nature of law'.<sup>46</sup> Indeed, he said that 'the morally attractive property of law is its inherent potential to realize or to manifest an ideal of governance'. (p.42)

But then Coleman went on to argue for what we can call the paperweight theory of law. It goes like this. Law is a thing that, by its nature,<sup>47</sup> has the inherent capacity to realize certain moral ideals. Because that is indeed an inherent capacity, an analysis of law 'should help us to understand what we find morally attractive about it, and an analysis that failed to do so would be lacking'.<sup>48</sup> But though hammers have the inherent capacity to be paperweights, being a paperweight or suitable for service as a paperweight is no part of the concept of a hammer. So, too (the argument goes), being morally attractive is no part of the concept or proper analysis or theory of law:

autonomy, dignity, welfare do not enter at any point into the analysis ... nor do any other moral properties. These ideals are external to the concept of law; law [just] happens to be the kind of thing that can serve them well.<sup>49</sup>

Justice, like human rights, dignity, and welfare, is as external to the concept or nature of law as the hammer's capacity to serve as a paperweight, or as the backbone of a garden gnome, is external to the concept and nature of a hammer.

This confident and unargued slicing between what is internal and what external to the nature of law overlooks the truth for which I have been arguing throughout this essay. One can reasonably spend a lifetime of using hammers without ever noticing that they would be good as paperweights or the backbones of garden gnomes. But one cannot begin to understand what law is about without noticing, not merely that it shares much of the same action-guiding vocabulary as morality, but—overwhelmingly more important—that it does so because it purports to occupy *the same place in the world* as morality: the decisive framing of the options for choice at the point where deliberation is ending in decision about what I should do and

what kind of person I should be. To hold that the 'morally attractive' virtue of justice stands to judicial responsibilities for adjudicating disputes according to law as loosely and extrinsically as paperweights and garden gnomes stand to hammers is, I suggest, a plain *reductio ad absurdum*.<sup>50</sup>

## IV

As I mentioned earlier, I should qualify an assertion I made in the essay from which Leiter quoted: that, given its desire for normative inertness, **(p.43)** positivism cannot do more than replicate what every lawyer already says. The qualification: it is a mistake to talk about positivism at all. I have been trying for decades not to do this sort of thing, and repent of having done it. (My excuse for having done it is not worth exploring here.) Better to think: there's no such thing as positivism.

Take, for example, the talk of 'normative inertness' which I have been pursuing through much of this essay. Here is Leiter's phrase: 'what John Gardner has aptly called the "comprehensive normative inertness" of legal positivism'.<sup>51</sup> But in Gardner's essay, the subject of which 'comprehensive normative inertness' is predicated is a *proposition*, labelled by Gardner (LP\*):

In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant senses, include the merits of its sources).<sup>52</sup>

Thus Gardner's full phrase is: 'the comprehensive normative inertness in (LP\*)'.<sup>53</sup> And then Gardner, unlike Leiter, goes on to make the following points about (LP\*):

(1) It<sup>54</sup> 'is not a whole theory of law's nature, after all. It is a thesis about legal validity, which is compatible with any number of further theses about law's nature, including the thesis that all valid law is *by its nature* subject to special moral objectives and imperatives of *its own*'.<sup>55</sup>

(1) (LP\*) relates to the question 'Is this really a law' and not to the 'more abstract' question 'What is law?' And 'once one has tackled the question whether a certain law is valid there remain many relatively independent questions to address concerning its meaning, its fidelity to law's purposes, its role in sound legal reasoning, its legal effects, and its social functions ... To study the nature of law one needs to turn one's mind to the philosophical aspects of these further questions too. To these further questions

there is no distinctively “legal positivist” answer, because legal positivism is a thesis only about the conditions of legal validity.’<sup>56</sup>

(1) *Natural Law and Natural Rights* ‘tak[es] (LP\*) for granted although remaining studiously unexcited about it’.<sup>57</sup>

(1) Legal positivists ‘need not deny that in some contexts “legality” ... names a moral value, such that ... laws may be more (p.44) or less valid depending on ... their merits. Nor need they deny that one must capture this moral value of legality ... in order to tell the whole story of law's nature.’<sup>58</sup>

So: the normative inertness endorsed by Gardner is vastly narrower than that endorsed by Leiter or by Kelsen in their envisaged positivist accounts of ‘law's essential properties’<sup>59</sup> or nature.

