DIALECTICAL JURISPRUDENCE:
ARISTOTLE AND THE CONCEPT OF LAW

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General theories of law struggle to do justice to the multiple dualities of the law.[1]

INTRODUCTION

Western law, culture, and philosophy thought that they were saying goodbye to Aristotle as they entered into modernity, only now to find the ancient philosopher standing in wait as they leave modernity and enter into post-modernity. But what use do we have for Aristotle at this time? He can perform a valuable service for us—he offers a therapy for the "bipolar disorder"[2] in contemporary jurisprudence and philosophy.[3] This disorder is manifested in the widespread tendency to approach and analyze philosophical topics as dueling dichotomies, incapable of resolution or reconciliation. It is all too often assumed at the outset that one is faced with a stark either/or sort of choice between alternatives, so participants in the philosophical debates arising out of this approach typically take one side of the dichotomy and see it as their task to marginalize and diminish the other side of the dichotomy.[4] H.L.A. Hart diagnosed one case of this disorder in his famous depiction of American jurisprudence as torn between the noble dream that judges can always

1. JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 1 (2009).

2. In this Article, I will use the notion of a "bipolar disorder" in philosophy in a broader way to refer to a more general dichotomy problem common today in approaches to philosophical topics.

3. Catherine Elgin, who applies the phrase to contemporary philosophy, sees it as a dichotomy between the absolute and the arbitrary. She describes it in this way: "The alternatives are stark. Unless answers to philosophical questions are absolute, they are arbitrary. Unless a position is grounded in agent-neutral determinate facts, it is right only relative to a perspective that cannot in the end be justified." CATHERINE Z. ELGIN, BETWEEN THE ABSOLUTE AND THE ARBITRARY 1 (1997).

4. As a result, the topic of many articles in legal philosophy, for example, can be summarized with the title of the Section on Jurisprudence program at the 2010 meeting of the Association of American Law Schools, "Legal Positivism: For and Against."

apply the existing law in cases they decide and the nightmare that this is just an illusion—that judges instead make the law up as they go along.[5]

This disorder extends far beyond the absolute/arbitrary dichotomy noted by pragmatic philosophers Catherine Elgin and Hart to a more general tendency to see philosophical topics in terms of opposed extremes, which is to say that this disorder has methodological, as well as substantive, causes and ramifications. Joseph Raz, for example, notes some important dualities in law, saying, "The law combines power and morality, stability and change, systematic or doctrinal coherence and equitable sensitivity to individual cases, among others."[6]

The problem here, according to Elgin, is that "[t]his bipolar disorder incapacitates philosophy, preventing it from seeing how fact and value intertwine, where art and science intersect, how human agents contrive categories, set standards, define goals, and thereby fix the frameworks within which objective judgments can be made."[7] Her analysis of the disorder reflects a concern like that expressed by Raz in the headnote.[8] But Elgin is unfortunately more accurate in her depiction of the symptoms of the disorder. All too often, theorists do not struggle against the bipolar disorder—instead, they succumb to it.

A precondition of the therapy for this "bipolar disorder" is the realization that the terms of these dueling dichotomies need not always create this sort of stark either/or choice. It is only currently prevalent assumptions and methodologies that make it so. Some of these dichotomies—those noted above by Elgin and Raz for example—can then be more successfully navigated by pursuing a reconciliatory course that is a mean between their opposed extremes. This, however, calls for a dialectical approach to these paired terms which takes them, not as irreconcilable opposites, but as reflexively related pairs. Mention of the mean and dialectic will, of course,

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5. *See* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 972, 978 (1977). Hart says of American legal philosophy that "it has oscillated between two extremes with many intermediate stopping places . . . . I shall call these two extremes, respectively, the Nightmare and the Noble Dream." *Id.* at 971. Both these views concern the wish that "an explanation and a justification can be provided for the common expectation of litigants that judges should apply to their cases existing law and not make new law for them . . . ." *Id.* at 978. They differ as to whether or not this wish can be fulfilled.

6. RAZ, *supra* note 1.

7. ELGIN, *supra* note 3.

8. *See supra* text accompanying note 1.

serve to prefigure a broadly Aristotelian[9] approach to these current problems in legal philosophy, whose use I seek to both illustrate and commend in this Article.

One important methodological cause of the bipolar disorder in law and legal theory is the way legal philosophy is conducted: through the conceptual analysis of law seen as a search for necessary and sufficient conditions[10] or, more recently, as necessary and important or adequately explanatory features of law.[11] Modern analytic philosophy has used these means to analyze our basic concepts and ideas. But this approach has come under serious attack by philosophers like Quine.[12] In our post-Quinean philosophical world and especially with regard to the concept of a socially constructed practice like law, this search can too often descend into tendentious argument (based, pursuant to this version of conceptual analysis, on intuitions that are not falsifiable) that my preferred element is necessary (and, therefore, essential), while yours is only contingent (and, so, of only marginal importance). The unending and unpersuasive nature of the debate which has arisen out of this approach to legal philosophy calls into question the utility and wisdom of its methodological assumptions. Both elements in the traditional dualities such as the ones Raz mentions have played and will continue to play significant and illuminating roles in the social practice that is law. But the argument over necessary and sufficient or necessary and explanatorily adequate features, as Elgin reminds us, only acts

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9. The account of dialectical jurisprudence I present here is Aristotelian in the same sense that John Rawls described his theory of justice as fairness as a kind of Kantian Constructivism, which is to say, by analogy, inspiration and fundamental structure and content rather than exact doctrinal and exegetical identity and fidelity. *See* John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 517 (1980).

10. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 15 (5th ed. 2009) ("Conceptual theories generally define terms by necessary and sufficient conditions. Such definitions cannot be directly verified or rebutted by empirical observation . . . .").

11. *See* JULIE DICKSON, EVALUATION AND LEGAL THEORY 17 (John Gardner ed., 2001) ("A successful theory of law . . . is a theory which consists of propositions about the law which (1) are necessarily true, and (2) adequately explain the nature of law." (citing Joseph Raz, *Can There Be a Theory of Law?*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 324, 324 (Martin P. Golding & William A. Edmundson eds., 2005))).

12. I refer to Quine's meaning holism and his denial of the analytic/synthetic distinction. He says, "[T]otal science is like a field of force whose boundary conditions are experience. A conflict with experience at the periphery occasions readjustments in the interior of the field. Truth values have to be redistributed over some of our statements . . . . No particular experiences are linked with any particular statements in the interior of the field, except indirectly through considerations of equilibrium affecting the field as a whole." W.V. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV. 20, 39–40 (1951).

to block examination of the interplay of these elements in these dualities.

The duality, and often dichotomy, of rules and ends (deontology and teleology) is an important and perennial pairing in moral and legal philosophy.[13] The bipolar approach to philosophical analysis leads to the asking of yes or no questions concerning rules and ends, such as Ronald Dworkin's question, "Is law a system of rules?"[14] Yet, this question does not readily admit of a simple yes or no answer, and Dworkin, in fact, does not himself give a yes or no answer when he asks it.[15] Hart, Dworkin's main target in posing the question in the first place, grants that law may at first glance appear to be a system of rules. But he immediately adds that "dissatisfaction, confusion, and uncertainty concerning this seemingly unproblematic notion underlies much of the perplexity about the nature of law."[16]

For these reasons, this Article proposes a change in the methodology of legal philosophy as it is conducted in the Anglo-American tradition, departing from the either/or assumptions of current practice and suggesting instead an embrace of both elements in the traditional dualities. It calls not for separation, but synechism or continuity as a regulative principle.[17] It aims to explore some important features of the social practice of law rather than to announce the necessary and sufficient or necessary and explanatorily adequate features of law. It seeks not only the salient aspects of the concept of law, but also the ways in which these elements interact and operate

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13. *See generally* JOHN H. MUIRHEAD, RULE AND END IN MORALS (1932) (using the dichotomy to divide all ethical theories).

14. Ronald Dworkin, *Is Law a System of Rules?, in* ESSAYS IN LEGAL PHILOSOPHY 25, 25–26 (Robert Summers ed., 1968). This article also appeared twice elsewhere under different titles. *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 14–46 (1967); *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14–45 (1978).

15. He asks the question in this way in order to accuse legal positivism of wrongly answering the question in the affirmative. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 14, at 16–22.

16. H.L.A. HART, THE CONCEPT OF LAW 8 (2d ed. 1994).

17. Synechism is a principle of continuity introduced into American philosophy by Charles S. Peirce. He described it as "that tendency of philosophical thought which insists upon the idea of continuity as of prime importance in philosophy and, in particular, upon the necessity of hypotheses involving true continuity." 2 CHARLES SANDERS PEIRCE, SCIENTIFIC METAPHYSICS (1935), *reprinted in* COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 6.169 (Charles Hartshorne & Paul Weiss eds., 4th prtg. 1978). For a recent treatment of synechism in philosophy see Susan Haack, *Not Cynicism, But Synechism: Lessons from Classical Pragmatism*, 41 TRANSACTIONS OF THE CHARLES S. PEIRCE SOC'Y 239 (2005).

in ongoing practice (and not as just a frozen snapshot). This is done mainly through the examination of puzzles and problems that arise in the course of the practice of law and legal philosophy. Whether or not or in what manner analytical jurisprudence and the conceptual analysis of law can survive this change will turn largely on how broadly or narrowly practitioners of analytic legal philosophy come to see and define these terms. As with many other determinations here, this will be a choice about usage and line-drawing made by legal philosophers based upon their evaluation of the reasons for making the change (or not) rather than on an intuition of conceptual necessity.

Dialectical jurisprudence is the name I propose for this alternative way of philosophically inquiring after the nature of law.[18] Now, "dialectical" is a freighted term with numerous different, if not contradictory, senses, holding associations with many philosophers and philosophical theories. This Article takes the term in its Aristotelian sense with the structure and associations that accompany that identification.

My exposition of dialectical jurisprudence below is in four parts — two methodological and two substantive. Parts I and II present an analysis and critique of some problems, puzzles, and debates in contemporary analytic jurisprudence. The first, methodological part of this examination treats the notions of necessity and importance in the conceptual analysis of law in contemporary analytic jurisprudence. The next, substantive part takes up the relation of rules and ends in current analytic jurisprudence (in their appearance in both legal positivist and non-positivist theories). Parts III and IV illustrate the Aristotelian character of the account of dialectical jurisprudence previously presented in a discussion of conceptual analysis and Aristotelian dialectic (a methodological part) and the Aristotelian doctrine of law and equity (a substantive part). This Article is not at all intended as a comprehensive presentation of the notion of a dialectical jurisprudence, let alone a demonstration of the truth thereof. Instead, my aim is simply to provoke interest in an alternative way of approaching the question, "What is law?" that may avoid some of the persistent difficulties and disputes which continue to bedevil the dominant analytic approach.

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18. For an explanation of Aristotelian dialectic and its relation to the analysis of the concept of law, see *infra* notes 121–42 and accompanying text.

I. BEYOND THE DEMARCATION PROBLEM

Let me start with a quick summary of my main argument. Contemporary analytic jurisprudence, following Hart, sees the question, "What is law?" as the most important, though most perplexing, question it has to answer.[19] This question is usually then paired with the question, "What is not law?," thereby raising what Brian Leiter (following Larry Laudan's work on the philosophy of science) calls the demarcation problem in jurisprudence[20] (also referred to as the boundary problem[21]). Traditional conceptual analysis in analytic jurisprudence has attempted to solve this problem by seeking necessary and sufficient features of law,[22] although this attempt so far has been unsuccessful. Worse yet, Quinean holism[23] has undermined faith in the distinctions between the necessary and the contingent and between the analytic and the synthetic that underpin the effort to identify and agree upon features of this sort.

