

Defending the Methodological Space for a Neutral Functional Theory of Law

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While it is not a novel issue, the role of functional thinking in legal philosophy can certainly be a point of confusion. Some might view the use or rejection of functionalism as a dividing line between jurisprudential methods, thinking that functionalism is a facet of normative methodologies, while its rejection is a facet of explanatory methods. Others see different ways of understanding the role of law's function in jurisprudence as the mark of distinctive methodologies, not necessarily tracking the normative-descriptive divide.

A very strong pre-theoretical understanding of a whole host of social practices, including law, relies heavily on the notion of function. Many people understand social practices in ways very similar to tools and other artifacts: that they are created, developed and maintained to serve a purpose, or with a point, even if that purpose or point is not quite as clearly worked out as in the case of tools.

In this paper I argue that there is methodological space for a functional explanation of the nature of law that does not commit the theorist to a view about the value of that function for society, nor whether law is the best means of accomplishing it.¹ A functional explanation will nonetheless provide a conceptual framework for a better understanding of the nature of law.

Theorists generally do not disagree whether the law performs some social function. The disagreements arise in determining what those functions are and whether an investigation of those functions is a fruitful way of trying to understand the law. Here I

¹ A version of this position (concentrating mainly on refraining from judging the law's chances of success, rather than the value of its purpose) has been called 'thin functionalism' by William Twining in 'A Post-Westphalian Conception of Law' (2003) 37 *Law & Society Review* 199 at 238, where the notion of functionality in play is termed 'aspirational.' See also J. Coleman, 'Methodology', in Coleman & Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 311 at 333, for a quick statement of the possibility of such a neutral functionalist theory.

am not concerned with which functions the law performs, but with answering this second issue in the affirmative by answering where and how an understanding of law's functions can illuminate the nature of law generally, and to what extent theorists can discuss those functions neutrally.² In order to do this, I first examine the role for function in an explanatory jurisprudence, carving out a path between the anti-functionalist work of Leslie Green and the more normative functionalisms of Steven Perry and Michael Moore. I then turn to address the extent to which a jurist can remain neutral with regard to the functions she uses to explain the law.

1. The Place for Functionalist Methodology

Les Green has canvassed functional thinking in legal philosophy,³ understanding the function of something to be the consequences it has that explain its presence or what it is supposed to do.⁴ A functional explanation of something is therefore one that involves some notion of causal consequences as helping to understand the nature or existence of the thing explained. Since the consequences can simply be expected in the case of understanding something by what it is supposed to do, the explanation does not necessarily entail a claim that the thing being explained must successfully cause the consequences.

Generally, functionalist explanations use either 'manifest' or 'latent' functions. The former are usually the intended consequences of an artifact, or the goals of the inventor,

² I thank an anonymous reviewer for these organizing questions.

³ L. Green, 'The Functions of Law' (1998) 12 *Cogito* 117; L. Green, 'The Political Content of Legal Theory' (1987) 17 *Philosophy of the Social Sciences* 1 at 4. See also, L. Green, 'The Concept of Law Revisited', 94 *Mich. L. Rev.* 1687 at 1709 (1996).

⁴ Green, 'Functions of Law', above n 3 at 117. See also, P. Achinstein, 'Function Statements' (1977) 44 *Philosophy of Science* 341; J. Bigelow and R. Pargetter, 'Functions' (1987) 84 *Journal of Philosophy* 181; H. Kincaid, 'Assessing Functional Explanation in the Social Sciences', in Martin (ed), *Readings in the Philosophy of Social Science* (1994) 415; Larry Wright, 'Functions' (1973) 82 *Philosophical Review* 139.

while the latter are the hidden (usually social) consequences that explain the development or maintenance of something in terms that generally make reference to subconscious psycho-social motivations.⁵

Green recognizes, however, that there may be functions that help to explain things which do not fit neatly into one of these two classifications. If we understand the function of the heart to pump blood, we seem to be invoking a kind of manifest function, without necessarily helping ourselves to any notions of intentionality on the part of a creator.⁶ A key element of a functional explanation is the value of the consequences to the entity that employs the thing to be explained.⁷ That (instrumental) value can be conscious, as in the case of the inventor of an artifact, or it can be somehow inherent in the context of an unconscious process, such as evolution. The notion of value here is therefore not simply a conscious one, as the heart is of value to an animal that has no knowledge of it (assuming its survival is of value). A more common term for this value is the 'point' of the thing to be explained.⁸

Furthermore, for things that are ripe for functional explanations, the function is the *best* explanation for the presence of the thing to be explained by it,⁹ so not just any valuable consequences can be used in a functional explanation. Hence, a functionalist explanatory methodology is one that seeks to produce a theory as to what valuable consequences best explain the presence or persistence of the thing to be explained.

⁵ Green, 'Functions of Law', above n 3 at 117.

⁶ Ibid at 118.

⁷ M. Bedau, 'Where's the Good in Teleology?' (1992) 52 *Philosophy and Phenomenological Research* 781. See also M. Murphy, 'Natural Law Theory', in Golding & Edmundson (eds), *Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 15 at 25.

⁸ Twining, above n 1 at 239, following Dworkin (R. Dworkin, *Law's Empire* (1986) at 47). Twining, however, appears to divorce 'point' from causal consequences. I think it is clear that some notion of causation is associated with the understanding of something's point in that its (perhaps only expected or intended) effects are of value. See also Bedau, above n 7.

⁹ Green, 'Functions of Law', above n 3 at 118.

An initial concern about functional explanations so understood might be that they entail a claim of backward causation (as if a consequence can bring a cause into being).¹⁰ However, we can bracket that concern in biological and artefactual systems. In artefactual systems, there is an inventor who adopts the function as the point of the artifact. It is therefore the imagined causal effect of the artifact that spurs the inventor to create it. In biological systems, we have an evolutionary explanation that incorporates functionality. The function of the heart is to pump blood because other methods of oxygenating cells in complex animal systems did not enhance survival chances as well as did the heart. Admittedly, it is not clear if either of these options is appropriate for explaining social institutions like law, but their availability is sufficient to show that the backwards causation problem is unlikely to be a serious threat for a functional explanation of law.¹¹

However, as Green notes, one caveat about these options is very important to a discussion of jurisprudential methodology: neither the artefactual, nor the evolutionary functionalist explanation requires any claim that the entity to be explained is the best or only means for accomplishing the function.¹² One might imagine a better system for circulation than the heart's pumping blood or a better method for illumination than the light bulb. In a functional explanation, the function is what best explains the presence of

¹⁰ Ibid at 116. See also Larry Wright, *Teleological Explanations : An Etiological Analysis of Goals and Functions* (1976) at 10; Jon Elster, *Ulysses and the Sirens : Studies in Rationality and Irrationality* (1979) at 32; G. A. Cohen, 'Functional Explanation, Consequence Explanation, and Marxism' (1982) 25 *Inquiry* 27 at 30; Maurice Mandelbaum, 'G. A. Cohen's Defense of Functional Explanation' (1982) 12 *Philosophy of the Social Sciences* 285 at 286; Joel Dickman, 'Two Qualms About Functionalist Marxism' (1990) 57 *Philosophy of Science* 631 at 638; R. O. N. McClamrock, 'Functional Analysis and Etiology' (1993) 38 *Erkenntnis* 249 at 250; G. A. Cohen, *Karl Marx's Theory of History: A Defence* (Expanded edn., 2001) at 281 (1978); Joly Agar, 'G. A. Cohen's Functional Explanation: A Critical Realist Analysis' (2003) 33 *Philosophy of the Social Sciences* 291 at 293ff.