And here is Gardner on the thesis which Coleman and Leiter (writing in 1996) take to be one of the ‘two central beliefs’ shared by ‘all [legal] positivists’—that ‘there is no necessary connection between law and morality’:<sup>60</sup> writing in 2001 and using the identical words to articulate the thesis, Gardner says it is an absurd thesis. That legal positivists hold this thesis is, he surprisingly adds, a mere myth.<sup>61</sup>

To cut a very long story short, the question whether any truth is conveyed ‘by legal positivism’, like the question what is to be understood by ‘legal positivism’, is a gloomy jungle into which it is best never to stray.

As Gardner remarked, I see little to object to in (LP\*). The sense it gives the terms ‘legally valid’ and ‘law’ is *precisely* the sense needed to give sense to the well-known slogan, recalled in sec. I and not usually associated with legal positivism, ‘an unjust *law* [something *legally valid* in its making but seriously unjust]—is *not a law* [lacks something essential to law's central purpose of determining what I truly should do].’ (Recall: a bad argument is no argument—and all the other analogous sayings.) Once one acknowledges that there is strong (moral) reason to recognize some persons as having the responsibility and thus the authority of changing the answer to the question ‘What truly should I do?’—changing it by their sheer say-so, their law-making or law-determining *act*—one is bound to acknowledge the utility of a concept of intra-systemic legal validity responsive to no questions other than this question: Was such-and-such indeed what it appears to have been, a law-making or law-determining act of the kind those persons were authorized to make, and done in the manner and form required for it and its normative juridical product to be authentic, that is, legally valid? Answering *that* question, and deploying the corresponding concept of legal validity, can

be a matter simply of social-fact sources, and involve no inspection of merits.  
**(p.45)**

As Gardner also said, that question does not settle what a judge should do, and more generally leaves entirely untouched the question whether and when and why any of us should ever bother to have or to follow any valid legal norms.<sup>62</sup> The positivist interest in the (LP\*) sense of law and legal validity, as Gardner went on to say, 'does not distinguish law from a game'.<sup>63</sup> 'But', as he rightly adds 'law is not a game. It purports to bind us morally, i.e. in a way that binds even those of us who do not fancy playing.'<sup>64</sup> And one cannot tell whether it succeeds or fails in its endeavour to do so, unless one tells 'the whole story of law's nature' and why 'legality' in certain contexts has a much richer meaning than 'legal validity' in the (LP\*) sense.

So John Gardner faced up to the problem that does indeed confront him:

Why begin [the necessary inquiry into law's whole nature]  
by asking about [law's] legal validity in the thin, practically  
noncommittal [normatively inert] sense found in (LP\*)?<sup>65</sup>

His response was that this is the right place to begin because the question (LP\*) tries to answer is 'a logically prior question. What is the field of human endeavor, to which the natural lawyer's proposed criteria [of legality and the nature of law] apply?'<sup>66</sup> And so we come back to the point I took up on p. 1 of *Natural Law and Natural Rights* and have taken up again in this essay: the assumption that in relation to human things constituted by human choices, like law, you can answer the question 'What is it?' before you tackle the question 'Why choose to have it, create it, maintain it, and comply with it?' That assumption, I have been arguing, is a philosophical mistake, induced or at least made apparently plausible by the surface grammar of the latter question. I think that this mistake sets many of my friends and colleagues off on the wrong foot.

Even so, most of us end up on the same road and indeed at much the same point on the road.† *Their* (official) route to that point has, I admit, the attraction of making it seem possible to build a legal-philosophical dwelling place without first spending time on the foundations.

## NOTE

## Notes:

\* 2003b ('Law and What I Truly Should Decide').

\* Raz, 'About Morality and the Nature of Law' at 8-9, 13 (= Raz, *Between Authority and Interpretation*, 173-4, 178).

\* Leiter at 29.

\* Essay I.6 at 106 (1970a at 103).

† *Convergence in contemporary legal philosophy ...* See also the end of sec. I of the Introduction to this volume (p. 9).

(1) *Posterior Analytics* II.2: 90a5-20:

... in all our searches we seek either whether there is an explanation or what the explanation is .... For in all these cases it is evident that *what* something is and *why* it is are the same. What is an eclipse? Privation of light from the moon by the earth's screening. Why is there an eclipse? or Why is the moon eclipsed? Because the light leaves it when the earth screens it.

(2) See the texts cited and summarized in *Aquinas* 41 n. 68. [Also essay I.11 at 184-5.]

(3) See *CL* 91, 193-200.