Faced with the choice of finding a different basis for necessity or of abandoning traditional conceptual analysis as the way of doing legal philosophy, analytic philosophers (especially the legal positivists like Joseph Raz[24]) have mainly taken the first option and doubled down on necessity by adopting a modal possible worlds[25] notion of conceptual necessity determined by intuitions and thought experiments. Unfortunately for its proponents, this approach to necessity has also not proven to be generally convincing. Not everyone has the same intuitions of necessity, especially concerning social practice concepts like law, as opposed to natural kind concepts like

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19. Hart begins his most influential work with this question, saying, "F[ew] questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?'" HART, *supra* note 16, at 1. This is echoed, for example, by Andrei Marmor, who says, "[T]he philosophy of law is interested in the general question: What is Law?" Andrei Marmor, *The Nature of Law*, *in* STANFORD ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Summer 2010), http://plato.stanford.edu/archives/sum2010/entries/lawphil-nature/.

20. Brian Leiter, *The Demarcation Problem in Jurisprudence: A New Case for Skepticism, in* NEUTRALITY AND THE THEORY OF LAW (Jordi Ferrer & Jose Juan Moreso eds., forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599620& (follow the "One-Click Download" hyperlink) (providing that the demarcation problem is the problem of distinguishing between law and morality).

21. *See, e.g.*, Danny Priel, *The Boundaries of Law and the Purpose of Legal Philosophy*, 27 LAW & PHIL. 643, 659–60 (2008).

22. *See, e.g.*, BIX, *supra* note 10, at 15.

23. *See supra* text accompanying note 12.

24. *See supra* Raz, note 11, at 324–42.

25. For an explanation of this notion, see *infra* notes 33–34 and accompanying text.

water (the classic example — or counterexample — in this discussion). Neither have Quinean doubts about necessity been banished by this move. The better decision, I will argue, is to take the other option and leave conceptual necessity behind and focus instead on the important features of, and salient puzzles and problems in, law and legal philosophy.

The demarcation problem has been a main focus of attention in Anglo-American legal philosophy for much of its modern history.[26] Why? Many see its solution as the key to understanding the nature of law,[27] which analytic legal philosophers have taken to be their primary and fundamental task. The notion of a demarcation problem is borrowed from the philosophy of science, and in the case of Leiter's critique, from the writing of Larry Laudan.[28] What should demarcation criteria do? Laudan tells us that "[m]inimally, we expect a demarcation criterion to identify the *epistemic* or *methodological* features which mark off scientific beliefs from unscientific ones," (that is to say, what their features are or how we determine them).[29] In the philosophy of science, according to Laudan, these demarcation criteria must supply us with necessary and sufficient conditions for scientific status.[30] In this way, they serve the same function in law, purporting to separate law from non-law through the use of necessary and sufficient conditions.

Demarcation criteria and necessary and sufficient conditions may seem at first to offer a powerful theoretical approach in both the philosophy of science and the philosophy of law, but with respect to practical results measured in terms of philosophical consensus, they have been a failure in both fields.[31] This has been primarily because

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26. Leiter says, "For more than two hundred years, legal philosophers have been preoccupied with specifying the differences between two systems of normative guidance that are omnipresent in all modern human societies: law and morality. In the last hundred years, what I will call the 'Demarcation Problem' — the problem of how to distinguish these two normative systems — has been *the* dominant problem in jurisprudence . . . ." Leiter, *supra* note 20, at 1.

27. As Leiter says, "The Demarcation Problem in jurisprudence also purports to resolve a theoretical dilemma: what to believe about the nature of law." *Id.* at 12.

28. *See id.* at 6.

29. Larry Laudan, *The Demise of the Demarcation Problem*, *in* PHYSICS, PHILOSOPHY AND PSYCHOANALYSIS: ESSAYS IN HONOR OF ALFRED GRÜNBAUM 111, 118 (R.S. Cohen & L. Laudan eds., 1983).

30. Laudan states this emphatically: "Without conditions which are both necessary and sufficient, we are never in a position to say '*this* is scientific: but *that* is unscientific.'" *Id.* at 119.

31. With regard to the philosophy of science Laudan says, "I will not pretend to be able to prove that there is no conceivable philosophical reconstruction of our intuitive distinction between the scientific and the non-scientific. I do believe, though, that we are warranted in

the criteria and conditions proffered fail to capture a consensus regarding the basic intuitions that philosophers (and, in the case of law, laypersons) have regarding the concepts in question. Worse yet, there has been no "Plan B" when this occurs.

This failure may result, at least in part, from the fact that our intuitions in these matters lack the fixed points needed for an explanation in terms of necessary and sufficient properties. Instead, our intuitions and beliefs may be better described and explained by Quine's holism;[32] that is, they are context and case dependent so that our willingness to accept or reject, modify or leave unchanged even basic intuitions, at least sometimes, may vary from person to person and from case to case.

Worse yet, given the a priori character of the intuitions used in conceptual analysis, there is no recourse open to empirical evidence (i.e., facts of the matter) which may be employed to resolve disagreements about whether particular features are necessary and sufficient for a concept.[33] Someone who does not have the same intuitions is left saying, "Well, that's just not the way I see it!" and there, one might think, matters would rest—except that they do not. In both the philosophy of science and in legal philosophy, these references to intuitions of necessity, which on their faces appear to be appeals to common understanding and latent consensus, are more often, as Laudan puts it, "used as *machines de guerre* in a polemical battle between rival camps."[34]

The methodological situation in analytic jurisprudence is not much improved or even greatly changed by the switch from a priori necessary and sufficient conditions to conceptually necessary and explanatorily adequate conditions more recently embraced by theorists such as Raz and Dickson.[35] Let me first quickly describe this newer approach to necessity employed by Raz and Dickson.

The notion of conceptual necessity on which the Raz/Dickson approach is based uses a metaphysical notion of necessity and a modal

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saying that none of the criteria which have been offered thus far promises to explicate the distinction." *Id.* at 124; *see also* Leiter, *supra* note 20, at 9–10 ("If, in the history of philosophy, there is not a single successful analysis of the 'necessary' or 'essential' properties of a human artifact, why should we think that law will be different?").

32. *See supra* text accompanying note 12.

33. *See* BIX, *supra* note 10, at 15 ("Such definitions cannot be directly verified or rebutted by empirical observation . . . .").

34. Laudan, *supra* note 29, at 119.

35. *See supra* note 11.

possible worlds philosophy of language[36] in which a feature of a concept is a necessary feature if it is true of the concept in all possible (i.e., conceivable) worlds. This means, in practice, that to determine if a feature of a concept is a necessary feature, we ask if we can conceive of that concept not having that feature or, instead, if they are rigidly linked (would a dog still be a dog without its bark, for example?). This determination is carried out through thought experiments issued in armchair intuitions and is sometimes referred to as intuition pumping (which may, but need not, have a negative connotation).

Another way of carrying this process out is through a linguistic division of labor, i.e., by relying upon the knowledge and consensus of experts in the field where the concept resides. With natural kind concepts, these experts are scientists. So, for example, our intuition/belief that water is necessarily H_2O (the favorite example in the philosophical literature) is based upon the consensus and say so of the appropriate group of scientists rather than our own everyday observations or upon "folk" beliefs (as they are called).

The "water is H_2O" thought experiment typically proceeds in this way. Suppose that rocket travel takes us to a distant planet where we find a clear, tasteless liquid that outwardly seems to be water. Chemical analysis, however, shows this newly discovered liquid to have a chemical formula of *XYZ* (the nonsense formula conventionally used in the discussion) rather than H_2O. This raises the question, "Is this liquid with the formula *XYZ* water?" The thought experiment is designed in such a way as to lead us to give a "no." Why? Perhaps because appearances can be deceiving—iron pyrite looks like gold but is only fool's gold, after all. Science tells us that water is H_2O. We are asked to conclude that this is a metaphysical, conceptual necessity and not merely an empirical discovery, i.e., that our concept of water is such that water is necessarily H_2O. The upshot of this thought experiment is that water is H_2O in all possible worlds, not merely all actual worlds.

Legal positivists like Raz use this possible worlds approach to answer the question, "What is law?" and to treat the demarcation problem in jurisprudence.[37] For if certain features of law are conceptually

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36. The usual citation in the legal philosophy literature is to Hilary Putnam's classic essay. *See* HILARY PUTNAM, *The Meaning of Meaning*, *in* 2 MIND, LANGUAGE, AND REALITY: PHILOSOPHICAL PAPERS 215 (1975).

37. *See, e.g.*, Raz, *supra* note 11, at 329.

necessary and others are not, we have gone a long way towards solving both these problems.[38] Even if one adopts this approach, though (i.e., if one accepts the "water is H_2O" thought experiment), it quickly becomes evident that it will be much more complicated and uncertain when this approach is applied to the concept of law.

One complication is that there are multiple, seemingly conflicting, assertions of conceptual necessity with regard to law. Raz, for example, holds that law necessarily claims authority[39] while Robert Alexy says that law necessarily claims moral correctness[40] (to mention only two claimed conceptually necessary features of law).

None of these cases is as easy or uncontroversial as the "water is H_2O" case. As a result, the corresponding thought experiments do not generate the desired intuitions as readily, in large part because the required intuitive consensus is lacking. Legal positivists, for example, have historically maintained the separation thesis (the denial of a necessary connection between law and morality)[41] as what sets them apart from non-positivists. Natural law, legal positivism's traditional opponent, is classically summed up by just the opposite thesis—that an unjust law is no law at all.[42] More recently, the intuitive divide between positivists and non-positivists has appeared in other related forms. Some contemporary positivists now emphasize the social fact thesis (i.e., the assertion that law is a socially determined and determinable, rather than a moral, fact)[43] in opposition,

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38. In this jurisprudential debate, writers on both sides have concentrated more on the issue of necessary and only contingent features of law more than on the explanatory adequacy of the necessary features.

39. *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 28–33 (2d ed. 2009).

40. Robert Alexy, *The Dual Nature of Law*, 23 RATIO JURIS 167, 168 (2010) ("My argument turns on the thesis that law necessarily raises a claim to correctness, and that this claim comprises a claim to moral correctness.").

41. One prominent positivist, Jules Coleman, has argued that the law/morality connection is only contingent and that there can be legal systems without moral requirements. He writes, "The separability thesis is the claim that there exists at least one conceivable rule of recognition (and therefore one possible legal system) that does not specify truth as a moral principle among the truth conditions for any propositions of law." Jules L. Coleman, *Negative and Positive Positivism*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 28, 30 (Marshall Cohen ed., 1983).

42. The quotation is traceable to St. Augustine but appears mainly in weaker forms by later natural lawyers.

43. Jules Coleman, for example, says, "Positivism claims that the possibility of legal authority is to be explained not in terms of substantive morality, but rather, in terms of certain *social facts*." JULES COLEMAN, THE PRACTICE OF PRINCIPLE 75 (2001). He then goes on to assert that "no claim is more central to legal positivism." *Id.*

for example, to Ronald Dworkin's interpretive theory of law, which holds that law should be seen in its (morally) best light.[44]

Let us explore some of the difficulties which present themselves if we attempt to bridge this divide over the necessary features of law. First, we cannot just appeal to empirical facts because conceptual arguments are not empirical—they are about intuitions rather than empirical facts. Conceptual disagreements can even arise in the absence of empirical disagreement. That may well be the case here, too. As Justice Holmes famously said, "When we study law we are not studying a mystery but a well known profession."[45] Now, positivists are not claiming that moral considerations cannot enter into the reasoning and practice of lawyers and judges, and non-positivists do not deny the moral imperfections of many laws (if they were, those assertions would simply be false). What they disagree about are the important and necessary features of the concept of law, not the empirical facts of the matter—empirical facts simply do not speak to that question.