¹¹ Green argues that this problem is solved by an examination of the causal mechanism, which suggests that functionality cannot be the most fundamental explanation, since it needs to be augmented by an explanation of that causal mechanism. 'Functions of Law', above n 3 at 118. As I will argue below, this may be correct but does not justify minimizing the role of function in the explanation.

¹² See Green, 'Functions of Law', above n 3 at 122.

the explanandum; it is not necessarily the case that the explanandum is the best means for accomplishing that function.¹³

There are at least three distinct questions that might be asked of a theorist adopting a functionalist methodology: What is/are the function(s) that best explain the law? What is your normative attitude toward that/those function(s) (or what ought ours to be)? And what is your (ought be our) attitude toward law as a method of accomplishing those functions?¹⁴ Functionalist legal theorists are bound to answer the first question. But it is not clear without further argumentation that they are bound to answer the second or third.¹⁵

Let us imagine, for the sake of argument, that the function of law was determined to be the provision of justice for society. That is, everyone agrees, upon reflection about the concept and nature of law, that law's point is to correct injustices and safeguard just states of affairs and to do so through just means. I purposely do not elaborate on what conception of justice is in play here. Perhaps it involves the radical redistribution of property; perhaps it involves the radical protection of property. Without elaborating on what notion of justice would be promoted, it is hard for anyone to dispute the value of such a function, so in offering it a theorist is likely answering both the first and second questions above.

¹³ This caveat holds even for functional kinds, for which all performers of the function get the same title. See *ibid* citing J. Raz, *The Authority of Law: Essays on Law and Morality* (1979) at 226.

¹⁴ These questions parallel Green's discussion in 'Functions of Law', above n 3 at 122.

¹⁵ Many have argued that legal theorists need not themselves evaluate justificatory normative claims in support of the law. See, e.g., H. L. A. Hart, *The Concept of Law* (Bulloch & Raz, eds, 2nd edn, 1994) at 240 (1961); J. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (2001) at 28; J. Dickson, *Evaluation and Legal Theory* (2001) at 37; A. Marmor, *Positive Law and Objective Values* (2001) at 153; W. Waluchow, *Inclusive Legal Positivism* (1994) at 19.

It still remains a separate question whether the law could ever achieve that end and if there are other means of pursuing it that would be more successful.¹⁶ A theorist could just as easily claim ‘the law is to achieve justice and therefore it is a good thing’ as ‘the law is to achieve justice but always by using means that stymies its pursuit of this end and hence it is a bad thing.’

Some might question whether it makes sense to ascribe an end to something that is always doomed to fail in achieving that end. I do not think this worry makes sense for artificial objects or institutional concepts. We do not say that all machines designed to fly before that of the Wright brothers are not flying machines because they were doomed to fail. Here, we are investigating functional *explanations* rather than functional definitions that establish membership criteria.¹⁷ This point bears special emphasis. Many who attack or ridicule functionalist methodology do so under the misimpression that a functionalist explanation is simply an Aristotelian functional definition.¹⁸ When we define something by its function in this way, we thereby make the success criteria embodied by the function into membership criteria for the explanandum. When a class of things is defined functionally, the failure of a putative member of the class to perform the function means that it fails to be a member of the class at all. Since a definition of this kind is supposed to offer sufficient and necessary conditions for membership in the class, anything that fails to meet those conditions cannot be a member of the class. For example, if we defined chairs functionally, we would have to say that a chair that cannot be sat upon is not a

¹⁶ Green, ‘Functions of Law’, above n 3 at 122.

¹⁷ Some definitions are themselves offered as explanations rather than to set forth necessary and sufficient conditions for membership in the class being defined. These might be likened to understanding the concept by its central or typical applications rather than attempts to delimit a bright-line boundary for the concept. I would see those definitions in their explanatory role and am here only concerned to distinguish more traditional Aristotelian definitions in order to avoid the straw man that functional explanations cannot deal with cases of failure.

¹⁸ I do not suggest that Green is guilty of this.

chair at all. This is both counter-intuitive and creates problems for the way in which we conceptualize the world.

A functional explanation (as opposed to a bright line definition) does not by itself serve as or offer criteria of validity or membership.¹⁹ Instead, it offers an account of the explanandum that is meant to provide insight into its nature or operation. Since it explains the explanandum in terms of a function, it is still offering a success criterion for judging members of the class. However, that success criterion is not understood as a necessary nor sufficient condition for membership. Hence we can understand chairs in terms of what they are for, without having to exclude ones upon which we cannot sit. On the other hand, once we do know that they cannot be sat upon, we know that they are not very good chairs (although this is only to comment on their value within the context set by their function – they still might be very valuable as works of art). However, if I were undertaking a project of developing a theory of chairs (admittedly, not a very useful or interesting enterprise), it would not be incumbent upon me to use that theory to judge the success of any particular chair, nor to judge the importance of sitting down, nor to weigh in on whether we would be better with some other method of seating.

A complete functional explanation of the law will involve not just functional or purposive elements, but descriptive elements of the law that bear upon its ability to meet those ends (which the theorist may or may not use to make judgments as to its efficacy). The values of those ends and of the law as a means to achieve them are separate issues in a wider moral or political theory. The standards by which one would judge the law's ability to achieve its ends are provided by the functional ascription and (hopefully)

¹⁹ See Green, 'The Concept of Law Revisited', above n 3 at 1710. See also M. Murphy, *Natural Law and Practical Rationality* (2001) at 32, discussing the viability of functional explanations that do not require a commitment to Aristotelian teleological explanations by final causes.

articulated by the theorist, but it is not incumbent upon the theorist to perform that judgment unless she wishes to take a stand in that wider political or moral debate.

A. Modality and Functional Kinds

Green notes that, within some limits, varieties of jurisprudential methodology are mostly compatible, differing mainly in their articulation of membership criteria for legal norms.²⁰ I would not dispute his claim that a complete philosophy of law must provide criteria for identifying law.²¹ However, following Kelsen, Green notes that functionalism itself is doomed to failure on that task because ‘as a form of social order, law is distinguished not by what it does, but by how it does it.’²² Hence,

a criterion for identifying law cannot consist entirely in considerations of function or content. ... It must also include considerations of form. ... [T]he uses to which law may be put, if not entirely open-ended, are many, and none of them seems unique to law or common to all legal systems.²³

To this I reply that the fact that the law’s function(s) are not unique to it does not entail that a functional understanding of the law cannot be useful for explaining it.²⁴ But does the additional criterion that a successful theory of law must be capable of identifying law (distinguishing it from other social phenomena) preclude the use of a functional explanation that does not include a claim that law is a functional kind?

A functional kind is a description of a class of things understood by the function they perform. It is still not a definition in the Aristotelian sense, which would see success as

²⁰ Green, ‘Political Content of Legal Theory’, above n 3 at 11.

²¹ Ibid at 12.

²² Green, ‘Functions of Law’, above n 3 at 120; Green, ‘Political Content of Legal Theory’, above n 3 at 12, citing H. Kelsen, *General Theory of Law and State* (Wedberg, trans, 1961) at 15 (1949).

²³ Green, ‘Political Content of Legal Theory’, above n 3 at 12. He does follow Hart in noting that a criterion for identifying law may consist partly in its function as a necessary minimum content. See Hart, above n 15 at 199. But see Green, ‘Functions of Law’, above n 3 at 120 (noting that Hart’s minimum content claims are a reason to see law as sharing its functions with other institutions). We should also note that considerations of form or method cannot be sufficient by themselves either. See L. Fuller, *The Morality of Law* (revised edn, 1969) at 112 (1964).