(4) These are hinted at in Hart, *Essays on Bentham*, 266-7:

Of course, if it were the case, as a cognitive account of duty would hold it to be, that the statement that the subject has a legal duty to act in a way contrary to his interests and inclinations entails the statement that there exist reasons which are 'external' or objective, in the sense that they exist independently of his subjective motivation, it would be difficult to deny that legal duty is a form of moral duty. At least this would be so if it is assumed that ordinary non-legal moral judgments of duty are also statements of such objective reasons for action. For in that case, to hold that legal and moral duties were conceptually independent would involve the extravagant hypothesis that there were two independent

'worlds' or sets of objective reasons, one legal and the other moral.

For all its caution, it is reasonable to infer from this that a meta-ethical scepticism played a significant albeit largely unadmitted role in Hart's legal philosophy, and in his conclusion on p. 267 that 'judicial statements of the subject's legal duties need have nothing directly to do with the subject's reasons for action', a conclusion of which he says 'I am vividly aware that to many it will seem paradoxical, or even a sign of confusion', coming as it does 'at the end of a chapter, a central theme of which is the great importance for the understanding of law of the idea of authoritative reasons for action ...' See also CL 191 and comments on this in my *NLNR* 30-1. [For a correction of the inference I articulate in this footnote, see essay 11 n. 72.]

(5) Or rather to the phrase which he treats as equivalent: '*the law is a morally valuable institution*'.

(6) Raz, 'About Morality and the Nature of Law' at 13 (= Raz, *Between Authority and Interpretation*, 179).

(7) Endicott, 'The Reason of the Law' at 85.

(8) There is a sense in which the idea of having a society regulated by justice and responsible government and the rule of law is an ideal (or three interrelated ideals). But there is another sense in which the rule of law, like responsible (answerable) government, and justice (all of which are described by Endicott as ideals), is a set of moral *requirements* which in many situations are here and now mandatory, rather than an ideal. (Endicott recognizes this, too, e.g. when he says that what he calls a responsible form of government is a 'requirement'.)

(9) On the presentation of this essay as a lecture, Raz asked why law should be thought to be like argument, medicine, or contracts, rather than like novels or paintings or people, that are still novels or paintings or people, even if they are bad. The answer is that, like argument, medicines, and contracts, law has a focused and normative point to which everything else about it is properly to be regarded as subordinate. Novels and paintings, on the other hand, can have incompatible points, e.g. to entertain or arouse (like kitsch or porn) or to tell a truth with artistry. People exist in the natural

order as living substances even if they are not functioning adequately or at all in the orders of logic and thought, deliberation, and/or exercises of skill.

(10) [And canonists]: see essay 7.

(11) For the texts, see *Aquinas* 257.

(12) See *Aquinas* 222–45.

(13) For whatever reason, at the time no such suggestion was offered.

(14) Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence' at 29, quoting Gardner, 'Legal Positivism: 5½ Myths' at 203.

(15) Leiter *ibid.*, quoting Gardner *ibid.*

(16) Leiter at 30, quoting Gardner at 203.

(17) Leiter at 50.

(18) *Ibid.* at 51.

(19) His Quinean dismissal of the distinction between necessary and contingent truth cannot be accepted, since the supposed distinction cannot be satisfactorily assessed if the discussion flips, like Leiter's, into an external point of view, as when he says:

there is simply the socio-historical fact that, at any given point in the history of inquiry, there are some statements we are unlikely to give up in the face of recalcitrant empirical evidence, and others that we are quite willing to give up when empirical evidence conflicts. (Leiter at 44.)

The question is whether, when we adopt an internal point of view (i.e. consider the data, evidence, subject-matter on its merits), we have grounds for being unwilling to give up what we consider necessary—and what these grounds are.

(20) Leiter at 34, quoting *NLNR* 16.

(21) *Pace* Leiter (at 34 n. 61), what I was invoking here was *not* (as I put it on the page he cites from an earlier section of my chapter) 'Max Weber's not too clearly explained methodological device, the *ideal-type*', but rather (as I put it in the endnote to the passage Leiter quotes from me) Weber's

specific thesis about ‘the necessity of the theorist using his own evaluations in order to assess significance for descriptive theory’, for which I cited (NLNR 21) Weber's arguments in Shils and Finch, *Max Weber on the Methodology of the Social Sciences*, 58, 76–82, 21, as well as Freund, *The Sociology of Max Weber*, 51–61. My endnote proceeded with some cautions about some of Weber's argumentation for his thesis. The passages that Leiter quotes from Gerth and Mills, *From Max Weber* in an effort to explicate the Weberian ideal-type reveal how unexplained are the key terms ‘construction [in what sense?] of certain [which?] elements of reality’ as ‘theoretically illuminating [why? how?] features of varied situations’. My discussion in Chapter I of NLNR endeavours to explain and justify a much higher level of methodological specificity than anything Leiter has found in Gerth and Mills's Weber.