Neither can one resolve this dispute by a referral to the appropriate experts, as was done in the "water is H_2O" thought experiment. There is the initial problem of deciding who these experts here might be—lawyers, legal officials, legal philosophers, or just citizens? Lawyers and legal officials are legal practitioners and, so, most analogous to the scientists in the "water is H_2O" example. Issues of metaphysical, conceptual necessity, and definition, however, are not part of what they ordinarily talk about and deal with in their practice of law. Recourse to legal philosophers will not help because they are the very ones having the disagreement we seek to resolve. Citizens are, of course, not legal experts, but they do typically have a concept of law, at least to some degree. Reliance on citizen intuitions, however, directly raises the question of whether a conceptual explanation of law ought to reflect and be judged by folk beliefs about law—I will discuss this independent issue later in this Article.

Coleman's thought experiment about the contingency of the law/morality connection,[46] for example, has the same structure as Putnam's "water is H_2O" example, but it does not have the same

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44. Dworkin sums up the task for Hercules, the personification of his theory, in this way: "His god is the adjudicative principle of integrity, which commands him to see, so far as possible, the law as a coherent and structured whole." RONALD DWORKIN, LAW'S EMPIRE 400 (1986).

45. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

46. *See* Coleman, *supra* note 41.

force. It does not have the same force because it lacks the same consensus about the features in question. This is so, in large part, because rigid designation/possible world theories of conceptual meaning are better suited to natural kind concepts, such as water (to which they were first applied), than they are to social practice/human artifact concepts, such as law.[47] This is the case for several reasons. Social practices like law (and, hence, its concepts) are subject to deliberate revision in ways that natural kinds are not. We typically think of natural kinds as having a nature that is independent of human interests and actions. In contrast, societies create and maintain social practices in pursuit of various and variable social ends. This is not true of natural kinds. Social practices also have sorts of complexity that natural kinds lack, including a reflexive structure in which there is an ongoing interaction between existing rules and policies, principles, and other ends these rules are designed to serve. These dimensions of complexity in social practices and social practice concepts have the paradoxical effect of increasing the number of candidates for necessary features, while at the same time making it more difficult to intuitively agree that any individual feature is, in fact, a necessary feature of the concept of that social practice.

To illustrate this situation, consider again the asserted necessary features of claim to authority, claim to moral correctness, and vagueness that Raz and Alexy, respectively, have held to be necessary features of the concept of law.[48] The first two claims have historically been presented as mutually exclusive alternatives in legal philosophy (e.g., in the separation thesis by legal positivists and in the claim that an unjust law is not a law by natural lawyers), but this is just the traditional way the two are related and not the only possible way that they can be related. The situation may well be otherwise—concepts may well have multiple necessary features of varying importance and salience.[49] Given the complexity and reflexivity

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47. This has already been noted by several philosophers of law. Brian Bix, for example, says, "The problem is that talk about 'essences' and the 'nature' of items does not fit as comfortably with human artifacts and social institutions as it does, say, with biological species or chemical elements." Brian Bix, *Conceptual Questions and Jurisprudence*, 1 Legal Theory 465, 468 (1995) (internal citation omitted).

48. *See supra* notes 37–40 and accompanying text.

49. Joseph Raz, for example, says, "While the law has many essential features we are not aware of all of them. They come to light as we find reason to highlight them, in response to some puzzle, to some bad theory, or to some intellectual preoccupation of the time." Joseph Raz, *On the Nature of Law*, Archiv Für Rechts-und Sozialphilosophie 1, 6 (1996) (Ger.).

of social practice concepts such as law, it would seem that a suffi-
ciently explanatory account of the concept should not merely iden-
tify the necessary or important features, but also explain the rela-
tionship between the features.

  The contemporary jurisprudential debate has largely proceeded
as if these candidates for necessary features are competing for a sin-
gle goal (to explain the nature of law) which only one can achieve.
But as has already been noted, these analyses have not succeeded in
legal philosophy or elsewhere. Perhaps it is time to look at some al-
ternative possibilities and approaches to the question of the nature
of law. I will look next at two.

  One alternative arises from a strange but common worry among
analytic philosophers of law—the fear that the opposing sides in the
nature of law debate are not really joining issue at all, but merely
talking past each other.[50] After raising this doubt, theorists usually
then drop it and go on as if this worry had never been mentioned.
Those unfamiliar with modern analytic legal philosophy might well
be surprised that this is a widespread concern in this (or any) schol-
arly field, yet this worry is, unfortunately, quite warranted. Let me
point to just a few significant examples as evidence for it. Hart's *The
Concept of Law* is universally regarded as the seminal work of mod-
ern analytic jurisprudence. Ronald Dworkin's critique of Hart's legal
philosophy set off what is usually referred to as the Hart-Dworkin
debate. This debate has come to dominate subsequent discussion in
analytic jurisprudence.[51] Yet Hart expressed surprise that two theo-
ries of law as different as his and Dworkin's should be seen as in
conflict.[52] Dworkin's attack on legal positivism has broken it into two
camps—inclusive and exclusive legal positivism (sometimes also re-
ferred to as soft and hard positivism).[53] Inclusive legal positivism

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  50. N.E. Simmonds, for example, begins an article by writing that "[n]ewcomers to juris-
prudence are inevitably struck, and are sometimes depressed, by the way in which legal theo-
ries do not meet squarely on a shared battleground, but appear to slip past each other in cov-
ert manner." N.E. Simmonds, *Bringing the Outside In*, 13 OXFORD J. LEGAL STUD. 147, 147
(1993).

  51. This is true even for theorists who would prefer to usher the debate off the philosophi-
cal stage. *See, e.g.*, Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Ju-
risprudence*, 48 AM. J. JURIS. 17, 17 (2003).

  52. In his postscript reply to Dworkin, Hart wonders, "It is not obvious why there should
be or indeed could be any significant conflict between enterprises so different as my own and
Dworkin's conceptions of legal theory." HART, *supra* note 16, at 241.

  53. Both schools of positivism deny a necessary connection between law and morality, but
the inclusivists hold that law and morality are not necessarily connected, while the exclusiv-
ists contend that there is necessarily no connection. Brian Bix explains the reason for the split

allows for the possibility of morality-based legal content while still asserting the social fact thesis.[54] It sees itself as quite distinct from non-positivist theories of law such as Dworkin's. Dworkin believes, however, that Coleman's argument for inclusive legal positivism "ends not in victory for his version of analytic positivism but in surrender of positivism altogether."[55]

Why is the fear of talking past each other so prominent in legal philosophy? The answer has much to do with problems of conceptual analysis in analytic legal philosophy we have been discussing. Start with the concept-word itself, "law." The word has reference to some things—laws of science, for example—that no one thinks legal philosophy should explain. Beyond this, there is the problem that there are two different notions for which the single English word "law" must do double duty. This is not the case in other languages. The Latin word *jus*, for example, embodies law in a broad sense,[56] while *lex* captures it in a narrower sense.[57] Many other European languages likewise have different words for these two senses of "law." Unfortunately, English does not. Relatedly, one can distinguish law taken broadly as an ongoing social practice from law, taken more narrowly, as a system of rules. Both the broader and narrower senses of "law" are standard definitions of the concept word, but they do not pick out the same things.

Concern that legal philosophers are talking past each other also arises out of disagreement about whether conceptual explanations of law ought to reflect or even take into account folk beliefs about law. This issue does not arise and may not even make sense with natural kind and other scientific concepts. Even the scientific study of humans is not judged against folk beliefs. Psychology, for example, need not demonstrate consistency between its basic entities and

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saying that "the inclusive view allows theorists to accept many of Dworkin's criticisms of legal positivism without abandoning what these same theorists consider the core tenets of legal positivism (law's grounding in social facts and conventions)." BIX, *supra* note 10, at 49–50 (internal citation omitted).

54. For one important account of this doctrine, see COLEMAN, *supra* note 43, at 151–74.

55. RONALD DWORKIN, JUSTICE IN ROBES 33 (2006).

56. One source says, "*Jus*, when used in a general sense, answers to our word *Law* in its widest acceptation. It denotes, not one particular law nor collection of laws, but the entire body of principles, rules and statutes, whether written or unwritten, by which the public and the private rights, the duties and the obligations of men, as members of a community, are defined, inculcated, protected and enforced." WILLIAM RAMSAY, A MANUAL OF ROMAN ANTIQUITIES 285–86 (Rodolfo Lanciani ed., 15th ed. 1894).

57. The first two definitions given by *Black's Law Dictionary* are "1. Law, esp. statutory law. 2. Positive law, as opposed to natural law." BLACK'S LAW DICTIONARY 991 (9th ed. 2009).

major theories and psychological folk beliefs. Is, or should, the same be true of legal philosophy? Should legal philosophy take into account legal folk beliefs as, for example, they enter into our socio-cultural self-understanding?

All sciences seek to save the phenomena,[58] that is, to account for (to the extent possible) the relevant observable facts. The difficulty is in deciding in the case of law just what the relevant phenomena are. Legal naturalists, be they descendants of the logical positivists of the early twentieth century or contemporary Quineans like Leiter, seek continuity with science and its methods and, so, put no stock in folk beliefs *qua* folk beliefs. But other legal philosophers, notably Raz, insist that the conceptual analysis of law should reflect our self-understanding.[59] The naturalist here takes an external, detached-observer perspective, while Raz, at least on this issue, takes a more internal, participant-oriented perspective.

Is there a genuine joining of issue here, or are Raz and the naturalists simply talking past one another? The opposed sides here have different methodologies and look to save different appearances and, so, on that score seem merely to be talking about different things. One might say that they have different concepts of the same thing—law. The problem is that they don't see it this way. They think that they are offering competing accounts of the nature of law rather than pursuing quite different inquiries. Should this consideration be determinative?

If logic will not help, let us turn instead to our philosophical role models. If one looks to Hart to answer this question, one finds him straddling both sides of the issue. In different places he famously presents his legal philosophy both as descriptive sociology and as hermeneutic.[60] The first statement casts his views as naturalist, while the second fits better with Raz's self-understanding approach. The

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58. For a classic historical treatment of this requirement in the context of physical theory and astronomy, see PIERRE DUHEM, TO SAVE THE PHENOMENA: AN ESSAY ON THE IDEA OF PHYSICAL THEORY FROM PLATO TO GALILEO 3 (Edmund Dolan & Chaninah Maschler trans., Univ. of Chicago Press 1969) (1908).

59. As Raz says, "In large measure what we study when we study the nature of law is the nature of our own self-understanding." RAZ, *supra* note 39, at 331.

60. In the preface of his masterwork, Hart famously and puzzlingly says, "Notwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology." HART, *supra* note 16, at vi. Regarding understanding of normative propositions of law, he later says that "what is needed is a 'hermeneutic' method which involves portraying rule-governed behavior as it appears to the participants . . . ." H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 13 (1983).

difficulty with these statements is that, in them, Hart seems to offer conflicting, mutually exclusive descriptions of his theory.