²⁴ See Murphy, ‘Natural Law Theory’, above n 7 at 26 for an outline of a similar argument.

necessary for membership in the class. Rather, to say that something is a functional kind is to see the performance of the function as *sufficient* for membership in the class, and hence failures can still be class members. Green's example is the concept of a leader as opposed to a president. A president is only present in some systems with a particular legal or organizational structure. A leader is a broader term covering persons who fill any roles that perform the function of leading others.²⁵ Hence, to say that a class of things is a functional kind is to say that its function is unique to that class.

Green tells us that functional explanations which do not claim law to be a functional kind cannot succeed because non-unique functional explanations will not isolate the law from other phenomena.²⁶ That is, whatever the law's function turns out to be, it is unlikely to be something that is possessed by the law alone. Morality, custom, and etiquette seem to perform similar functions in society. Instead, for Green, what is unique about the law is its way of doing what it does, which separates it from other phenomena. Green speculates that hence the law may be a 'modal kind' rather than a functional kind.²⁷

I have two replies to this claim: First, the fact that the *theory* must include membership criteria for law does not mean that those criteria must be a part of the function(s) used to explain the law. Uniqueness, membership criteria, or differentia are desiderata of the theory as a whole and not each part of it. Hence, a non-unique function can still be an extremely important, even essential, part of a broader theory that provides

²⁵ Green, 'Functions of Law', above n 3 at 119. *See also* M. Moore, 'Law as a Functional Kind', in George (ed), *Natural Law Theory: Contemporary Essays* (1992) 188 at 206; and M. Moore, 'Law as Justice' (2001) 18 *Social Philosophy & Policy* 115 at 119, although I take issue with Moore's understanding of functional kinds below.

²⁶ Green, 'Functions of Law', above n 3 at 120.

²⁷ *Ibid* at 121.

membership criteria and differentiates the law from other phenomena. If I were to develop a theory of the university, I would have a very poor theory if I failed to explain that it is an institution that performs the functions of higher learning and research. The fact that other institutions in society perform those same functions (think-tanks, hospitals, liberal arts colleges, etc.), does not detract from the importance of those functions to the theory. Yet the theory must *also* include other elements to identify universities and differentiate them from other institutions. As long as we still hold the functions to be an essential part of a successful theory, we are adopting a functionalist methodology. Therefore, I agree with Green that law is not a functional kind, but do not think that this means one cannot use a functionalist methodology for its explanation.

Second, it is not so clear that the law operates in such a unique way either. Other institutions create and enforce rules, and mete out punishments. What is unique may be neither its form (modality) nor its function but instead the particular way in which the two are joined. I will return to this point and develop it further shortly.

One potentially more worrying claim that Green makes in the text quoted above is that the law might have different uses in different systems.²⁸ It would indeed be problematic for a functional explanation methodology if legal systems differed wildly in all of their functions from society to society. But this simply is not borne out in the way that would be needed for Green's point to hold. It is certainly possible for despots, legislators, and even individual litigants, to use the law in a wide variety of ways and for a wide variety of purposes in different systems. However, we are not talking here about the kind of use to which an individual might put the law for her own purposes. The fact that legislators use the law to stay working in a particular job is not likely to be of great

²⁸ See *supra* n.23.

theoretical importance. Nor is it likely to be of great theoretical importance that judges wear ceremonial robes in many systems (although this is still part of the ‘way’ law does what it does). Rather, the functions that are useful for generating functional explanations are the social functions of law. These may still differ somewhat from society to society, but it is also plain that they share many important characteristics. With those shared characteristics they can be classified into a typology or can be given a more general description, which can then serve a central role in an explanatory theory.

B. Different Kinds of Functional Kinds

The contention that law is a functional kind can lead to untenable conclusions. Michael Moore understands something’s function to be dependent upon a larger system of which it is part. We ‘hypothesize’ the existence of and a ‘goal’ for that larger system. The entity (or activity) to be explained has an effect that is conducive to the goal of the larger system. That effect is then the function that explains the entity or activity.²⁹

Moore defends functionalist jurisprudence as he sees it against the claim that once a broader goal for law has been articulated, that would not allow us to claim simply anything necessary for the pursuit of that goal is law. When he emphasizes the need for the functionalist to see the law as a functional kind, his argument goes awry. Even if the goal of law is survival, and basic prohibitions against violence and murder are necessary for survival, that does not thereby mean that such prohibitions are necessary to law itself.³⁰ It should be noted that this problem only arises when we see law as a functional kind; once we give up on that claim, this problem evaporates since we are no longer

²⁹ Moore, ‘Law as a Functional Kind’, above n 25 at 210.

³⁰ Ibid at 218, citing K. Nielsen, ‘The Myth of Natural Law’, in Hook (ed), *Law and Philosophy* (1963) at 136.

bound to say that anything performing law's function is law. However Moore attempts to respond while still maintaining that law is a functional kind:

[T]his objection forgets what it is that functionalist jurisprudence claims about the goal of law: the claim is that law's essence is given by that goal, not by any structural feature. Therefore any structural feature necessary to attain law's goal is law in any sense that the functionalist need defend.³¹

Hence, for Moore, if a mower is a functional kind,³² and a human driver is a structural feature necessary to perform the mower's function of mowing, then the driver is the mower (perhaps more charitably, the driver is a part of the mower – but that still seems very difficult to accept). If a time piece is a functional kind, and winding the time piece is necessary for the time piece to perform its function, then the winding is part of the time piece. If a leader is a functional kind, and followers are structurally necessary for the leader to perform her function, then the followers are a part of the leader.

This shows the inherent problem with Moore's particular understanding of functional kinds and his application of it to the law. Since Moore makes use of some notion of functional essence in order to explain functional kinds,³³ he goes beyond the simpler notion offered by Green of something whose function is unique to it, and approaches the Aristotelian notion of a functional definition.³⁴ If something's function is unique to it *and* is its essence, then any necessary component for the performance of that function must be a part of the system. We are no longer simply explaining something by its function; we have moved into the conceptual realm of how we divide up the world. I believe that the implausible conclusions to which Moore is forced by this understanding of functional

³¹ Moore, 'Law as a Functional Kind', above n 25 at 218.

³² Ibid at 207, taking the example from *In Re Erickson* 815 F.2d 1091 (7th Cir 1987).

³³ This is still true more recently. Moore, 'Law as Justice', above n 25 at 119.

³⁴ Moore has made it clear that he still believes functional kinds imply success requirements characteristic of functional definitions. Ibid at 121.

kinds is very good evidence that the law cannot be a functional kind in Moore's more demanding sense (let alone Green's weaker sense, as I have shown above).

Moore is led to claim that law is a functional kind by dividing the world up into natural kinds, nominal kinds, and functional kinds.³⁵ Clearly law is not a natural kind since it does not exist as a kind in nature without any human participation. A nominal kind is something that becomes a member of the class simply by being called that by human beings. Law cannot be a nominal kind since, if it were, we would not be able to make new discoveries about the nature of legal systems. We would not really be able to ask of social practices whether they were legal. They would simply be legal if they were called 'legal.' But this is not how we see ourselves when we do jurisprudence. We do not think that we are conferring an appellation on a social practice when we call it legal. Rather we make arguments and give reasons, based on the characteristics of those social practices, that it would be appropriate to explain or understand them as legal practices.³⁶

Moore concludes from the rejection of the law as a natural and as a nominal kind, that it must be a functional kind. However, it is far from clear why we are limited only to three kinds for dividing up the world's entities.³⁷ As mentioned above, Green suggests the possibility of modal kinds (which I reject for law). I prefer to think that the law is a

³⁵ Moore, 'Law as a Functional Kind', above n 25 at 206

³⁶ Moore's argument against considering law to be a nominal kind is slightly different from this, resting first on the impossibility of doing general jurisprudence in a world in which an understanding of law as a nominal kind restricts it to a language-specific study, and then on a positive argument that law is a functional kind. Ibid at 206. I find his argument unpersuasive on both counts and therefore present my own against considering law to be a nominal kind.