(22) Leiter at 51.

(23) *Ibid.* at 46.

(24) *Ibid.* at 45 n. 89.

(25) *Ibid.* at 46.

(26) *Ibid.* at 45.

(27) NLNR 13–16.

(28) CL 41.

(29) *Ibid.*, 41.

(30) *Ibid.*

(31) *Ibid.*, 42.

(32) *Ibid.*, 199.

(33) *Ibid.*

(34) *Ibid.*, 193.

(35) *Ibid.*

(36) *Ibid.*, 198.

(37) *ibid.*, 199.

(38) *ibid.*, 93.

(39) Leiter at 28–9.

(40) Hart conceived his account of the necessity of sanctions and primary rules as a ‘reply to the positivist thesis that “law may have any content”’: *CL* 199.

(41) 2000d at 1611; also in essay 5 at 115. The ellipses are filled as follows:

It cannot explain the authoritativeness, for an official's or a private citizen's conscience (ultimate rational judgment), of these alleged and imposed requirements, nor their lack of such authority when radically unjust. Positivism is not only incoherent. It is also redundant.

The incoherence is explained earlier as ‘its inherent and self-imposed incapacity to succeed in the explanatory task it sets itself’. In the terminology of the present essay, it is the incoherence of complete normative inertness *with* the ambition to explain law (even descriptively). There is no confusion in my essay between incoherence and mere failure to seek a moral justification.

(42) Essay I.6 at 105–6 (1970a at 103).

(43) Kelsen, *General Theory of Norms*, 214, 217, 224, 391, 394–5. He also (*ibid.* at 226–41) judged it a fatal breach of comprehensive normative inertness for legal theory to hold that if [P1] a valid legal norm of a jurisdiction specifies that thieves ought to be imprisoned for ten years, and [P2] Smith a subject in that jurisdiction has committed theft, then [P3] it is legally required that Smith ought to be imprisoned for ten years. For legal theory to hold that P3 is legally required by P1 and P2 would be for legal theory to participate in practical reasoning; the time for legal theory to assert P3 is after someone with legal authority to do so decides that P3; only then can legal theory include P3 in its inert description of that legal system. [Kelsen adopted these positions in writings later than those I was considering in essay I.6 (1970a).]

(44) Coleman, *The Practice of Principle*, 196.

(45) So I agree with much in Leiter's critique of 'conceptual analysis'. But if the 'naturalistic turn', with which he associates that critique, is well represented, as he suggests (Leiter nn. 77 and 101), by Quine's essay 'Natural Kinds', in Quine, *Ontological Relativity and Other Essays*, 114–38, it seems likely to be a turn for the even worse: Quine's essay is a striking example of (multiple) self-refutation, relying again and again on distinctions between natural kinds of e.g. arguments, disciplines, stages in 'the [human] race's progress', etc., etc., to argue that 'it is a mark of maturity of a branch [sc. kind] of science that the notion of similarity or kind finally dissolves, so far as is relevant to that branch of science' (121), that 'induction itself is essentially only ... animal expectation or habit formation' (125), and so on.

(46) Coleman, *The Practice of Principle* at 192.

(47) *Ibid.* at 194.

(48) *Ibid.* at 195.

(49) *Ibid.*

(50) As [or rather: to the extent loosely indicated in the last two sentences, one can concur with what] Raz says, in *The Authority of Law*, 159, 158: 'positivists can and should adopt' the thesis 'that normative terms like "a right", "a duty", "ought" are used in the same sense in legal, moral, and other normative statements'.

(51) Leiter at 29.

(52) Gardner, 'Legal Positivism: 5½ Myths' at 201.

(53) *Ibid.* at 203.

(54) *Ibid.* at 210: the subject of his sentence is 'Legal positivism' but the whole context shows that this is here understood as or stipulated to be a theory the entire content of which is (LP\*).

(55) *Id.* (emphases added).

(56) *Ibid.* at 224.

(57) *Ibid.* at 227.

(58) *Ibid.* at 226.

(59) Leiter at 51.

(60) Coleman and Leiter, 'Legal Positivism', in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, at 241.

(61) Gardner at 223. But Coleman and Leiter are in very good company: e.g. Hart, *Essays on Bentham*, 262–3: 'positivist jurisprudence, ... like Bentham's and my own work[,] denies that there is any conceptual or necessary connection between law and morality ...'

(62) Gardner, 'Legal Positivism: 5½ Myths' at 225.

(63) *Ibid.* at 227.

(64) *Ibid.* at 226.

(65) *Ibid.* at 227.

(66) *Ibid.* at 226.