This puzzle arises because our basic intuitions in this area appear to conflict. How can these intuitions be saved and reconciled? We express our intuitions in terms of the models and metaphors that populate our theories,[61] but we can become overly fond of them and stretch them well beyond their useful range. The solution is not to drop them altogether (models and metaphors are, after all, what we use to philosophize), but rather to play them off against alternative models and metaphors. In doing this, we realize that our conceptual explanations are only partial and never complete[62] and that they are driven by our current interests and concerns[63] (and, thus, likely to change). They are better seen as operating in tandem than as mutually exclusive alternatives.

The existence of several senses of the concept-word "law" as well as disagreement over the relevance of legal folk beliefs and social/cultural understanding to the conceptual explanation of law prompts some immediate questions about the tasks of analytic legal philosophy. Does the concept of law that legal philosophers endeavor to explain encompass both the wider and narrower senses of law? Does it also take in the external as well as the internal approaches to the concept? Should it? These issues should be analyzed and debated as questions of choice and argument, but more often answers are merely assumed as starting points for polemical argument. One gets the impression from the discussion that positivists mainly take law in its narrower and external senses,[64] while non-positivists grasp law in its internal and broader senses. From this fact, one might conclude that positivists and non-positivists are in-

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61. *See* MAX BLACK, MODELS AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY (1962). He aims there "to clarify the character of philosophical inferences from grammar." *Id.* at 1.

62. As Peter Winch says with regard to Wittgenstein's philosophical method, "This, I think, is in the spirit of Wittgenstein's method, particularly in his later works, of passing over the same point again and again from different directions, thus building up a picture of its complex relations to other points of philosophical interest." PETER WINCH, *Introduction: The Unity of Wittgenstein's Philosophy, in* STUDIES IN THE PHILOSOPHY OF WITTGENSTEIN 1 (Peter Winch ed., 1969).

63. *See* Bix, *supra* note 47.

64. Mark Greenberg calls this assumption the Pronouncement View. "The assumption is that the content of law is determined by the contents of legally authoritative pronouncements." Mark Greenberg, *The Prism of Rules* 1 (UCLA Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Research Paper No. 07-31 2007), *available at* http://www.ssrn.com/ abstract=1042121.

deed talking past each other. But all is not as clear as first appears. For even if they are talking about different senses or features of law, both sides are claiming to describe law's necessary or important features in an explanatorily adequate manner and so, at least in that way, are joining issue.[65]

But this result seems paradoxical. Is this simply a matter of great confusion in the legal philosophical discussion? Or is the concept of law, by its very nature, a confused concept? This is not quite right — it is not so much confusion (although there may be that, too) that we see here as it is conceptual contestation and disagreement. Law is and has been a contested rather than a confused concept. Dworkin first brought the notion of essentially contested concepts into the legal philosophical debate,[66] but he borrowed the idea from an article of the same name by W.B. Gallie.[67] According to Gallie, essentially contested concepts are human-activity concepts which exhibit the sort of conflict and disagreement we have seen regarding the concept of law and which also meet certain criteria; they must be appraisive, internally complex, diversely describable, open, reciprocally recognized among contending parties, anchored on an exemplar, and improvable through competition.[68] This description applies to those social concepts where argument about the essential features of the concept and their application constitutes a major portion of the explanation of the concept. Law certainly falls within this category.

The categorization of law as an essentially contested concept facilitates a third possible approach to the conceptual analysis, an alternative to the two options so far discussed — that is, to the search for necessary features and adequate explanations and to the conclusion that legal philosophers have, all the while, just been talking past each other and discussing different concepts without fully realizing it. This third way would retire, or at least weaken, the necessity claims "used as *machines de guerre* in a polemical battle between rival camps."[69] It would instead see the contestable nature of the concept

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65. This again raises the question of whether participant beliefs and attitudes are privileged in determining the answer to conceptual questions like this. Raz, it seems, would think so, as would I. But I recognize that this is one of the larger questions at issue in this Article.

66. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 14, at 103 n.1.

67. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 167 (1955–56).

68. *See id.* at 171–72.

69. Laudan, *supra* note 29, at 119.

of law in all its complexity and diverse describability as just present-ing so many puzzles and problems to be clarified and resolved (as in Gallie's last criterion—improvability through competition).

Pursuit of this third way brings with it a change in the search for necessary features of the concept of law, either through a weakening in the sort of necessity called for in the conceptual analysis of law or in an abandonment of the necessity requirement altogether.[70] Just as Justice Story wrote, "'necessary' often means no more than *needful*, *requisite*, *incidental*, *useful*, or *conducive to*;"[71] so, too, it can mean important rather than absolutely necessary. In this way, the search for metaphysically necessary features of the concept of law employed as means of conceptual demarcation is transformed into an exploration of the relations between important features of the concept of law through the examination of conceptual problems and puzzles. The regulative principle of conceptual analysis in this way changes from separation to synechism.

Hart himself was an early (although perhaps not consistent) pro-ponent of this move. In an early symposium on theory and defini-tion in jurisprudence with Jonathan Cohen, in reply to Cohen's as-sertion of three necessary criteria of legal rules, Hart said, "I am not sure that in the case of concepts so complex as that of a legal system we can pick out any characteristics, save the most obvious and unin-teresting ones, and say that they are necessary."[72] So, taking Hart's advice here, my argument drops the search for metaphysically nec-essary features of law and turns to continuity issues and other puz-zles involving important, normal, but not necessarily essential, fea-tures of the concept of law.[73] In the next part of this Article, I apply the approach to conceptual analysis that I have been arguing for to the duality of rule and end in law and legal philosophy.

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70. For a recent article making this argument, see Frederick Schauer, *Necessity, Importance, and the Nature of Law* (Apr. 23, 2010) (Va. Pub. Law & Legal Res. Paper 2010-19), http://www.ssrn.com/abstract=1594930.

71. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1242, at 118 (Boston, Hillard, Gray & Co. 1833).

72. H.L.A. Hart, *Theory and Definition in Jurisprudence*, 29 PROC. ARISTOTELIAN SOC'Y, SUP-PLEMENTARY VOLUMES 239, 251 (1955). He continues in the same paragraph, "Whereas I think that all that can be found are a set of criteria of which a few are obviously necessary . . . the rest form a sub-set of criteria of which everything called a legal system satisfies some but only *standard* or *normal* cases satisfy all." *Id.* at 252 (emphasis in original).

73. In this, I follow Raz's dictum that "[a]n explanation is a good one if it consists of true propositions that meet the concerns and the puzzles that led to it, and that are within the grasp of the people to whom it is (implicitly or explicitly) addressed." Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, 4 LEGAL THEORY 249, 256 (1998).

II. RULE AND END IN LAW

Modern moral philosophy has been divided into two main camps—those (e.g., deontologists) who see morality as a system of rules and those (e.g., consequentialists or teleologists) who see it as driven by ends. More recently, this dichotomy has been expressed as the division between particularism and generalism in moral theory. Although there may well be as many versions of moral particularism and generalism as there are individual particularists and generalists, the basic difference between the two camps is over the relative importance and priority of particulars and general rules in morality and moral theory.[74]

Legal philosophy, like moral philosophy, is a type of practical philosophy. One would not be wrong, then, in surmising that issues of rules and ends, generalities and particulars would play important roles in legal philosophy, too. When Dworkin launched his critique of Hart, he did it by asking, "Is law a system of rules?"[75] In the *lex* sense, yes. But in a broader sense, the *jus* sense, it is more than that. The puzzle has been in explaining this broader sense in a clear and convincing way. The Hart-Dworkin debate and much of the analytic jurisprudence that has followed it can be characterized as an attempt to solve this puzzle.

A start can be made by contrasting law with other practices which are also systems of rules—games. Law is sometimes compared to the game of chess.[76] The practice of law and the playing of games, like most activities we engage in, have underlying purposes and ends, but practices and games have different and contrasting relations to their underlying purposes and ends. Underlying purposes and ends do not normally enter into game play. We do not take policy considerations or abstract standards of justice and fairness into account in deciding how many strikes a batter gets in baseball. But we do normally take these considerations into account in making legal decisions. Another way of making this point is in terms of opacity. The rules of games are opaque to their underlying purposes and ends. Legal rules are not fully opaque to their background purposes and ends, often unpredictably and unforeseeably so. As a result,

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74. *See generally* MORAL PARTICULARISM (Brad Hooker & Margaret Olivia Little eds., 2000) (providing a spirited exchange between moral philosophers on moral particularism and generalism).

75. *See* Dworkin, *Is Law a System of Rules?*, *supra* note 14.

76. *See, e.g.*, Andrei Marmor, *How Law Is Like Chess*, 12 LEGAL THEORY 347 (2006).

questions and doubts concerning rule application and underlying purposes may arise at any time.

Thomas Morawetz marks this contrast between rule-defined games like chess and practices like law where rule application is sometimes affected by underlying purposes by calling the former closed practices and the latter open practices. In open practices, "rules can be given more or less exhaustively and are *constitutive* of the practice,"[77] whereas in closed practices like games of chess, each game has a beginning and an end and the rules are fixed. Open practices like law do not have these features.[78] With closed practices, "[t]o criticize the rules is to stand outside the practice and recommend a new practice."[79] Open practices, by contrast, can be criticized and modified in terms of the point of the practice.[80]

To explore the accuracy and fruitfulness of Morawetz's contrast, let us apply it to the Hart-Dworkin debate over the nature of law. Despite his claim that law is an open practice, Morawetz believes that Hart holds the contrary view.[81] Dworkin seems to agree with Morawetz about Hart, charging that for Hart and positivism, "[r]ules are applicable in an all-or-nothing fashion."[82] He then illustrates this by describing how rules operate in the game of baseball.[83]

As one might expect, there are some aspects of Hart's philosophy of law that seem to vindicate the analysis of Morawetz and Dworkin and some that provide Hart some defense. Hart's notions of legal reasons as content-independent reasons[84] and as peremptory reasons[85] are the best evidence in Hart's theory for the claims of legal reason. If legal reasons are in fact always both content-independent and peremptory, legal reasons are opaque to their underlying pur-

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77. Thomas Morawetz, *Commentary: The Rules of Law and the Point of Law*, 121 U. Pa. L. Rev. 859, 860 (1973).

78. "An open practice, and I shall argue that law is an open practice, has none of these features." *Id.*

79. *Id.* at 863.

80. *See id.* at 863–68.

81. "In general, Hart seems to analyze law as if it were a closed practice, since closed practices are adequately analyzed when their constitutive rules are exhaustively given." *Id.* at 869.

82. Dworkin, Taking Rights Seriously, *supra* note 14, at 24.

83. *Id.* at 24–25.

84. According to Hart, a content-independent reason is "intended to function as a reason independently of the nature or character of the actions to be done." H.L.A. Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory 254 (1982).

85. Peremptory reasons are reasons that "preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act." *Id.* at 253.

poses, and legal systems are closed practices. But the existence of "hard cases"[86] where we do recur, because of legal indeterminacy and uncertainty, to these underlying purposes seems to give the lie to Hart's theory here. Perhaps Hart can save his claim that legal reasons are peremptory and content-independent by saying that they are only normally and not always this way. This is, in effect, as we will soon see, what Hart does say. But this is a strange and puzzling response in an important way, for it amounts to the assertion that legal reasons are content-independent and peremptory except when they are not. This defeats the rationale for and utility of content-dependent and peremptory reasons—that they are clearer and more efficient than their underlying purposes and points directly applied to conduct would be. To limit the damage and in order to save the notions Hart and other legal positivists wish to preserve, this contagion of uncertainty and semi-opacity must be cabined and marginalized.