³⁷ See I. Hacking, 'A Tradition of Natural Kinds' (1991) 61 *Philosophical Studies* 109 (suggesting that natural kinds are only one among many useful ways of classifying entities). See also R. Boyd, 'Realism, Anti-Foundationalism and the Enthusiasm for Natural Kinds' (1991) 61 *Philosophical Studies* 127 at 140 (arguing for social and conventional kinds).

social kind.³⁸ Perhaps there is even a subclass of these we can distinguish as an institutional kind, the possibility of which is suggested by John Searle's analysis of institutional facts as a class of social facts more generally.³⁹ Social kinds need not be natural or strictly nominal. Since functional explanations can advance our understanding of many different kinds of things, to say that law is ripe for a functional explanation does not commit the theorist to claim that the law is one or another of a particular kind of thing.

C. Desiderata: Validity Criteria, Membership Criteria, and Explanatory Uniqueness

While Green claims that the fundamental task of legal philosophy is to identify the membership criteria for law, Stephen Perry claims that the fundamental task of jurisprudence is to show how law creates reasons for action that we would not otherwise have.⁴⁰ The question is how far apart they are in their view of the task of legal philosophy.

Criteria of validity pick out what counts as valid law within a given legal system.⁴¹

Perry's demand represents a success criterion for a theory of the validity criteria: A theorist's articulation of the nature of legal validity criteria had better explain how they create reasons for action in giving some putatively legal action (legislation, court decision, direction of an official, etc.) the status of law.

³⁸ 'Most "human kinds" – kinds of people and their behavior – are social rather than natural kinds.' Hacking, 'A Tradition of Natural Kinds', above n 37 at 123.

³⁹ J. Searle, *The Construction of Social Reality* (1995). Of course, I do not mean to suggest that Hacking would endorse Searle's understanding of the social construction of such entities. I. Hacking, 'On Boyd' (1991) 61 *Philosophical Studies* 149 at 152; I. Hacking, *The Social Construction of What?* (1999).

⁴⁰ S. Perry, 'Hart's Methodological Positivism' (1998) 4 *Legal Theory* 427.

⁴¹ This is what would be contained in Hart's Rule of Recognition. Hart, above n 15 at 94.

Consider Green's claim that the fundamental task of jurisprudence is to identify the membership criteria for law. Within a legal system the membership criteria for law are provided by that system's validity criteria.⁴² All and only valid laws count as law. In the case of functional explanations of artifacts like chairs or shoes, or of institutions like universities, membership is not a question of validity.⁴³ But since law is a system that guides behavior, not all putative legal statements get the status of law; those that fail to be valid will not serve to guide behavior (at least not legally speaking).⁴⁴

Notice that the two tasks differ only very slightly in the questions they ask: Green demands that jurisprudence tell us *what* law is; Perry demands that jurisprudence tell us *how* law does what it does. This is important in answering Green's challenge that functional methodology cannot be sufficient to explain law since the law cannot be identified solely by its social function.⁴⁵ Green claims that how law does what it does is the thing that helps us to identify it.⁴⁶ But it is Perry, a champion of functional methodology,⁴⁷ who sees the 'how' question as the central one in jurisprudence. This is because Green was initially too quick to isolate the formal or modal question – how law

⁴² Understood more broadly these two can come apart. For example, it does seem entirely possible, even likely, that membership in the class of legal systems will be different from those picked out as valid legal systems (depending on the criteria of validity for legal systems). However, Green puts his point in terms of legal propositions, in which case the membership and validity criteria will be much more closely aligned.

⁴³ Although some institutions may require a legally valid instrument (such as one of legal recognition) in order to count as an example of that kind of institution.

⁴⁴ This parenthetical bears emphasis. It is certainly true that putative laws can guide behavior without being valid laws, and people can be mistaken about the validity of laws. But they will guide behavior in their status as accepted norms, while still lacking some feature that allows them to be properly considered laws. Hence, they will not be guiding behavior as laws. For an illuminating discussion on this distinction between norm-guidance and norm-governance, see S. Shapiro, 'On Hart's Way Out', in Coleman (ed), *Hart's Postscript* (2001) 149 at 153.

⁴⁵ Green, 'Political Content of Legal Theory', above n 3 at 12; Green, 'Functions of Law', above n 3 at 120.

⁴⁶ Green, 'Political Content of Legal Theory', above n 3 at 12; Green, 'Functions of Law', above n 3 at 121.

⁴⁷ See, e.g., S. Perry, 'Interpretation and Methodology in Legal Theory', in Marmor (ed), *Law and Interpretation* (1995) 97 at 114.

does what it does – from the functional question of law’s point.⁴⁸ Later, Green notes: ‘the social functions of law may have a more modest role to play, for they may provide a *constraint* on an adequate theory. ... There may be necessary or typical functions of law even if none of them is unique or distinctive.’⁴⁹ It remains to be seen just how modest a role this is.

Let us uninformatively and perhaps even circularly entertain the claim that law’s function is to provide legal reasons for action.⁵⁰ An explanation of this will show both what counts as law and how law creates those reasons. A functional explanation gives both a reason for and a description of the explanandum.⁵¹ How the explanandum does what it does is a part of the causal description contemplated by a functional explanation.

Recall the architectural adage that form follows function.⁵² We can adapt this in reply to Green: It is not opposed to a functional methodology to insist on the role of form (or the way that the law does what it does) as central to understanding the law. Rather, one key aspect of understanding the concept of law will be to understand precisely how the end or point of the law gives rise to its particular way of accomplishing that end.

However, the form (or modality) of law is somewhat more manifest than the function. As with artifacts, and even other social institutions, the form or operation of the thing to be explained will be easier to access by casual observation. A Martian anthropologist encountering a chair for the first time will be able to describe its form. But she will not be able to discern which elements of the form are most important to explaining the artifact

⁴⁸ Green, ‘Political Content of Legal Theory’, above n 3 at 13.

⁴⁹ Green, ‘Functions of Law’, above n 3 at 121, emphasis in original.

⁵⁰ Obviously, we would need to explain legal reasons for this to serve as an explanation at all. See J. Raz, ‘On the Functions of Law’, in Simpson (ed), *Oxford Essays in Jurisprudence* (Second Series, 1973) 278 at 284.

⁵¹ Wright, above n 4 at 157.

⁵² Louis H. Sullivan, ‘The Tall Office Building Artistically Considered’ (1896), in Twombly (ed), *The Public Papers* (1988) 103 at 111.

without an understanding of its function. In order to be in a position to make judgments about which structural or modal elements are important to include in an explanation of an artifact or institution (and possibly also for a sub-organism biological system), one must ground those judgments in an understanding of the entity's function. Hence, a functional explanation, admittedly married to a detailing of form as needed, will be required of any complete jurisprudence.

The problem arises when we start to describe what is so unique about the way the law does what it does. Articulating what is unique about the law requires us to make use of legal concepts; otherwise we are back in the conundrum with which Green saddles the functionalists: we have not shown what is unique about the law. For example, let's say that the thing unique about the way the law does what it does is that it employs political institutions to make pronouncements that are then binding under threat of coercion upon those subject to the jurisdiction of the political institution.⁵³ That cannot be enough because it does not distinguish legitimate legal actions from illegitimate ones. If a judge stands up in court and directs her bailiff to go next door and retrieve a meal from the neighboring restaurant because she's feeling a bit hungry, we would not usually count that as a legal action (even if she somehow could threaten the bailiff with coercion).⁵⁴ We would need to separate this type of example out. Hence, the theory of the way that the law does what it does must include an account of legal validity. However, it seems that there is a problem: that account of legal validity is either couched in terms that require an existing understanding and identification of law – it needs to employ legal concepts to

⁵³ While this might be unique, and hence sufficient, it is probably not a necessary condition for the presence of law. Lon Fuller provided an example of a hypothetical legal system that does not use coercion by extracting fines from personal escrow accounts. Fuller, above n 23 at 109.

⁵⁴ That is, it certainly might not be against or opposed to the law, but it is not an action within the purview of the judge's legally defined role; she is not creating a legal duty on the bailiff with her request.

explain legal validity (and is therefore circular), or it is not necessarily unique to law (since it employs non-legal concepts to explain legal ones).

If this is Green's conundrum, it is not clear how any theory can meet the desiderata. Even a theory that concentrates exclusively on law's modality will either need to employ legal concepts to explain that modality, or it will employ non-legal concepts threatening the law's uniqueness by putting that modality in terms that are shared by other social institutions, entities, or systems of behavior guidance.⁵⁵

We may question why such uniqueness is so essential for an understanding of the law. Just as Green is dubious of the law being a functional kind because it is difficult to see any function that is unique to it, I doubt that its particular way of doing what it does is so unique. Consider all of the wide variety of social organizations that assemble, use *Robert's Rules of Order*, set rules to define the roles and powers of officers, set rules for their members' behavior, and impose negative consequences for breaking those rules. We might say that law is unique only in the precise way that non-unique elements of form and function are related.⁵⁶ It is clear that an explanation of this relationship is one in which form will follow function: the (non-unique) choice of means is explained and motivated by the (non-unique) function. In this we should not be worried about underdetermination. That there might be more than one way to accomplish whatever function law serves does not undermine the explanatory power of the adduced function. All of the variety among legal systems speaks to this point.

⁵⁵ It might be pointed out here that an explanation *per genus et differentiam* (by type and what differentiates the explanandum from other members of the type) is always going to employ concepts beyond the sphere of the explanandum in establishing the differentia. As I point out immediately below, uniqueness is derived from the particular combination of differentia within the genus. But even this kind of uniqueness is just as unlikely from a purely modal theory as it is from a 'purely' functional one.

⁵⁶ Consider, for example, Raz's notion of the law as providing a specific *kind* of normativity as a unique relation between form and function. See Raz, 'On the Functions of Law', above n 50 at 280. Green could be construed to agree with this claim. Green, 'Functions of Law', above n 3 at 120.

This leads me to question the importance of uniqueness as a criterion by which to judge explanatory projects. Certainly it is important to be able to identify the thing explained and separate it from other elements of our natural or social world. But that can be accomplished through classification, and through particular combinations of non-unique elements. To suggest a somewhat facile metaphysical metaphor: every unique object is simply a different collection of otherwise non-unique elements.

2. Normative Commitments in Functionalist Methodology

Earlier, Greed had divided ‘Legal Functionalism’ into two main camps, the normative and the descriptive. Into the descriptive he put a wide variety of theories including Critical Legal Studies, Marxist theories, feminist theories and even (partially) law & economics.⁵⁷ Descriptive functionalists claim that law’s social consequences help explain what law is and why it is present in society. Some such theorists concentrate on law’s manifest functions (where explanatory consequences are intended and ‘contemplated’ by actors in the legal, political, or economic regime) and some on law’s latent functions (where hidden social consequences explain law’s presence and nature).⁵⁸ ‘Normative functionalism, on the other hand, presents a teleological view of law as an institution whose distinctive province it is to aim at certain valuable ends.’⁵⁹

Once we see that those ‘valuable ends’ are not ones that the theorist must necessarily adopt as her own, Green’s early distinction is less useful. Green cites as an example of a descriptive function that law is ‘society’s mechanism for the resolution of private

⁵⁷ Green, ‘Political Content of Legal Theory’, above n 3 at 4. On the mixed nature of law & economics, see also, Coleman, *Practice of Principle*, above n 15 at ch 11. Later, Green prefers the term ‘explanatory functionalism.’ ‘Functions of Law’, above n 3 at 116.

⁵⁸ Green, ‘Political Content of Legal Theory’, above n 3 at 4, citing R. Merton, *Social Theory and Social Structure* (1968 enlarged edn.) at 73 (1957).

⁵⁹ Green, ‘Political Content of Legal Theory’, above n 3 at 5.

disputes,’⁶⁰ and as an example of a normative function ‘that the law acts so as to reduce social conflict.’⁶¹ It is difficult to see any robust difference between these two possible functions. The only real difference that is apparent on the face of the two formulations is that the first does not include a claim that the law is successful in resolving disputes, while the second intimates that the law is successful.⁶²

It also appears strained to say that Marxist, feminist, or Critical Legal Studies critiques of law are descriptively functionalist while natural law is normatively functionalist.⁶³ Green’s point is that their articulation of law’s function is descriptive, without an obvious normative element. However, these theorists do adopt a normative stance toward the functions they use to explain and describe the law: They see those functions as disvalues. Hence, Green’s early taxonomy dividing the functionalist theories into ‘descriptive’ and ‘normative’ does not reflect a clear difference in the ways these theories employ functions in explaining the law.

Green also claims, ‘The normative functionalist recognizes that law may not in fact promote its distinctive ends, but believes that it ought to do so, and that in its ideal type or central case it does.’⁶⁴ If a theorist has articulated a distinctive function for law not as an explanation of law, but as an element of normative political theory then it is more straightforward to say that the law ought to pursue that end in the course of one’s advocacy. However, if a theorist has articulated a function for law primarily as an explanation, then it makes less sense to say that it ought to pursue those ends. A Marxist

⁶⁰ Ibid at 4.

⁶¹ Ibid at 5.

⁶² Another apparent difference is that the first claims that law is a mechanism for resolving ‘private disputes,’ which may only be a subset of the second’s ‘social conflict.’ But as these are only examples, there is no suggestion that this difference is in any way important to the discussion.

⁶³ Green, ‘Political Content of Legal Theory’, above n 3 at 4.

⁶⁴ Green, ‘Political Content of Legal Theory’, above n 3 at 5.

would not say that the law ought to aim at the maintenance of class power divisions, nor would a feminist say that the law ought to perpetuate male-centered power structures. These are still the functions that, for them, explain the law. When we explain that a chair is something to be sat upon, we do not thereby claim that anyone ought to sit on it.

Hence, in the context of Green's taxonomy, his statement about normative functionalism makes sense. But if we reject his dichotomy between descriptive and normative functionalism on the grounds that some of those he describes as descriptive functionalists are making the same kind of robust normative judgments as the normative functionalists (although coming down on the opposite side), then we can isolate the theorists' functionally explanatory methodology from their particular normative judgments about the law (situating the latter in a more comprehensive moral or political doctrine). This is likely at the root of Green's later shift to 'explanatory functionalism' as his way of describing Marxist, Feminist, and economic functional analyses of law.⁶⁵

Green had already cautioned us 'not to define 'valuable ends' [in understanding normative functionalism] too widely'⁶⁶ for fear of having normative functionalism collapse into the theorist's wider moral theory. Green thinks that the distinction which allows normative functionalism its methodological space is the common claim by such theorists that these 'valuable ends' represent the central or ideal case of law.⁶⁷ But it is far from clear why this move provides that methodological space; it still appears that articulating law's function in this way, as the necessarily valuable ends that law ideally pursues, still collapses legal theory into the theorist's wider moral or political theory.