That is in fact what Hart seeks to do with his placement of his theory of law as a mean between formalism and rule-skepticism and in his account of core and penumbra in legal rules. Hart's account of the nature of law, despite what seems implied by his notion of content-independent, peremptory legal reasons, positions itself between rule and end and attempts to find a place for both particulars and general standards. He does this first by defining the twin extremes of formalism[87] and rule-skepticism.[88] Both these extremes revolve around a desire for absolute rules[89] and a denial of unavoidable indeterminacy and choice in adjudication.

Hart's answer to the formalists and rule-skeptics takes the form of an account of core and penumbra of meaning in general terms and

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86. One legal philosopher recently defined hard cases as "suits where good arguments are made by each of the opposing parties and reasonable lawyers disagree about which side should prevail." Scott J. Shapiro, Legality 234 (2011).

87. Speaking of the unavoidability of choice in the application of legal rules, he says, "The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down." Hart, *supra* note 16, at 129.

88. Rule-skepticism, according to Hart, "amounts to the contention that, so far as the courts are concerned, there is nothing to circumscribe the area of open texture: so that it is false, if not senseless, to regard judges as themselves subject to rules or 'bound' to decide cases as they do." *Id.* at 138.

89. *Id.* at 138–39 ("The rule-sceptic is sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven . . . .").

legal rules.[90] This approach does not deny the existence of controversial hard cases, but acts instead to minimize their significance and the danger they present to the basic assumptions of legal positivism such as the separation thesis, the social fact thesis, and the conventionality thesis. This is done by treating the problem of legal indeterminacy (or, more properly, underdetermination[91]) as a problem of vagueness (or, more precisely, of the possibility of vagueness[92]) of legal terms and rules, a problem restricted to a zone of open texture at the margins of "the core of settled meaning possessed" by legal terms and rules.[93] Thus marginalized and cabined, cases of legal indeterminacy can then be resolved by acts of judicial discretion (i.e., choice).

Hart explains rule application and classification in terms of a duality of certainty and doubt.[94] Certainty's domain lies in the core, while doubt occurs at the fringes. Hart thus navigates the dichotomy of formalism and rule-skepticism by appropriating the former for core applications of legal rules (i.e., for easy cases) and by banishing rule-skepticism to the fringe of open texture (i.e., for hard cases). Any residual uncertainty that occurs under this approach may be excused because law inhabits the real world and natural

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90. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) ("There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out. These cases will each have some features in common with the standard case; they will lack others or be accompanied by features not present in the standard case.").

91. Indeterminacy of meaning means that the word or rule could have any meaning; underdetermination of meaning means only that the range of possible meanings cannot be narrowed down to only one candidate. The problem discussed by Hart, Dworkin, and their followers is that of underdetermination of legal meaning but, unfortunately, it is usually called indeterminacy of meaning. It is probably too late to do anything about this so, outside this footnote, I will not try.

92. As Schauer elucidates Waismann's notion, "[O]pen texture according to Waismann is the possibility that even the *least* vague, the most precise, term will turn out to be vague as a consequence of our imperfect knowledge of the world and our limited ability to foresee the future." FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE 36 (Tony Honoré & Joseph Raz eds., 1991).

93. Wilfred J. Waluchow, *Hart, Legal Rules and Palm Tree Justice*, 4 LAW & PHIL. 41, 68 (1985).

94. HART, *supra* note 16, at 119–20 ("All rules involve recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies. Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or 'open texture . . . .'").

language,[95] not some abstract, formal system. Under this theory, then, the open texture of the legal term or rule affects just its application and not its meaning.[96] Where choice must occur and discretion be exercised, "this function of the courts is very like the exercise of delegated rule-making powers by an administrative body."[97] The meaning/application distinction is too neat here because the meaning of a rule is affected by its application—the two cannot be completely separated.

Unfortunately for Hart and legal positivism, the notions of core, penumbra, and open texture are not enough to cabin and marginalize indeterminacy and uncertainty in law. There are several reasons why this is so, although they may not be readily apparent. A large part of the suggestive power of Hart's analysis comes from the physical and spatial metaphors that it employs. These metaphors imply a fixity and a measurability that actual legal terms and rules lack. The "core of settled meaning" is never actually fixed, immune to revision in future cases; it is, at best, less likely to be upset than other meanings.

To see this, compare Hart's notions and account of law with a model of meaning to which it bears superficial similarity—Quine's meaning holism.[98] Both theories use a core and periphery model, but they do so in different ways. In Hart's theory, centrality is a function of fixity of meaning, while in Quine's theory, it is a measure of removal from direct contact with experience. Of the two, Quine's model is truer to actual practice in law and elsewhere. No rule or meaning is proof against all possible circumstances.[99] The force of Quine's insight has laid low notions of necessity and fixity in many areas of philosophy. Moreover, if the meaning of legal terms and rules is not completely fixed by nature or convention, some account must be given of what it is that makes some cases hard and others

95. *Id.* at 128 ("[U]ncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open textured.").

96. The distinction between rule and application as a device for marginalizing or banishing uncertainty and indeterminacy is often used by contemporary legal positivists. *See, e.g.*, Andrei Marmor, *No Easy Cases?*, CAN. L.J. & JURISPRUDENCE, July 1990, at 61, 72.

97. HART, *supra* note 16, at 135.

98. *See supra* text accompanying note 12.

99. Many a constitutional law professor, for example, has imagined a science-fiction-like scenario to argue for the constitutionality of a thirty-four-year-old President despite the constitutional thirty-five-year minimum.

easy. Relying on metaphor rather than argument here, Hart and positivism have no such account.

A second problem for Hart's account of legal meaning here is its reliance on only one cause—vagueness (or the possibility of vagueness)—to explain legal indeterminacy.[100] Granted, as just mentioned, some vagueness in natural language terms in social practices is unavoidable. Vagueness will be a problem for any theory of the nature of law, not just legal positivism. For legal positivism, this reliance upon vagueness also has the polemical advantage of promising to keep legal rules opaque to their underlying points and purposes in all but a marginal fringe of cases, thus securing its main distinctive theses (i.e., the separation thesis, the conventionality thesis, and the social fact thesis). The difficulty for positivism here is that this reliance places more weight upon this single factor of vagueness than it can bear. Although there are doubtless cases of legal vagueness, most of the hard cases discussed in the Hart-Dworkin debate and its aftermath are not cases that are best analyzed as cases of vague terms or rules.

Take, for example, one of the cases repeatedly used by Dworkin in his attack on Hart and positivism, *Riggs v. Palmer*,[101] for it is well known and clearly raises the main problem with the positivist position here. A grandson, who was the primary beneficiary of his grandfather's will, fearing (based on statements made by the grandfather) that the grandfather would alter his will, murders his grandfather.[102] He then presents a claim to his inheritance as the beneficiary of a legally valid will.[103] The court is thus faced with the difficult question of whether or not to give the grandson the inheritance in question. What makes the case difficult has nothing to do with any issue of vagueness or the possibility of vagueness relating to the relevant general terms and legal rules. The grandson has a clear right to inherit under the plain meaning of the relevant wills statutes.[104] The court, however, departs from the literal meaning of the

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100. "In all fields of experience," Hart observes, "there is a limit, inherent in the nature of language, to the guidance which general language can provide." HART, *supra* note 16, at 126.

101. 22 N.E. 188 (N.Y. 1889).

102. *See id.* at 188–89.

103. *See id.*

104. The court, even though it rules against the grandson, clearly concedes this fact, saying, "It is quite true that statutes regulating the making, proof, and effect of wills and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer." *Id.* at 189.

statutes involved here for two reasons having to do with the spirit of the law, rather than the letter of the law. The first reason is its conviction that the result that would follow from the literal meaning of these statutes could not have been intended by the makers of the statutes.[105] The second is that such a result would run counter to a fundamental equitable maxim of the common law.[106]

The meaning of the applicable legal rules and their general terms is clear in this case. What is less clear is whether the plain meaning of the applicable rules should be applied in this case.[107] This is entirely due to the conflict between the plain meaning of the rules and the underlying point or purposes of the rules and of the law itself. These values will not suffer to stay preempted. It will not do for the positivist to counter, in *Riggs* or cases like it, by saying that rules have exceptions and that a rule with an exceptions clause is still a rule. Both of these statements are true, but they do not speak to the difficulty for legal positivism in cases like this.

The values embodied in the point and purposes of legal rules, and in the law itself, cannot be adequately or effectively captured by adding exceptions clauses to rules (which may be why in actual legal systems we see more cases like *Riggs* than we see rules with laundry lists of every conceivable exception). There are several reasons for this. The first is that "the most precise of rules is potentially imprecise."[108] It is potentially imprecise not because some categorical, exceptionless rule cannot be fashioned but because no categorical, exceptionless rule can be fashioned for which we will always accept the results, i.e., because law is an open practice and not a closed practice. *Riggs* is an effective illustration of this fact. And even if we could fashion a complete list of exceptions, we would not do so because the resulting rules would be too cumbersome to employ efficiently.

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105. The court notes that courts have held, under certain circumstances, that "matters embraced in the general words of statutes nevertheless were not within the statutes, because it could not have been the intention of the law-makers that they should be included." *Id.*

106. Namely the maxim that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." *Id.* at 190.

107. As Simpson writes, "difficulties in interpretation . . . , which seem to be difficulties about words, are really difficulties about the applicability of rules to facts . . . ." A.W.B. Simpson, *The* Ratio Decidendi *of a Case and the Doctrine of Binding Precedent*, *in* OXFORD ESSAYS IN JURISPRUDENCE 148, 158 (A. Guest ed., 1961) (emphasis omitted).

108. SCHAUER, *supra* note 92, at 35.

Here, too, the contrast between social practices and natural kinds is worth remembering. Open texture, that is, the possibility of vagueness, is a ubiquitous feature of social practices. Even positivists like Hart grant that much. Coming up with the same sort of vagueness when talking about natural kinds calls for a flight of imagination, such as J.L. Austin's exploding goldfinch.[109] Why the difference? A large part of it is due to the points and purposes that underlie rules in social practices (but do not underlie meaning with natural kinds). These create occasions for conflict and doubt that are simply not present with natural kinds or even with closed practices like games.

The general point here is that "[r]ules . . . under-explain the legal system . . . ."[110] And theories of the nature of law that rely too much on rules leave out important factors, purposes, and ends, which have important effects on legal content, much like an invisible dark star may have a detectable and otherwise unexplainable effect on the motion of a visible twin star. My point and my method here have their counterparts in Hart's writing. He tells us that "a legal system often has other resources besides the words used in the formulation of its rules which serve to determine their content or meaning in particular cases."[111] The purposes and ends underlying rules are important examples of just those resources.

Hart's devastating critique of John Austin's command theory of law does not argue that commands are not a necessary feature of law. Instead, Hart argues that Austin's attempt to shoehorn all law into the command model is a misleading and inaccurate account of law. One of his section headings in this critique—*Distortion as the price of uniformity*[112]—well sums up Hart's demolition of Austin's, as well as my, critique of Hart and legal positivism on the issue of legal meaning and indeterminacy. The point here is that Ockham's razor (the principle of economy of entities) can be overused. Some trade-off must take place between simplicity and explanatory detail and depth. The same thing must occur, I argue, between legal rules and

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109. Austin, a great philosophical influence on Hart, asks us to imagine a creature that we have made sure is a goldfinch "and then in the future it does something outrageous (explodes, quotes Mrs. Woolf, or what not)." J.L. AUSTIN, PHILOSOPHICAL PAPERS 56 (1961). Schauer says that "Waismann's point [about open texture] was captured perfectly by J.L. Austin's exploding goldfinch." SCHAUER, *supra* note 92, at 36.