⁶⁵ Green, 'Functions of Law', above n 3 at 116. A further reason might have been the growing realization that no useful descriptive methodologies are devoid of meaningful normative judgments. See Perry, 'Hart's Methodological Positivism', above n 40 at 445.

⁶⁶ Green, 'Political Content of Legal Theory', above n 3 at 5.

⁶⁷ Ibid, citing J. Finnis, *Natural Law and Natural Rights* (1980) at 4.

After all, any support for the value of those ends that the law ideally pursues comes out of a wider moral or political theory about what is good for humans to pursue individually or collectively. At the very least, it makes the statement about law's function a conclusion in, and hence dependent upon, the theorist's wider moral or political theory.

It is precisely this recognition by Green that leads me to dispute his early taxonomy: 'According to functionalism of both the descriptive and normative sorts, the theory of law is dependent on general political theory in order to supply the account of the functions at issue.'⁶⁸ Many of the functionalisms he examines (Marxism, feminism, law & economics, John Finnis' theory) do articulate their functional explanations of law as an element of such a wider political theory. What I dispute is that functionalism as a methodology for analyzing law requires a theorist to articulate a function that is already situated in or supplied by that wider political or moral theory. Green himself makes this point in his argument against functionalism.⁶⁹ So I agree with this point but do not believe that it leads us to reject functional explanations as a method.

I am not claiming that legal theory as a discipline can be isolated from the wider domains of moral or political theory. The reasons theorists are interested in understanding legal concepts tend to be related to their wider commitments about the nature and value of social interactions. Rather, I claim that it is possible for a theorist to isolate her theory of law from her comprehensive moral or political commitments when the theorist has a neutral functionalist account of law. Granted, the theorist's legal theory cannot be isolated from commitments that led the theorist to view legal theory as a valuable enterprise to pursue, and the wider background commitments of theory construction and

⁶⁸ Green, 'Political Content of Legal Theory', above n 3 at 5.

⁶⁹ See Green, 'The Concept of Law Revisited', above n 3 at 1709.

methodology.⁷⁰ Perhaps even more importantly, theorists are bound to have normative aspirations for their explanatory theories, such as the hope that the theory will help us to be more precise in the use of the concept, or even shed practical light on the practice as a whole.⁷¹ Hence, a ‘neutral’ functional theory is not one that is purely descriptive. Rather, it is neutral with regard to the subject matter of the theory: the value of the function(s) served by law, and the value of law as a means to serve those functions. This is not to say that a theorist ought not to take a position on these questions. But to the extent that the theorist’s legal theory can be divorced from those normative commitments (perhaps made elsewhere), the legal theory itself is neutral.⁷²

Green’s anti-functionalism seems to be based on two things: the fact that functional theorists tend to insist on the need to commit to robust moral norms in the articulation of the law’s function⁷³ (I agree with him that there is no such need); and the inference from the fact that law has no unique function explaining it to the conclusion that functions cannot be jurisprudentially useful in understanding law as a whole⁷⁴ (with which I do not agree as explained above).

There is no doubt that the functionalist explanation must reach beyond the legal in order to illuminate that which it is trying to explain.⁷⁵ That is, the concepts employed in the functional explanation cannot be limited to legal concepts or the explanation would be akin to question begging, or at least it would be highly uninformative. Plus, in reaching beyond legal concepts, the explanation must say something that is both plausible

⁷⁰ On this important distinction, see generally Dickson, *Evaluation and Legal Theory*, above n 15.

⁷¹ On this point see, e.g., Coleman, ‘Methodology’, above n 1 at 313.

⁷² The possibility of such a neutral functional theory is briefly outlined by Coleman in the context of rejecting it as an interpretation of Dworkin’s methodology. See *ibid* at 333.

⁷³ Green, ‘The Concept of Law Revisited’, above n 3 at 1709.

⁷⁴ *Ibid* at 1710; Green, ‘Political Content of Legal Theory’, above n 3 at 12.

⁷⁵ Green, ‘Functions of Law’, above n 3 at 119.

and explanatory. So, it is not sufficient to say that the law has the function of making people 'law-abiding,'⁷⁶ but nor is it sufficient to say that the law does what it does by giving people legal reasons for acting (which is important to remember when we consider Green's claim that law is a 'modal kind,' rejected above).

The functional methodology itself only requires the articulation of an instrumental value that the law apparently serves. Since it is only an instrumental value, the theorist need not endorse that value. In articulating a first order jurisprudential theory, the functionalist theorist need only treat the law *as if* it has a function or set of functions that are useful in explaining it. The first order theory is then generated by analyzing the institutional nature of the law, which is a set of practices situated within a wider social and political context. One simply does not need to have already completed an understanding of that wider context (nor developed any value judgments about its elements) in order to begin the process.

Perry points out the important fact that, in providing an explanation, the theorist must choose what elements of the practice to include and exclude from the theory. He believes that this involves the theorist in much more robustly normative judgments about the value of the subject matter.⁷⁷ Perry illustrates this by pointing to the example of Hart's defense of the value of moving to a 'modern' legal system with secondary rules.⁷⁸ Hart makes a big point out of legal systems having secondary or power-conferring rules and that this offers important advantages over 'primitive' systems, which only have primary rules

⁷⁶ Ibid. This is another reason for rejecting the claim that the law is a functional kind. Once we have the requirement to go outside the law in order to articulate its function, it is hard to see how the law is a necessarily unique means for accomplishing it.

⁷⁷ Perry, 'Hart's Methodological Positivism', above n 40 at 442.

⁷⁸ Ibid at 437, citing Hart, above n 15 at 94.

outlining permitted, required, and prohibited behaviors.⁷⁹ Perry uses Hart's advocacy of systems with secondary rules to argue that Hart makes robust normative judgments a key part of his methodology.⁸⁰ For Perry, to see this conceptual explanation as elucidating our concept requires us to see it as rationalizing our practice. To do this it must show how law's claim to authority is justified, which in turn is accomplished by attributing a function to law and showing how its serving that function gives us reasons.⁸¹

If Perry is right about the need to justify law's authority and rationalize our practices, it would be difficult to defend a neutral functionalist methodology. The theorist would be in the position of having to make the exact value judgments I claimed were unnecessary: that the law is the best (or at least a good) way to achieve the ends used in the functional explanation, and that those ends are important ones for society to pursue.

Notice, however, that this view excludes on methodological grounds any legal theories that accompany moral or political arguments critical of law's value or efficacy. Marxist legal theory, feminist legal theory, critical legal studies, as well as philosophically anarchist theories of political obligation are all excluded as having necessarily defective methodologies.

Perry might reply that critical theorists are making choices about what elements of the law are salient to include in their theories, and are simply basing those choices on their wider moral or political values, bearing out his claim that such choices stem from robustly normative judgments. Hence, the Marxist legal theorist might focus on the way in which the law tends to entrench existing power structures because the Marxist believes that this is important to explaining the law. She believes this is important to include

⁷⁹ Hart, above n 15 at 92.

⁸⁰ Perry, 'Hart's Methodological Positivism', above n 40 at 457.