110. SCHAUER, *supra* note 92, at 12.

111. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, *supra* note 60, at 8.

112. HART, *supra* note 16, at 38.

their underlying purposes and ends. And it is the tendency of legal positivism to minimize, if not suppress, this process that I oppose.

But interpretivists like Dworkin err in the opposite direction by pursuing an approach of interpretive universalism.[113] The *Riggs* case, used by Dworkin as a cudgel against Hart and the legal positivists, can be an entry point to a discussion of how Dworkin's constructive interpretation theory of law treats the duality of rule and end in law and legal theory. In his first go at Hart in *Taking Rights Seriously*, Dworkin employs *Riggs* and a few other well known cases to make a distinction between an all-or-nothing legal rule and a principle which "states a reason that argues in one direction, but does not necessitate a particular decision."[114] Principles, then, provide reasons in Dworkin's theory of law that may be weighty, but not peremptory.

Because a case may involve more than one principle or some combination of both rules and principles (as in *Riggs* itself), some way of balancing among them or choosing between them is required. This need is more fully addressed in the theory of law as integrity, which Dworkin presents in *Law's Empire*. There, he says that general theories of law, "for all their abstraction . . . are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice."[115] He goes on to ascribe the same characteristics to legal practice in the same way, saying that it is continuous with legal philosophy.[116] Dworkin also gives us a role model by which to practice law as integrity—the ideal judge, Hercules.[117] He would then have us follow Hercules, to the best of our abilities, in the practice of law as integrity. If we were to do so, then, we would be attempting to put law in its best light in every legal decision or action we perform.

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113. "Interpretive universalism" is a term coined by Dennis Patterson. For him it is "the idea that all understanding is a matter of interpretation." Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 3 (1993). He uses the phrase in a pejorative manner and argues that "interpretive universalism, and the manifold claims that issue from it, engender a seriously false and misleading picture of law." *Id.*

114. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 14, at 26.

115. DWORKIN, *supra* note 44, at 90.

116. *Id.* ("So any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts.").

117. Dworkin describes Hercules as "an imaginary judge of superhuman intellectual power and patience who accepts law as integrity." *Id.* at 239.

My aim here is not a full-blown critique of Dworkin's legal theory (entire books have been devoted to that)[118] but only to place it in my discussion of the duality of rules and ends in law and legal theory. Positivists' reaction to Dworkin's distinction between rules and principles was perhaps predictable—they denied or at least blurred the distinction. Hart, for example, sees no coherence in Dworkin's position here. Citing *Riggs*, he notes that rules as well as principles may be outweighed, i.e., that neither operates in an all or nothing fashion.[119] He then asserts that this incoherence "may be cured if we admit the distinction is a matter of degree."[120] I agree with Hart's point here but note that this argument undermines the positivist characterization of legal reasons as peremptory as much as it undermines Dworkin's bright-line distinction between rules and principles. Hart's position forces both to explain how the balance or interplay of rules and the purposes and ends which underlie them is to be conducted.

Perhaps the Hart-Dworkin debate was never really just about the difference between rules and principles, but rather about the larger conflict between two theories of law—one based on social standards and the other on moral standards.[121] As regards the opacity of legal rules, it is a debate between a position that would treat legal rules as content-independent, peremptory reasons in all but some few fringe cases and a position which would deny both these characterizations of rules and would instead have us examine the underlying moral purposes and ends of rules in all cases. Thus starkly presented and summarized, both views are too extreme and misdescribe the legal reality they claim to explain.

How, then, is a middle path between the social fact positivism of Hart and his followers and the constructive interpretivism of Dworkin to be hewn, in a way that does more than give us another deceptively clear and informative metaphor for law and legal practice?

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118. *See, e.g.*, Coleman, *supra* note 41.

119. HART, *supra* note 16, at 262 ("This is an example of a principle winning in competition with a rule, but the existence of such competition surely shows that rules do not have an all-or-nothing character, since they are liable to be brought into such conflict with principles which may outweigh them.").

120. *Id.*

121. As Scott Shapiro says, "The 'real' debate between Hart and Dworkin, therefore, concerns the clash of two very different models of law. Should law be understood to consist in those standards socially designated as authoritative? Or is it constituted by those standards morally designated as authoritative?" Scott J. Shapiro, *The "Hart-Dworkin" Debate: A Short Guide for the Perplexed, in* RONALD DWORKIN 22, 31 (Arthur Ripstein ed., 2007).

For an approach with some real explanatory significance, I turn to Aristotle and now present Aristotelian[122] accounts of a dialectical approach to conceptual analysis, which will explain the role of intuition about important features of law and their role in solving puzzles in legal philosophy, and a dialectical approach to explain the duality of rules and ends in law and legal philosophy.

III. CONCEPTUAL ANALYSIS AS DIALECTIC

Modern moral philosophy may have once been divided into rival camps seeing rules or ends as keys to the science of morality, but in 1958, G.E.M. Anscombe[123] gave rise to a third way in moral theory, an Aristotle-inspired virtue ethics (and later to virtue jurisprudence[124] and even virtue epistemology[125]). The approach presented here is related to these efforts but is broader in scope, encompassing dialectics, practical reason, and practical wisdom as well as virtue (all features of Aristotelian ethical theory) for a more comprehensive Aristotelian legal theory.

This approach begins with an attempt to explain how Aristotelian dialectics provides us with a way of implementing the shift called for above from necessary and explanatorily adequate features in the conceptual analysis of law to the exploration of important features and the solving of puzzles and problems this raises.[126] It also defends conceptual analysis from the attacks of naturalists like Quine and Leiter. Recall that the problems with the metaphysical necessity/possible worlds approach to conceptual meaning analyzed above indeed center around the notions of intuition and necessity that the approach utilizes. Philosophers' armchair intuitions, because they are metaphysical and a priori, lack empirical input or correction. As a result, assertions of intuitive necessity, when not self-evident or uniformly accepted, leave philosophical discussion at

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122. *Cf. supra* note 9 and accompanying text.

123. *See* G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 1–19 (1958).

124. For the leading anthology on the subject, see VIRTUE JURISPRUDENCE (Colin Farrelly & Lawrence B. Solum eds., 2008).

125. For a significant book on this subject, see LINDA TRINKAUS ZAGZEBSKI, VIRTUES OF THE MIND: AN INQUIRY INTO THE NATURE OF VIRTUE AND THE ETHICAL FOUNDATIONS OF KNOWLEDGE (1996).

126. As Jules Coleman puts it, "[t]he aim of Conceptual Analysis is to uncover interesting and informative truths about the concepts we employ to make the world rationally intelligible to us." Jules L. Coleman, *Methodology, in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 311, 344 (Jules Coleman & Scott Shapiro eds., 2002).

an impasse. This is very much the case in the legal positivist/non-positivist divide today, which proceeds from different and seemingly irreconcilable intuitions about the nature of law, to the point where it is not clear whether the two camps are engaged in the same enterprise or are even answering the same questions.

Aristotle's dialectical method, in contrast, starts from common opinions rather than metaphysical intuitions and seeks to resolve problems and puzzles that arise from them rather than to determine essence and necessity.[127] Perhaps the best summary of these more modest aims of dialectical method given by Aristotle is the following:

> We must, as in all other cases, set the phenomena before us and, after first discussing the difficulties, go on to prove, if possible, the truth of all the reputable opinions about these affections or, failing this, of the greater number and the most authoritative; for if we both resolve the difficulties and leave the reputable opinions undisturbed, we shall have proved the case sufficiently.[128]

This summary of the nature of dialectic has a deceptive appearance of simplicity, vagueness, and common sense obviousness.[129] This appearance will fade, I hope, after deploying dialectic to illuminate conceptual analysis.

I will briefly unpack this passage from Aristotle, as it contains most of the main points needed to explain the difference between a metaphysical necessity/possible worlds approach to analytic legal philosophy and conceptual analysis and an Aristotelian dialectical jurisprudence. First, note that the best English translations of the important Greek words in the summary of dialectic are the subject of great debate among the experts. Aristotle's terms are generally

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127. Whether or not this process is objective, results in truth rather than just consensus, or leads us toward first principles are just three of the issues that have attended philosophical discussion of Aristotelian dialectic through the centuries (which has not abated even today). I view this as a strength and not a weakness of a dialectic approach to practical philosophy, one more appropriate for a created human practice such as law.

128. ARISTOTLE, NICOMACHEAN ETHICS (c. 350 B.C.E.), *in* 2 THE COMPLETE WORKS OF ARISTOTLE 1794, 1809 (Jonathan Barnes ed., Benjamin Jowett trans., Princeton Univ. Press 1984).

129. Martha Nussbaum, for example, says, "If Aristotle's method simply spoke in vague terms of preserving perceptions and beliefs, it would be no substantial contribution to philosophy. But we can elicit from his theoretical remarks and from his practice a rich account of philosophical procedure and philosophical limits." MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 245 (1986).

somewhat broader and looser than their English translations.[130] So, *phainomena* means not only "observed facts," but also sometimes "means 'what we say' or 'our common beliefs,' and is associated with a method that aims at sorting out and arranging our descriptions and interpretations of the world."[131]

Likewise, the Greek term translated above as "reputable opinions" (*endoxa*) has a broader meaning than the English phrase used as its translation, one which also has more significant methodological implications. *Endoxa* partake, in Aristotle's dialectical method, of empirical content, public opinion, and reasoned judgment in a reflexive relationship. They both involve *nous*, an Aristotelian term often, ironically in the context of this Article, translated as "intuition." *Nous*, like "intuition," has a perceptual element, but unlike "intuition" it also has an intellectual element. In some contexts, it is well-rendered as "discernment" in English.[132]

What are the phenomena we should start with in a dialectical approach to the concept of law? They would include the outwardly observable actions, rules, and statements of legal actors within the legal system in question, but they would not be limited to these things—Aristotle is no legal realist! They would also include the participant understanding (i.e., common beliefs)[133] about the system that underlies and gives meaning to its outwardly observable aspects. In this way, Aristotle's dialectic is hermeneutic more than descriptive or expressivist.[134] To put it more simply, the phenomena would include the things legal system participants commonly

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130. *See, e.g.*, *id.* at 242–45 (discussing the meaning and translations of *phainomena*).

131. *Id.* at 243–44.

132. I belabor these issues of translation, not to display a knowledge of philosophical Greek (which I do not possess and is, in any case, of limited relevance to the topic in this Article) but rather to illustrate the fact that Aristotle's terms often have a reflexive duality that their common English translations lack and that this duality is a strength and not a defect in Aristotle's approach to the main questions of this Article. For an illuminating discussion of the meaning and nature of *nous*, see Rosalind Hursthouse, *Practical Wisdom: A Mundane Account*, 106 PROC. ARISTOTELIAN SOC'Y 285, 287–92 (2006).

133. As Terence Irwin says, "Aristotle says dialectic is argument from common beliefs (*endoxa*); and these are the things prior and better known to us from which inquiry begins." TERENCE IRWIN, ARISTOTLE'S FIRST PRINCIPLES 37 (1988).