⁸¹ Ibid at 457.

because of her wider beliefs about the disvalue such entrenched power structures have for society. If Perry were to take this option and say that the Marxist's methodology is permissible, however, he would be giving up on the idea that the theorist has to justify legal authority.

Return momentarily to Perry's example of Hart's rationalization of moving to a legal system with secondary rules. This certainly seems to be a justification of law over another possible social arrangement. However, that justification is in the context of a set of clearly instrumental values. The advantages of a system with secondary rules are that it helps alleviate the uncertainty, static nature, and inefficiency of a set of only primary rules.⁸² But Hart also makes it clear that such advantages might not be important to a certain kind of small community, who could live quite successfully in a system of only primary rules.⁸³ So we could reinterpret Hart to be saying that one set of functions for the addition of secondary rules to primary ones is that it alleviates these problems, *if* we happen to be in a situation where such problems are important to solve.

Furthermore, Hart is justifying the addition of secondary rules to a system of primary rules based on the problems that such a system would have without that addition. This is somewhat different than justifying or rationalizing the law as a whole and on its own. The most it can be said to do is to rationalize the law *as against* a system of primary rules alone. Hart's claim is essentially that a system with secondary and primary rules can perform its behavior guidance function better than a system of primary rules alone.⁸⁴

There is nothing in the theory that amounts to the claim such a way to guide behavior is

⁸² Hart, above n 15 at 92.

⁸³ Ibid at 92.

⁸⁴ This neutral functionalist reading of Hart is endorsed by Shapiro in 'On Hart's Way Out', above n 44 and in, 'Law, Morality, and the Guidance of Conduct' (2000) 6 *Legal Theory* 127.

necessarily better than *all* alternatives, nor that such an end should be embraced categorically. Nor, for that matter, does this kind of justification amount to a justification of legal authority.⁸⁵

It is true that theorists must make normative judgments about what is important to include in their theories, but those normative judgments are informed by the theorist's possibly pre-theoretic beliefs about the point or function of law, not (necessarily) the value of that function. This contextualizes or instrumentalizes the judgments about what is important to include, isolating them from any wider normative commitments. Hart claimed that a union of primary and secondary rules is superior to a system of only primary rules in performing the behavior guidance function of law.⁸⁶ He chose to focus on secondary rules as an important factor in explaining *how* law performs that function. He did not thereby give (nor should he be expected to give) any arguments to show that such behavior guidance is valuable as a part of a wider moral or political theory.⁸⁷

A. The Centrality of Participant Perspectives

My claim that the theorist need not have made value judgments about any functions for law in her theory clearly puts me at methodological odds with John Finnis. Finnis does note the functional character of even the most descriptive forms of legal positivism, claiming that 'Hart's description ('concept') of law is built up by appealing, again and

⁸⁵ Hart's justification of legal authority, offered in 'Are There Any Natural Rights?' (1955) 64 *Philosophical Review* 175, on the basis of fair play is independent of his explanation of the concept of law.

⁸⁶ This is not to suggest that Hart saw his own theory as placing any importance on law's function. See Hart, *Concept of Law*, above n 15 at 249. Here I follow Perry in thinking that Hart did not fully appreciate the importance of function within his own theory. Perry, 'Hart's Methodological Positivism', above n 40 at 458.

⁸⁷ One might read his notion of 'natural necessity' in the minimum content of natural law (Hart, *Concept of Law*, above n 15 at 193) as a claim of the need to guide human behavior by the use of rules and hence to imply a value to doing so. Even there, however, the notion of the 'natural necessity' of rules against violence and theft is contextualized to the project of behavior guidance and no judgment is made about the value of behavior guidance or the need for rules in order to do so.

again, to the practical point of the components of the concept.’⁸⁸ This point is echoed by Perry.⁸⁹ Accounts of law such as Hart’s, Joseph Raz’s, and even, to a large extent, Lon Fuller’s are descriptive, differing only in their judgments about what is ‘important’ or ‘significant’ about the law from which to build a theory.⁹⁰ Finnis says that descriptive theorists’ judgments about importance or significance for various elements of legality (judging which elements are ‘central cases’⁹¹) require them to ‘adopt[] the practical point of view, ... asking what would be considered important or significant ... by those whose concerns, decisions, and activities create or constitute the subject matter.’⁹²

On this point I agree with Finnis except to say that asking what a participant considers significant in his legal practice does not require the theorist herself to adopt the participant’s point of view. This is clearly laid out by Hart in his discussion of the need for at least some participants to take the law as reasons for their actions, from an internal point of view.⁹³ To call it ‘the practical point of view’ invites the understanding that the theorist must herself adopt the participant’s viewpoint, along with a participant’s judgments about the value of the practices themselves.

Finnis concludes that the participant who treats legal obligation presumptively as a moral obligation is the central case of a participant viewpoint.⁹⁴ This is the participant viewpoint most focused on law and which would bring a legal system into being. It is

⁸⁸ Finnis, above n 67 at 7, also noting that Raz understands law in terms of the unique ‘dual function’ of legal norms.

⁸⁹ Perry, ‘Hart’s Methodological Positivism’, above n 40 at 458.

⁹⁰ Finnis, above n 67 at 9. *See also* Dickson, above n 15 at 39. To say that they are ‘descriptive’ here is not meant to imply that they have no normative components.

⁹¹ Finnis, above n 67 at 10. *See also* above n 64 and accompanying text. Notice that Green claimed the ideal of law’s operation in its ‘central case’ as a characteristic of ‘normative functionalism’ (such as Finnis’), while here Finnis attributes the descriptive role of central case methodology to even the most descriptive of positivists.

⁹² Finnis, above n 67 at 12.

⁹³ Hart, *Concept of Law*, above n 15 at 89.

⁹⁴ Finnis, above n 67 at 14.

therefore to be the primary focus of the theorist. In order to analyze this central participant viewpoint (understood as the most practically reasonable one⁹⁵) the theorist herself must decide what is practically reasonable in order to identify it as the central case.⁹⁶ Hence the theorist must make her own judgments about the practical value of those characteristics of law evaluated by the central participant, essentially adopting that participant's perspective for herself.⁹⁷

It is this last claim that worries me precisely because the standards by which a theorist determines what is important or significant are very different from those by which a participant determines what is significant, useful or valuable about law. Finnis addresses this by noting that the theorist must make her own normative judgments about what is significant and important about the law in building her theory, but can (and should) account for descriptive data involving what participants have historically taken to be valuable about the practice.⁹⁸

I agree that the theorist must make her own judgments about what is important about the law to explain it, but do not believe that this leads to the conclusion that the theorist must make and involve her own moral or other practically evaluative judgments in her theory. One way to establish this is to deny Finnis' 'central case' perspective: that the participant who is practically reasonable is one who adopts law's aims as his own and finds law's claims to be morally binding. It is possible to accommodate Finnis' initial remarks about what constitutes such a central case perspective, even up to the point of

⁹⁵ Ibid at 15.

⁹⁶ Ibid at 16.

⁹⁷ Julie Dickson notes that Finnis appears to have developed this claim to incorporate the idea that the theorist will somehow be unable to draw a distinction between assessing which perspectives are central and adopting those perspectives in such a way as to endorse the moral commitments they represent. Dickson, above n 15 at 45. This is suggestive in that I will shortly show he demands a distinction be drawn among otherwise central perspectives without sufficient theoretical justification for such a demand.

⁹⁸ Finnis, above n 67 at 17.

having such a participant adopt the stated functions of law, yet for that person still not to view the law's claims as morally (or, in a wider sense, practically) binding.