134. Expressivism is an external observer approach to legal theory and internal legal statements. Kevin Toh tells us that "[i]nstead of defining a term, an expressivist analysis tells us what mental state a speaker expresses by uttering a statement containing that particular term." Kevin Toh, *Hart's Expressivism and His Benthamite Project* 11 LEGAL THEORY 75, 78 (2005). Toh argues that Hart's theory of law is expressivist and noncognitivist. *See id.* at 79.

do, think, and say about the law that constitute our self-understanding.[135]

But, with which participants, and which statements and thoughts, should dialectic start? Here, Aristotle is wisely ambiguous. He seeks to preserve the truth of only "reputable statements," not all statements. The tests of repute are, as I understand it, source and content. The opinions of experts are generally, but not always, given more weight than those of average citizens. Opinions that are widely accepted, regardless of their source, are held in high repute. But the imprimatur of source or content is not enough to make any statement, thought, or action immune to criticism or revision in the process of adjusting belief and experience here.[136]

Recall that the intuitions of the metaphysical necessity approach to conceptual analysis are not empirical—in fact, they are immune to empirically-based revision. Aristotle's dialectic is partly empirical but not completely so.[137] Neither is dialectic merely a summary or composite of common beliefs; dialectic may, in fact, challenge and revise those beliefs,[138] although its aim is to "save the phenomena" (i.e., to preserve the truth of the common beliefs with which the dialectical process has begun).[139]

Common beliefs are put to the test in dialectic through the examination of puzzles and problems ("discussing the difficulties") to which they give rise. Typically, these puzzles are the disagreements and conflicts that the various common beliefs generate. Examination of these puzzles is central to the dialectical practice.[140] By examina-

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135. IRWIN, *supra* note 133, at 48 ("Dialectical puzzles concern concepts and assumptions that we use to interpret and understand experience as a whole . . . .").

136. *Id.* at 47 ("No particular subset of beliefs is in principle beyond revision; and the theorist's task is to achieve fairly broad coherence.").

137. *Id.* at 39 ("The distinction between empirical and dialectical appearances is not completely sharp.").

138. *Id.* at 38 ("Though dialectic relies on common beliefs, it does not confine itself to discussion of them, and does not exclude the possibility of proving something that sharply conflicts with many of them.").

139. On this, Nussbaum says, "But in resolving our difficulties we are not, Aristotle insists, free to follow a logical argument anywhere it leads. We must, at the end of our work on the puzzles, bring our account back to the *phainomena* and show that our account does, in fact, preserve them as true—or, at any rate, the greatest number and the most basic." NUSSBAUM, *supra* note 129, at 247.

140. IRWIN, *supra* note 133, at 48 ("Dialectic is not concerned with our lack of beliefs, but with conflicts and difficulties in beliefs we already have. For dialectic, the study of puzzles is central, and induction and generalization are secondary, reversing the order of importance in empirical inquiry. Similarly, the puzzles constrain the form of an acceptable dialectical solution, to degree without parallel in empirical inquiry.").

tion here, I mean simply argument from common beliefs. The various "multiple dualities of law," of which Raz speaks,[141] and the difficulties legal philosophy encounters in trying to reconcile them are relevant examples of this sort of puzzle.

In what ways, then, is a dialectical, Aristotelian approach to the question of the nature of law preferable to the necessity-focused forms of conceptual analysis (call it "the received view" if you will) that predominate in contemporary analytical jurisprudence? The differences between the two ways can all be traced back to their very different starting points. The received view starts from an a priori or metaphysical perspective that makes sweeping claims of necessity (and sometimes even of sufficiency) for the features it claims in the concept of law, yet these assertions are based on private intuitions that are neither subject to empirical (dis)confirmation or rational refutation. It is not surprising that a conceptual methodology of this type has led to the formation of warring camps in legal philosophy. In contrast, dialectic starts from common, reputable beliefs about a concept, beliefs that have been extensively vetted by both experts and average citizens, and which are subject to empirical disconfirmation and rational refutation.

Both Raz's view of the conceptual analysis of law and Aristotelian dialectic tie meaning in practical philosophy to reflection of our self-understanding. But surely this self-understanding is a shared, social understanding and not the private, internal self-understanding of a single individual or even the different and independent self-understandings of various isolated individuals. If this is so, how can the a priori experience or intuition of the philosopher be social and shared? The proverbial armchair of the metaphysical philosopher is a metaphor for her own mind. In contrast, both the common beliefs and argument that form the basics of Aristotelian dialectic are by their very natures shared and social.[142] Dialectical revision and puzzle resolution directly impact shared self-understanding for they are the public face of that understanding.

The different camps in analytical legal philosophy are themselves founded on different basic intuitions. Because these intuitions are immune to empirical disproof, there is little basis for productive argument and discussion between proponents of different theories.

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141. *See* RAZ, *supra* note 1.

142. As Aristotle famously notes, "[M]an is by nature a political animal." ARISTOTLE, POLITICS (C. 350 B.C.E.), *in* 2 THE COMPLETE WORKS OF ARISTOTLE, *supra* note 128, at 1986, 1987.

Because there is no shared field of argument under the received view, it is not clear that proponents of different theories are even discussing the same issues. From this, the sneaking suspicion and nagging fear arises that these proponents of different philosophical views are merely talking past each other, but even that doubt cannot be definitively resolved one way or the other.

Aristotelian dialectic, because it is based on puzzles arising from common beliefs and appearances, has a public, shared, and more readily comprehended field of argument. Dueling theories arise not from private intuitions, but from attempts to solve a common puzzle.[143]

Finally, because it focuses on the determination of necessary features of the concept of law, the received view spends little time seeking to solve the puzzles (i.e., the apparent conflicts and contradictions) that beset the concept or to illuminate the continuities between the various apparent features that the concept possesses. Aristotelian dialectic, with its focus on solving conceptual puzzles, is better suited to clarifying the concept by resolving conflicts and establishing continuities. Let me next illustrate this contrast by applying the Aristotelian dialectical approach to the puzzle of the duality of rule and then end in law and legal theory. Earlier, this Article examined the manners in which the legal philosophies of Hart and Dworkin treated this problem and found them both wanting. I will now try to suggest some ways in which a dialectical, Aristotelian approach to this puzzle does a better job of saving the phenomena (our common and reputable observations and opinions in this area) and resolving the apparent conflicts and contradictions.

IV. LAW AND EQUITY

What makes the relation of rule and end in legal theory puzzling is that, although both appear to, and are thought to, play roles in law, their relative prominence and the ways in which they interact in law are the subject of widespread philosophical disagreement. While only a diehard rule-skeptic would deny the existence of legal rules altogether, legal rules do not seem to operate in the all-or-nothing manner Dworkin claims or in the way rules do in a game

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143. As Irwin puts it, "Once the dialectician has expounded the objective puzzles, her next task is to find some general theory or principle that will solve them." IRWIN, *supra* note 133, at 43.

like chess.[144] Legal rules claim to provide peremptory reasons for action as Hart holds[145]—sometimes, they do in fact provide such reasons, but on other occasions they do not. Worse yet, the ways in which rules sometimes fail to provide peremptory reasons for action are not fully foreseeable or specifiable and, so, cannot be accounted for in exceptions clauses or even defeasibility conditions. This inherent uncertainty (for we would not recognize a system that completely lacked this uncertainty—a closed system, to use the phrase contributed by Morawetz—as a legal system) renders the main legal positivist theses (the separation thesis, the social fact thesis, and the conventionality thesis) questionable or at least in need of significant qualification. These theses are not always true of law, but at best only normally true in standard cases. To put this difficulty in another way, legal rules have an opacity that may vary in unpredictable ways from case to case and from time to time.

Clearly, something else must be operating in the legal realm to cause (and to explain) this indeterminacy of legal rules. Vagueness, or even the possibility of vagueness (open texture), will not suffice to explain this indeterminacy.[146] In this Article, several other factors have been lumped together under the rubric of ends to designate this something else. Things falling under this category include Dworkin's principles and policies[147] as well as purposes and points of the rules (these terms may well constitute different ways of characterizing the same influences on rule application). This category of ends includes, but is not limited to, moral values.[148] Whatever their other differences may be, the members of the category of ends here share the common feature that they underlie the legal rules and provide a background of meaning that affects rule application.[149]

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144. *See supra* notes 82 and 76 and accompanying text.

145. *See supra* notes 84 and 85 and accompanying text.

146. *See supra* notes 92–106 and accompanying text.

147. For an explanation of the meaning of and difference between principles and policies for Dworkin, see DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 14, at 22–30.

148. The dividing line between moral and non-moral ends is, in any case, an unclear one. Policies, for example, are goals contrasted with moral principles, but they can be also be given a moral hue through characterization as utilitarian ends.

149. So, I do not deny the claim made by soft positivists like Hart that what I call ends in this Article can be and are sometimes incorporated into positive law. *See, e.g.*, HART, *supra* note 16, at 250. What I deny is that the notion of incorporation of ends into legal rules fully explains the role of ends in law and legal theory.

But the interpretive universalism discussed above in its Dworkinian form, which sees every case as containing a need for interpretation, goes too far in the other direction by effectively erasing the distinction between easy and hard cases and conflicting with the judicial phenomenology or perception that recognizes that distinction. There is an element of truth in Hart's notions of core and penumbra if one gets away from the deceptive fixity of its physical/spatial metaphor. If Hart's approach is accurate for the most part (i.e., in normal cases), the nub of the problem is to explain why and how it is that some cases are normal and others are anomalous. On this question, neither Hart nor Dworkin has very much to say, but Aristotle does, so it is to him that I now turn.

Aristotle's historically and philosophically important doctrine of the relation between law and equity provides the paradigm for my explanation. But it is also important to see more general features of Aristotle's approach to practical philosophy at work here, for the significance of his philosophy is not limited to cases of equity, but embodies a general jurisprudence, too, a worthy competitor to those of Hart and Dworkin. Most philosophers are familiar with the basic elements of Aristotle's ethical theory such as character, virtue, and practical wisdom, and most law professors are familiar with the contrast between law and equity. But both groups typically view these terms and the ethical and legal theories they compose as quaint and of no significant relevance to current explanations of language, meaning, and law. Neither group fully appreciates the important connections between the two. It is an aim of this Article to correct these misimpressions.

The function of equity in Aristotle's legal theory (and in later Western law and legal philosophy) is to modulate the strictness of the application of categorical legal rules in the interests of values such as justice and mercy (to name what are perhaps the two main reasons to temper legality). The first thing that must be recognized here about Aristotle's doctrine is that, although law and equity are both just, they are not the same things, nor are they just in the same way or sense. Law for Aristotle roughly corresponds to the positivist notion of law as the rules put in place by government. The second thing that must be recognized here is that, since law deals with practical matters, universal law will not always be correct, but will

sometimes stand in need of rectification.[150] This is a perfection of justice and not a retreat from it.[151]

This account of equity and the need for it in law explains why legal rules will not always give us peremptory reasons for legal actions and why law is not a formal, closed system. But it does not yet explain when and how equitable moments occur in law (recall that this was also a shortcoming of the legal theories of both Hart and Dworkin). For this, we must look beyond the confines of Aristotle's doctrine of law and equity to the broader features of his ethical philosophy. Too easily forgotten is the fact that law and ethics are branches of practical philosophy and, because of this, are not exhausted by their verbal and demonstrative elements.[152] Few claim that law is a formal system or that all legal reasoning is deductive, but few legal philosophies say much about why this is so and what underlying reality this reflects.

Aristotle's practical philosophy is an exception to this tendency. It is an integrated, practical explanation of how judgment comes into being and is exercised in ways that modern theories are not. Like many modern theories of practical philosophy, it has an account of practical reason, and like them, it sees law as a form of practical reasoning.[153] But unlike many contemporary theories, Aristotle integrates his account of practical reason with accounts of other related

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150. Aristotle sums this up, saying:

What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start.