Take one of the functions for law that Finnis thinks is common to everybody's view: to subordinate self-interest to social needs in certain circumstances.⁹⁹ Putting aside what those circumstances might be, let us say that the central case participant perspective views that function or goal as a very useful and valuable one. It is still a separate question whether the central case participant perspective includes the view that law is the best or correct means for accomplishing that. While Finnis has an argument that he thinks would be open to anyone with practical reason that law is the best means,¹⁰⁰ it is not clear that the value of law as a means to that goal is necessarily transparent to anyone with practical reason. Even if Finnis would be right to claim that his argument *should* convince anyone of a certain level of practical reason, he would be the first to admit that this does not mean that they are already convinced in fact. If endorsing law as the best means to accomplish the goal of subordinating self-interest requires comprehension of and agreement with a subtle philosophical argument printed in one book, it is exceedingly difficult to incorporate the endorsement of law as the best means to the goal into the central case perspective. Hence, there is a participant perspective that might need to be included among the central cases: one who endorses the function of law, but not law as the best means to achieve it. This would then lead the theorist back to a more strictly explanatory methodology since the theorist could not herself endorse law as the means to achieve its function without privileging one central perspective over another and biasing her theory.

⁹⁹ Ibid at 14.

¹⁰⁰ Ibid at ch 10.

Even if it is true that a functional method requires us to analyze the central case, and even if we explain the law functionally, we do not thereby explain the idea of a *participant* in a legal system functionally. A participant does have a role in the legal system (and that role is probably best understood functionally), but we are not here analyzing the participant's functional role in a legal order. Rather we are using the point of view of a participant within a legal system to understand the important characteristics of law. The centrality of that viewpoint is not fixed in the same way as the centrality of the conceptual components of law. The thing that makes such a viewpoint central for this theoretical use is only that it involves 'adopting an internal perspective' or a 'belie[f] in the validity of the [legal] norms.'¹⁰¹ There is no theoretical impetus to hone this set of viewpoints any further and doing so risks excluding viewpoints that are still sufficiently central to be important for understanding the law.

Finnis' primary argument that the theorist must endorse the participant's values is contained in the claim that the theorist must

assess importance or significance in similarities and differences within his subject-matter by asking what would be considered important or significant in that field by those whose concerns, decisions, and activities create or constitute the subject matter.¹⁰²

I admit that those who constitute the subject matter understand what they think to be important about it as having a moral or practically reasonable dimension. But the theorist is not called upon to assess that moral dimension, only to note it as important or significant. The participant perspective might take a characteristic as morally important or significant; the theorist only need report that fact as important or significant *simpliciter* (without the moral judgment added).

¹⁰¹ Joseph Raz, *Practical Reason and Norms* (1975) at 171.

¹⁰² Finnis, above n 67 at 12.

We can provide an additional consideration against Finnis' claim: the reasons for the moral judgments made by those within the central perspective are not the theorist's reasons. Those within the perspective say, 'The law is a good thing because it does good things.' The theorist says, 'The law is an important thing to study and understand because people believe that it does good things.' This second claim on the part of the theorist is not a moral claim while the first claim is.

Hence one can base one's understanding of the law upon a conception of its function or develop a theory of law based upon the assumption that it is explainable by its function, without thereby endorsing that function or law as the best means for achieving it.

B. Sub-system Instrumental Values

Moore's understanding of function as contributing to the 'goal' of a larger system of which the explanandum is part presents him with the problems of how to figure out what the 'goal' of the larger system is, and how to support that hypothesis without arguing *ad infinitum*, adducing larger and larger systems and goals to justify and explain those below.¹⁰³ He sees two kinds of answers to these problems, one is 'value-neutral' and the other is 'value-laden.' The 'value-neutral' option is only open when we find that the larger system we are using to explain the function of its part naturally tends toward some homeostatic balance. The idea is that this balance state is discoverable by science and the function of the part can be described in terms of its contribution to the larger system's ability to reach and maintain that balance state. The more common, 'value-laden,' option is for the theorist to endorse the goal of the larger system as good (choosing one from

¹⁰³ Ibid.

‘our list of good things’), cutting off the need to keep searching for an answer to the question of for what it is good.¹⁰⁴ Moore applies this analysis to the role of an organ in the body to reach a very implausible conclusion: that the goal of the human body is to be physically healthy.¹⁰⁵ If we put this conclusion aside and agree that there is no scientifically discoverable, homeostatic state for society to which law contributes, then it would appear that a functional theorist would be bound to embrace whatever primary goal of society it is to which law contributes.

Let us for the moment ignore the regress problem and focus again on the necessity to situate the function within a larger system. It is clear that a functional explanation of a sub-system would have to include some explanation of the value that sub-system served to the larger system of which it was a part. After all, the sub-system is performing that function *for* the larger system. However, it is very important that this notion of value not be too hastily assumed to be intrinsic, or moral, or unopposed. It would still be a functional explanation of law as a sub-system within society to say that the law’s function is to entrench the powerful elite, since that would still be doing some good for the larger society. One can even say that the good it does for the larger system is simultaneously bad for that system. Entrenching the powerful elite might be good for society in some ways and bad for it in others. As long as there is some form of instrumental good being

¹⁰⁴ Ibid at 211.

¹⁰⁵ Ibid: ‘...physical health is the goal of the human body.’ This is implausible for many reasons. While functions might be explicable without reference to intentionality (causal contribution to some end state), that seems a taller order for goals. To be a goal is to be someone’s goal (or at least contemplated as one). At least pre-theoretically, something can be valuable as an end without being someone’s value. The concept of a *telos* or end state avoids this problem only by blurring the distinction between a goal and a homeostatic state discussed above (or an ideal state). I have no problem admitting that functions are mind-dependent and imposed on the external world in order to make sense of it for our own purposes. But that claim does not entail that everything must be explained using goals and functions in order to make sense of anything. From an evolutionary standpoint, this claim of Moore’s might make some sense at first blush, but upon closer inspection, survivability of the species (or genes) does not entail that physical health be the goal of the body. Nevertheless, these issues do not arise in the same way (or at all) for entities that are clearly social constructions, so this is a tangential matter.

done for at least some aspect of the larger system, the functional explanation is viable and the possibility of the theorist's neutrality with respect to that value is maintained.

3. Closing Programmatic Remarks

Both the functional methodologies and Green's attacks see functionalism as essentially a 'top-down' theoretical task, in which the theorist imposes a functionality claim onto her analysis of our legal practices and concepts. In contrast, the neutral functionalist approach provides for the possibility of 'bottom-up' approaches in which law's functionality is reached after an empirical sociological investigation. There are many possibilities for such investigations: We might see law as analogous to a biological subsystem (without committing ourselves to Moore's notion of functional kinds), seeing how and what law contributes to the larger social systems, noting any feedback mechanisms that sustain legal structures. Alternatively, we might treat law as analogous to an artifact and search for the purposes of its inventors to be found in the statements and actions of founders and legal reformers in many systems across the globe. We might even look for common properties among the functions of individual legal actions like statutes or court decisions and seek to aggregate or organize those common properties into a coherent set. There is no reason to think that these are mutually exclusive or jointly exhaustive.

Far from abstract and divorced from reality, the kind of functions that a neutral functionalism will yield would therefore be firmly grounded in the institutional facts of our legal practices. I suspect that it is already the somewhat hidden methodological backdrop to much of what is going on in the sociology of law. In uncovering that backdrop, the theorist can make a positive contribution to the organization and understanding of that scholarship. I believe this result would be superior to either the

premature dismissal of functional methodology as wrong-headed, on the one hand, or moral advocacy on the other.