ARISTOTLE, *supra* note 128, at 1795–96.

151. Notions of equity like Aristotle's are sometimes thought to conflict with rule of law values. I do not believe that there is an ultimate conflict between the two. An extended argument of this proposition is, however, well beyond the scope of this Article. For an argument supporting the consistency of equity and rule of law values, see Lawrence B. Solum, *Equity and the Rule of Law*, *in* THE RULE OF LAW 120, 135–40 (Ian Shapiro ed., 1994).

152. Recall Hart's statement that "a legal system often has other resources besides the words used in the formulations of its rules which serve to determine their content or meaning in particular cases." HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, *supra* note 60, at 8.

153. Of the contemporary analytical philosophers that have been discussed in this Article, Joseph Raz is the theorist with the most influential and fully developed account of practical reason, law, and practical philosophy. *See, e.g.*, JOSEPH RAZ, PRACTICAL REASON AND NORMS (1975).

notions such as character, virtue, and practical wisdom.[154] Contemporary theories of practical reason do not do this. Whatever their other virtues, too many current accounts of practical reason place it in a near vacuum where output is almost entirely a function of the reasons standing alone.

In Aristotle's ethical and legal philosophy, practical reasoning takes place in an ethos that influences both the process and outcome of deliberation as well as the moral perception or intuition which feeds the process. Just as an individual has a character which affects how she views and acts upon moral rules, a legal system has an ethos against which citizens and officials view and act upon the legal rules. Character and ethos, in their spheres, moderate the harshness of rules. In morality the result is mercy; in law the result is equity. Without this integrated context, all legal rules would provide peremptory reasons because there would be nothing with which to question or resist them. Without ethos, intuition, and moral wisdom, judges would have insufficient resources to enable them to recognize and make the choices about rule application of which both Hart and Dworkin speak.

Character (ethos) also helps with a nagging problem of interpretive theories of law like Dworkin's. One worry with his account of law as integrity is that it is all sail and no anchor. In its best light, justification considerations will inevitably overwhelm the resistance of the dimension of fit with existing law and any constraint that it might exercise on judicial decision making, thus collapsing the distinction between what the law is and what ideal morality requires. Dworkin defends against this possibility through arguments of coherence.[155] And in response to critics' charges that his defense is

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154. As Nancy Sherman says, "But to talk about character requires one to talk about practical reason. For it is practical reason that integrates the different ends of character, refining and assessing them, and ultimately issuing in all considered judgments of what is best and finest to do." NANCY SHERMAN, THE FABRIC OF CHARACTER: ARISTOTLE'S THEORY OF VIRTUE 4–5 (1989).

155. Dworkin says, echoing Quine, "There is no paradox in the proposition that facts both depend on and constrain the theories that explain them. On the contrary, that proposition is an essential part of the picture of knowledge as a complex and interrelated set of beliefs confronting experience as a coherent whole." Ronald Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More, in* THE POLITICS OF INTERPRETATION 287, 293 (W.J. Thomas Mitchell ed., 1983).

viciously circular, he contends that there is no vicious circularity if the system is sufficiently complex.[156]

Even doubters of Dworkin's theory of law and interpretation give some credence to his sufficient complexity defense.[157] The crucial issues here, though, are what gives complexity and structure to these properties and what constitutes sufficient complexity and structure to have the effect of preventing circularity and collapse. These are questions about which none of the contemporary participants in the debate concerning interpretive legal theory (including Dworkin) has very much to say; however, the Aristotelian notion of ethos does speak to these questions.

An Aristotelian ethos provides a background of ends against which perception is given sense and against which rule applications are judged and decided. Excellence in pursuing these ends is called virtue in Aristotle's ethics. Moral virtues arise out of habituation.[158] Habit here for Aristotle is not the "mere convergent behaviour"[159] (what people do as a rule rather than what they do because they are obeying a rule) that Hart contrasted with rule-governed behavior. Neither is it merely repetition of certain acts. For, as Sherman argues, it is also a critical, reflexive practice.[160] Thus, virtue is intimately related to and inseparable from practical wisdom or prudence. Neither virtue nor practical wisdom is mindless.[161] Instead, virtue and practical wisdom form a reflexive combination of the habitual and the reasoned, in contrast to modern conceptions of practical reason that tend to see these features in either/or terms. To reference a philosophical contrast that Hart was familiar with from his friend Gilbert Ryle,[162] ethos involves both a knowing-how as well as

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156. *Id.* ("Of course the constraint would be illusory if that system were not *sufficiently complex and structured . . . .*") (emphasis added).

157. *See, e.g.,* Andrei Marmor, *Coherence, Holism, and Interpretation: The Epistemic Foundations of Dworkin's Legal Theory,* 10 LAW & PHIL. 383, 408 (1991) ("But again, it is important to realize that this circularity is vindicated by the complexity thesis and the Holism presumed by Dworkin.").

158. Aristotle says that "moral excellence comes about as a result of habit . . . ." ARISTOTLE, *supra* note 128, at 1742.

159. For Hart's explanation of convergent behavior and how it differs from rule-governed behavior, see HART, *supra* note 16, at 9–11, 55–60.

160. *See* SHERMAN, *supra* note 154, at 178–83.

161. The apparent mindlessness of practical reason in its postmodern formulations is an issue in the literature. *See, e.g.,* Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647 (1998).

162. Ryle and Hart were longtime friends, sharing both wartime service and philosophical interests. The title of Hart's *magnum opus, The Concept of Law,* was influenced by the title of

a knowing-that.[163] Despite the general recognition that legal philosophy is a branch of practical philosophy (i.e., the philosophy of doing things), legal (and other) philosophers still tend to think of knowledge as propositional rather than in terms of know-how.[164] So, Aristotle's *phronimos* (person of practical wisdom) is someone with know-how or practical ability.[165]

Aristotelian ethos, then, provides resistance that is not merely different in quantity, but also different in quality, from the factors it constrains in Aristotelian practical philosophy; it adds dimensions of practicality and physicality to Quinean holism. It thus gives Aristotelian accounts of legal and ethical deliberation a defense to potential charges of vicious circularity and collapse that theories of constructive interpretation like Dworkin's lack.

Aristotelian ethos also offers a way of navigating a route between formalism and rule-skepticism in what might be called the puzzle of legal rules in contemporary analytic jurisprudence. This puzzle starts from the observation that legal rules claim, but do not always achieve, peremptory status. Leading legal theorists such as Hart and Dworkin seek this middle path, and much of the criticism their legal philosophies engender, including mine, results from their difficulties in explaining just how this is to be done.

The need for this middle path arises from what Frederick Schauer calls "[t]he [s]uboptimality of [r]ules"[166]—the fact that legal rules do not always produce the best results or even results as good as their background conditions or underlying purposes would produce if applied directly to the case in question. But we do not abandon rules every time they threaten to produce suboptimal results. If we did, the system of legal rules would collapse into mere rules of thumb in which every case was decided by an all-things-considered judg-

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Ryle's *The Concept of Mind*. For a discussion of the personal and philosophical friendship between the two men, see NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM 132–39 (2004).

166. GILBERT RYLE, THE CONCEPT OF MIND 25–61 (1949).

164. On this point, John McDowell says, "We tend to assume that the knowledge must have a stateable propositional content . . . ." JOHN MCDOWELL, MIND, VALUE, & REALITY 57 (1998).

165. As Hursthouse says, "But when we read Book VI [of the *Nicomachean Ethics*], we do not find Aristotle telling us that the *phronimos* knows *that* . . . . Instead we find him distinguishing practical wisdom from various sorts of theoretical knowledge-that, and then, when he comes to discuss it, exploring a number of states that all look like intellectual capacities or skills rather than knowledge-that." Hursthouse, *supra* note 132, at 286.

166. SCHAUER, *supra* note 92, at 100.

ment. In making such a change in the nature of legal rules, we would lose all the reliance and efficiency that having a system of legal rules provides. The court in the *Riggs* case, for example, did not change the general rules of inheritance, but only created an exception under its stark fact situation.[167] We would arguably not have a legal system at all in that situation—we would not possess the rule of law.

For this reason, legal rules resist being overridden by all-things-considered calculations. But this resistance is not absolute; legal rules are not set in stone. The core of the puzzle of rules entails explaining what influences, if not all-things-considered factors, will override or change those legal rules. In terms of Schauer's helpful phraseology, the issue is one of how we can reconcile rules as entrenched generalizations with a notion of rule-sensitive particularism. A generalization is entrenched when "[t]he generalization would by its terms control the decision *even in those cases in which that generalization failed to serve its underlying justification*."[168] In contrast, in rule-sensitive particularism, "[the] decision procedure appears to recognize the formal values of having rules while at the same time taking into account all relevant factors in every particular case."[169] Each of these positions is more nuanced than the more extreme formalism and rule-skepticism that they respectively approach. One would like to reconcile them—but how?

Aristotelian practical philosophy opens the door to this reconciliation. Rules are entrenched in the ruling ethos of the system and community. That is, rules are entrenched in the most practical manner as habits of participants in the system, not just as reasons or commitments. They have been practiced, refined, and reinforced until they have become part of the underlying structure of the system and community. Even judicial choice or legislative enactment will not immediately or completely efface them; instead they will resist (but not forever stymie) change.

At the same time, decision making is sensitive to particulars and context. While virtue and ethos determine the general goals and rules of practical activity, intuition and practical wisdom discern the

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167. *See* Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889).

168. SCHAUER, *supra* note 92, at 49.

169. *Id.* at 97.

context and means of achievement.[170] Together these balancing factors allow law to tread a middle path between entrenched generalization and rule-sensitive particular and between peremptory reason and all-things-considered determination,[171] thus illustrating the Aristotelian model for reconciling dichotomies and dialectically harmonizing dualities in law and other parts of practical philosophy. This middle path has several salient virtues. First, it accords best with the puzzling facts of the matter we perceive as participants in the legal system (i.e., it saves the appearances). Second, it harmonizes important but apparently conflicting, if not contradictory, features of the practice. Finally, it does this in a manner that allows the practice to reap the advantages of both opposing elements of these dualities.

CONCLUSION

In his Clarendon Law lectures, Jules Coleman compares blues and philosophy. In both these fields, he says that there is "an important sense in which nothing is new . . . ."[172] If the analogy is apt, and I believe that it is, in this Article I have been playing riffs on some of the oldest classic themes in the legal philosophical genre. Coleman also says that there is no embarrassment, and perhaps there is even great value, in doing this. I have faith that he is correct. For what I have suggested in this Article is an ancient, dialectical, Aristotelian remedy for the bipolar disorder that afflicts the contemporary effort in analytic legal philosophy to say what the nature of law is. This is a remedy that can solve the puzzles, both methodological and substantive, which ail analytic jurisprudence and reconcile the apparently contradictory elements of its controversial dualities.

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170. ARISTOTLE, *supra* note 128, at 1729. On this important point, Aristotle says, "Again, the function of man is achieved only in accordance with practical wisdom as well as with moral excellence, for excellence makes the aim right, and practical wisdom the things leading to it." *Id.* at 1807.

171. These conflicting demands upon rules are summarized by Schauer in this way: "The degree of normative force for any rule commonly lies between these extremes, most rules have enough power to determine an outcome even if all else is not equal, yet falling short of absoluteness." SCHAUER, *supra* note 92, at 115.

172. COLEMAN, *supra* note 43, at x.